



Council of the European Union
General Secretariat

**Interinstitutional files:
2016/0295(COD)**

Brussels, 05 June 2020

WK 5945/2020 INIT

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From:	Presidency
To:	Working Party on Dual-Use Goods
Subject:	PRES compromise proposal - EU controls on non-listed items

Delegations will find attached a draft text proposal for EU controls on non-listed items, as prepared by the Presidency, taking into account the comments submitted by Member States.

Draft compromise text - EU controls on non-listed items (amendments to Regulation (EC) No 428/2009 are highlighted)

At the third trilogue on 13 February 2020, the Parliament and the Council mandated the Commission to prepare a compromise text for EU controls on non-listed items with a view to the next trilogue. Accordingly, the draft compromise text below provides a basis for the introduction of EU controls on non-listed dual-use items, including controls on exports of cyber-surveillance technologies on human rights grounds. This compromise text provides for targeted controls building on the decisions of national competent authorities while ensuring, through a systematic and clear consultation process, that the EU is equipped with a credible capacity to control exports of sensitive technologies so as to prevent any misuse by third countries and to protect our strategic interests. In effect, the compromise text develops the existing mechanism for end-use controls in Art. 4 of Regulation (EC) No 428/2009 and complements it with a “watch list” of technologies and/or entities of concern subject to consistent controls in the EU.

Article 2

[...]

Art. 2.19 “arms embargo” means an arms embargo imposed by a decision or a common position adopted by the Council or a decision of the Organisation for Security and Cooperation in Europe (OSCE) or an arms embargo imposed by a binding resolution of the Security Council of the United Nations;

Commented [A1]: Definition reintroduced for 4.1(b).

Art 2.21 “Cyber-surveillance items” means dual-use items specially designed to enable the covert surveillance of information and telecommunication systems with a view to monitoring, extracting, collecting or analysing data;

Art. 2.24. “essentially identical transaction” means a transaction concerning items with essentially identical parameters or technical characteristics and to the same end user or consignee as another transaction;

Article 3

1. An authorisation shall be required for the export of the dual-use items listed in Annex I.
2. Pursuant to Article 4 or Article 8, an authorisation may also be required for the export to all or certain destinations **or to certain natural or legal persons or partnerships** of certain dual-use items not listed in Annex I.

Article 4

1. An authorisation shall be required for the export of dual-use items not listed in Annex I if the exporter has been informed by the competent authority that the items in question are or may be intended, in their entirety or in part:

(a) for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons;

(b) for a military end-use if the purchasing country or country of destination is subject to an arms embargo that may pose a threat to the maintenance or restoration of international peace and security; For the purposes of this subparagraph, 'military end-use' means:

- (i) incorporation into military items listed in the military list of Member States;
- (ii) use of production, test or analytical equipment and components therefor, for the development, production or maintenance of military items listed in the abovementioned list; or
- (iii) use of any unfinished products in a plant for the production of military items listed in the abovementioned list.

~~(c) for the acquisition of these items by terrorists;~~

(d) with regard to cyber-surveillance items, where there is evidence that the end-use may be in connection with internal repression and/or the commission of serious violations of international human rights and international humanitarian law.

2. If an exporter is aware that dual-use items which it proposes to export, not listed in Annex I, are intended, in their entirety or in part, for any of the uses referred to in paragraph 1, it ~~must shall~~ notify the competent authority, which shall decide whether or not to make the export concerned subject to authorisation.

3. A Member State may adopt or maintain national legislation imposing an authorisation requirement on the export of dual-use items not listed in Annex I if the exporter has grounds for suspecting that those items are or may be intended, in their entirety or in part, for any of the uses referred to in paragraph 1.

4. The Member State which imposes an authorisation requirement pursuant to paragraphs 1, 2 or 3 or on the basis of a national measure pursuant to art. 8 or 8a shall immediately inform its customs administration and other relevant national authorities and shall provide the other Member States and the Commission with ~~all~~ relevant information on the export in question, in particular as regards the items and entities concerned, unless it considers it not appropriate in light of the nature of the transaction or the sensitivity of the information concerned.

Commented [A2]: Modified article 4 to be in addition to art. 8/8a in order to have two complementary mechanisms.

Commented [A3]: Changed back to current wording.

Commented [A5]: Acceptable based on scope of definition in 2.21.

Commented [A6]: in the mandate from 5 June 2020, SE suggests changing „must“ to „shall“.

Commented [A7]: "Authorization requirement" as trigger has the advantage to cover more sensitive (emerging) technologies that have not resulted yet in a specific transaction. "Denials" as trigger might have the advantage to give a clearer indication of a critical transaction. To be discussed.

Commented [A8]: To include 8/8a here would combine the two instruments in a way to allow for national measures under art. 8/8a to be included in the mechanism of art. 4.

Commented [A9]: Text from current mandate.

Commented [A10]: NL cannot agree with 'all relevant information', proposed 'relevant information'

5. The other Member States shall give due consideration to the information received pursuant to paragraph 4 and shall review it in light of the criteria set out in paragraph 1 as well as inform their customs administrations and other relevant national authorities.

Commented [A11]: Language of 4.4.

6. The other Member States shall carry out such review within ~~3010~~ working days. In exceptional cases, any Member State may request the extension of the ~~3010~~ day period. However, the extension may not exceed 30 working days. ~~6-~~Where all Member States notify ~~consider the other Member States and the Commission~~ that an authorisation requirement should be imposed for essentially identical transactions, the Commission shall publish in the C series of the Official Journal of the European Union information –communicated by the Member States regarding the items and/or entities and/or country of destination subject to authorisation requirements.

Commented [A12]: Changed to clarify that positive feedback by MS is needed.

Commented [A13]: Question of right procedure: “notify” implies positive feedback by MS, no silent procedure.

Commented [A14]: Possibly to be added to provide more flexibility.

7. The Member States shall review authorisation requirements imposed under paragraph 6 when appropriate. Where all Member States consider that an authorisation requirement should be amended, revoked, or renewed, the Commission shall modify accordingly and without delay the information published pursuant to paragraph 6 in the C series of the Official Journal of the European Union.

8. The provisions of Article 15(1), (2) and (5) to (7) shall apply to denials cases concerning dual-use items not listed in Annex I.

Commented [A15]: Text as it is in the mandate from 5 June 2019 and 30 January 2020

9. The provisions of Article 8(2), (3) and (4) shall apply to the national measures referred to in paragraph 3 of this Article.

Commented [A16]: Current 4.6 added here.

~~109.~~ All notifications required pursuant to this Article shall be made via secure electronic means including the system referred to in Article 20(3).

~~110.~~ This Regulation is without prejudice to the right of Member States to take national measures under Article 10 of Regulation (EU) 2015/479.