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GREEN PAPER

The dual-use export control system of the European Union: ensuring security and competitiveness in a changing world

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1. INTRODUCTION

Controlling the export of dual-use items, that is items which can be used for both civil and military purposes, is at the forefront of international non-proliferation efforts. Guided by security objectives, dual-use export controls are implemented through trade measures taking the form of authorisation requirements for the export of dual-use items to third countries. The high-tech nature of such goods and technologies, and the considerable volume of trade in them, means that the dual-use sector is a crucial element of the EU's drive towards innovation and competitiveness.

Consequently, when controlling exports, particular attention needs to be paid to striking the right balance between the pursued security objective and the need to support business activities. This close link between security and trade is at the heart of dual-use export controls. It is also what creates particular challenges for implementation within the European Union.

Since 1995¹, it has been commonly accepted that dual-use export controls constitute an exclusive competence of the European Union and form an integral part of the EU's Common Commercial Policy. This exclusive competence excludes the competence of the Member States save where the Union grants them specific authorization². Such an authorisation for exceptional national measures was in fact given to Member States in the Export Regulation³ and is also present in legislation setting up the EU's dual-use export control system (Regulation (EC) No 428/2009 – the Dual-use Regulation).

Export controls in the EU are consequently a function of trade and security considerations on the one hand, and of EU and national measures on the other. Of course, whenever exceptional circumstances occur which may have a bearing on a Member State's essential security interests, the latter should prevail. This security exception should not however be interpreted as a broad authorization to allow independent national approaches wherever a Member State wants to take action⁴.

The development of the EU export control system over the last decade has witnessed an entanglement of these trade and security considerations. Instead of having a harmonized EU approach to export controls where security considerations are brought to bear on a case-by-case basis to protect essential security interests and prevent high-risk transactions, we have different approaches being applied to export controls across the EU. These range from

¹ The European Court of Justice issued two fundamental rulings in 1995 in case C-70/94 - *Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany* and in case C-83/94 - *Criminal proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer*.

² See Article 2(1) of the Treaty on the Functioning of the European Union

³ Council Regulation (EEC) No 2603/69.

⁴ See case C-70/94 and C-83/94 above. In case C-83/94, the European Court of Justice specified that any exceptional measures taken in this regard must be proportional to the aim being pursued.

extremely tough export restrictions put on exporters established in some Member States, to the use of broad national facilitation measures to allow certain exporters in particular Member States to export dual-use items with minimum difficulty.

2. OBJECTIVE OF THE GREEN PAPER

Article 25 of the Dual-use Regulation requires the Commission to prepare a report on the implementation of the EU export control system and possible areas of reform. Consequently, the objective of this Green Paper is to launch a broad public debate concerning the functioning of the current EU dual-use export control system⁵. This consultation is being conducted with a view to gathering input from civil society, NGOs, industry, academia and Member State governments on:

- the detailed provisions of the current export control framework in order to prepare the review of the system;
- the progressive reform of the EU dual-use export control system in order to adapt it to the rapidly changing circumstances of the modern world.

The results of the consultation will therefore help identify the strengths and weaknesses of the current system and map out a longer term vision of the EU export control framework. These results will be translated into concrete amendments to the current system and the preparation of a long term strategy on the development of export controls in the EU.

3. STRUCTURE OF THIS GREEN PAPER

In order to facilitate the consultation process and to keep the short-term elements of the review process separate from discussions on medium- to long-term visions, this Green Paper is divided into three separate parts:

- the first deals with the broader context of export controls;
- the second deals with the details of the current EU dual-use export control system as set out in Regulation 428/2009;
- the third deals with the possible direction of evolution of the EU dual-use export control framework.

4. EU EXPORT CONTROLS IN A CHANGING WORLD

4.1. Importance of the dual-use sector to the EU economy

The dual-use industry in the EU is extensive with around 5000 companies engaged in the export of controlled dual-use items accounting for a non-negligible percentage of EU

⁵ This Green Paper deals exclusively with export controls on dual-use items. EU sanctions and exports of military equipment are specifically excluded.

exports⁶. The dual-use industry is also extremely wide-ranging covering exporters active in such sectors as: nuclear, biological, chemical, materials processing equipment, electronics, computers, telecommunications, encryption, sensors and lasers, navigation and avionics, marine equipment, and aerospace and propulsion equipment. Given the nature of these activities, dual-use items are often cutting edge high-tech and are a reflection of the EU's technological leadership in the world. The dual-use industry is a large employer of highly-qualified staff, who are key to the EU's competitiveness.

Questions:

To exporters:

- (1) In your view, what is the importance of the dual-use sector for the EU economy?
- (2) What is the importance of dual-use exports for your business? What are the associated costs of compliance? Please provide figures.

To competent authorities of the Member States:

- (3) What is the value of dual-use exports from your Member State (in absolute terms and as a percentage of all your exports)?

4.2. Dual-use export controls in an evolving world

Due to the very nature of dual-use goods, the most advanced items are only available from a limited number of supplying countries. These suppliers cooperate among themselves within four international export control regimes: the Australia Group (AG), the Missile Technology Control Regime (MTCR), the Nuclear Suppliers Group (NSG) and the Wassenaar Arrangement (WA). This is done with a view to limiting the risk that sensitive items are diverted to military uses or to the production of weapons of mass destruction (WMDs)⁷.

Not all suppliers of dual-use items are members of all international export control regimes and not all members of the regimes have equally efficient export control systems. A number of sensitive items may therefore not be subject to export controls at all or may be subject to only minimal levels of control. The issue of foreign availability of controlled items is a key element of export control considerations as it significantly influences decisions on whether or not to control certain items. If there is broad foreign availability of particular goods, the reasons behind their control are greatly diminished, as the respective export control decisions can potentially negatively influence business performance, while not achieving any security goals.

The question of foreign availability is one of many trade issues having a strong bearing on international export control efforts and closely linked to the dynamic economic development seen around the world. Strong economic progress, rapid modernisation, the exponential spread of technology have all contributed to increasing global prosperity, but have also

⁶ An analysis of the dual-use relevant CN codes (covering items which are both dual-use and not dual-use in nature) suggests that dual-use exports may account for up to 10% of EU exports (upper bound).

⁷ The work of the international export control regimes is closely linked to achieving the objectives of several international instruments including the Nuclear Non-Proliferation Treaty, Chemical Weapons Convention, the Biological and Toxin Weapons Convention and UN Security Council resolutions such as UNSCR 1540.

fundamentally altered the basic principles underpinning export control policy. Whereas a few decades ago, controlled items could reasonably be expected to be found in a very limited set of the most highly advanced countries, supply is much more abundant now. Technological progress and advances in education mean that many sensitive items can now be manufactured in much more heterogeneous environments, thereby also contributing to increased global supply.

Many supplier countries around the world have realised these trends and have embarked on ambitious reforms designed to enhance the competitiveness of their industries and their exports, while ensuring that acceptable levels of security are maintained. These reforms are primarily based on a certain prioritisation of control efforts on those items which pose the highest risk, meaning that the strictest levels of controls are concentrated on the most sensitive items and destinations. As part of these reforms, ambitious export facilitation measures are being proposed for less sensitive exports which would give a considerable competitive edge to local exporters.

There is a risk that the combination of foreign availability of certain items and simplification of export control procedures being undertaken in certain third countries, could make it more difficult for EU exporters to compete on global markets.

Questions

To all stakeholders:

- (4) What is the impact of the foreign availability of certain controlled items on the competitiveness of EU dual-use exports?
- (5) How competitive are EU dual-use exporters as compared to exporters from third countries? How is this competitiveness affected by export control reforms being undertaken in third countries?
- (6) How would you rate the current EU export control system as compared to the export control systems of third countries?
- (7) What is the impact of dual-use export controls on activities of international collaboration in research and innovation? Should the EU legislative framework contain special provisions for such activities?

4.3. Differences in national approaches to dual-use export controls

The Dual-use Regulation provides a general framework for dual-use export control activities in the European Union. Practical implementation however is left almost entirely to the Member States, with the consequence that different approaches are applied across the EU. These differences between the national approaches can be divided into three broad categories:

- Administrative – Member States have vastly different approaches to such issues as registration requirements for exporters and reporting. More importantly, some Member States seem to require their exporters to have internal compliance programmes before being eligible to export dual-use items, while others do not.
- Substantive – Member States make different use of the various authorizations available under the Dual-use Regulation. For example, a few Member States have

implemented broad National General Export Authorisations thereby facilitating exports for their exporters, while exporters from other Member States do not have access to such facilitation measures.

- Operational – Member States have different interpretations of control list entries and make different use of the 'catch-all' provisions of the Dual-use Regulation allowing for the imposition of authorisation requirements on items not listed on the EU control list⁸.

These differences lead to situations where an export of a specific item from one Member State may be significantly delayed or even prohibited, while the export of the same items from another Member State may be completed without any problems. Consideration could be given to the issue of limiting the most significant differences in the application of the Dual-use Regulation.

Questions:

To all stakeholders:

- (8) Have you encountered any problems due to differences in the application of export controls across the EU Member States? What was the nature of these problems?

4.4. A level playing field for EU exporters

The prosperity of the European Union is built on a number of fundamental principles, including the free movement of goods, the freedom of establishment and competition, which together create the climate necessary for economic growth, stability and prosperity. These principles lie at the heart of the Single Market. The EU's Common Commercial Policy is a logical reflection of these principles in the trade area, where the EU speaks with one voice and ensures equal treatment of exporters from all 27 Member States, thereby providing the necessary basis to successfully compete in the global market.

The export control field would seem to be particularly challenging in this regard with the consequence that despite more than a decade of EU-level work, the EU export control system remains fragmented and does not ensure similar standards for exporters as in other areas.

Of course, dual-use export controls cannot be treated like any other area of trade. Dual-use export controls bring together and try to balance security and non-proliferation efforts with the need to support the competitiveness of EU industry. In this regard, the application of export controls can mean either severe losses for an exporter (if an export license cannot be obtained) or tremendous gains (if a license can be obtained quickly or at least quicker than the competition). The question of administrative burden put on exporters to comply with export control legislation and the time needed to obtain licenses are consequently of paramount importance. Given the logic of the EU Single Market and Common Commercial Policy, such questions should be properly addressed at EU level so that European businesses can concentrate on competing on global markets rather than spending valuable resources in order to comply with different and sometimes contradictory rules in place across the Member

⁸ There are nevertheless certain operational areas, in particular in the customs field, where a single EU approach is used. For example the correlation between control list items and customs goods nomenclature is unified at EU level via the TARIC database.

States. It is the responsibility of the EU and all the Member States to work together to push this common agenda forward.

Questions:

To all stakeholders:

- (9) Do you think that the current EU dual-use export control framework provides a level playing field for EU exporters? If not, how is any unevenness demonstrated? Please provide examples.

5. EU DUAL-USE EXPORT CONTROLS UNDER REGULATION 428/2009

5.1. Overview of the EU dual-use export control system

Regulation 428/2009 sets out the key elements of the EU dual-use export control system leaving most of the practical implementation and the definition of additional measures within the competence of the Member States. The framework sets out *inter alia* the types of authorisations that can be issued, the conditions under which controls on 'non-listed' items can be imposed, consultation and information exchange procedures and requirements for intra-EU transfers of certain controlled items.

The key elements of the export control framework are addressed in further detail below. Each sub-section is followed by a series of questions geared towards gathering the views of particularly concerned stakeholders concerning the practical implementation of the Dual-use Regulation.

5.2. Types of authorisations available

Four types of authorisations are currently available under the Dual-use Regulation, three of which are issued by Member States (individual, global and national general export licenses). The EU General Export Authorisation (EU GEA) EU001 found in Annex II of the Regulation is issued by the EU. The Commission is aware that the processing times and requirements for the various licenses differ across the Member States and would therefore like to gather further specific information from stakeholders on how these licenses are applied across the EU.

The use of National General Export Licenses (NGAs) across the EU is of particular interest due to their significant impact on exports. On the positive side, NGAs can considerably facilitate the export of items in low-risk situations. On the negative side, NGAs are only available to exporters in certain Member States and may thereby risk distorting the Single Market. Only 7 Member States have made NGAs available to their exporters.

Questions:

To all stakeholders:

- (10) Is the framework of licenses available in the EU sufficient? If not, how should it be changed?
- (11) What is the time needed to obtain an individual or global license?

- (12) Do existing types of export authorisations ensure fair treatment of exporters across the EU and a level playing field?
- (13) What is the usefulness of National General Export Authorisations as compared to EU General Export Authorisations?
- (14) How could the benefits of NGAs be extended to exporters established in other Member States?

To exporters:

- (15) What license type/s do you primarily use? Are there any particular problems with obtaining any specific types of licenses?

To licensing authorities:

- (16) How many licenses did you issue in 2010 (per type of license)?

5.3. Catch-all controls

Article 4 of the Dual-use Regulation allows Member States under certain circumstances to require an authorisation for the export of items not included on the EU control list. This authorisation requirement is only valid in the issuing Member State and concerns a particular transaction or type of transaction (e.g. exports of certain items to a specific destination or end-user). Due to its limited scope, the currently available catch-all mechanism may have adverse security and trade effects. On the security side, this limited scope may mean that the same or similar items remain available from other Member States. On the trade side, this limited validity may mean that competitors in other Member States may continue to freely trade a particular item even though an authorisation requirement has been imposed in other Member States.

Questions:

To all stakeholders:

- (17) Are you satisfied with the way the current catch-all mechanism functions? If not, what problems have you encountered?
- (18) Does the current system of catch-all controls lead to distortions within the Single Market and to an uneven playing field for EU exporters?
- (19) How would you improve the application of catch-alls across the EU?

To exporters:

- (20) Have you encountered situations where a catch-all has been imposed for your export transaction, while your competitors continued to trade the same items and possibly to the same end-user or destination? Please describe.

5.4. Transit and brokering controls

Regulation 428/2009 introduced completely new controls on brokering services and on transits. With regard to brokering, an authorisation is required for activities carried out from the EU if the transaction concerns dual-use items going from one third country to another. In terms of transit controls, Member States are empowered to prohibit a specific transit of non-EU goods, but the territorial validity of the prohibition is limited to the issuing Member State.

Questions:

To all stakeholders:

- (21) What is the usefulness of current brokering controls?
- (22) Would there be a need to extend the scope of these controls to also cover transactions from the EU to third countries?
- (23) How is the current transit control system functioning? What is the impact of the limited territorial validity of prohibitions?

5.5. Additional controls imposed by Member States

The Dual-use Regulation allows Member States to introduce certain additional national measures concerning dual-use items. Such additional measures are foreseen *inter alia* in relation to catch-all controls (Article 4(5)), brokering, transit and intra-EU transfer controls, as well as with regard to additional lists of items controlled due to public security or human rights considerations (Article 8).

The broad fields in which additional national measures are allowed would seem to suggest considerable divergences between the Member States with regard to the scope of necessary controls on dual-use items.

Questions:

To all stakeholders:

- (24) How are you impacted by the provisions of the Dual-use Regulation that allow additional controls to be introduced by Member States?
- (25) What is the impact of these additional national controls on competitiveness, trade flows and on security?

5.6. Criteria used to decide on an export authorisation

The Dual-use Regulation includes in Article 12 a list of criteria that should be used to assess authorisation requests. On the positive side, the Regulation contains a flexible set of criteria applicable across the entire EU. On the negative side, these criteria may be too general in nature leaving room for varying interpretations.

Questions:

To all stakeholders:

- (26) Do you think that the criteria set out in Article 12 are clear and precise enough or not?
- (27) Is there a need to harmonise to a greater degree the criteria used by Member States to assess export applications? If so, how?

5.7. Denials

Article 13 of the Dual-use Regulation includes a number of detailed provisions concerning the issuing of export authorisation denials, consultations and information exchange among Member States. Under the regulation, Member States should review their denials every three years with a view to their revocation, amendment or renewal.

Questions:

To all licensing authorities:

- (28) What are your views concerning the current system of denials and the denial consultation mechanism? How could this mechanism be improved?
- (29) Considering the amount of work needed to perform a review and the number of denials in force, what are your views on introducing a 3-year validity period for each denial - after which, in the absence of any amendment or renewal, the denial would be automatically revoked?

5.8. Intra-EU transfer controls

The Dual-use Regulation contains provisions which require controls concerning the transfer of certain items listed in Annex IV of the Regulation between the EU Member States. Nevertheless, relevant provisions of the Regulation exempt certain EU projects from the scope of these controls. Moreover, there would seem to be a few Member States that do not apply these controls fully due to the existence of previously signed international commitments that are still in force.

The Commission has, on a number of occasions, received feedback from stakeholders that these intra-EU controls unnecessarily hinder cooperation on various projects among the EU Member States, as not only physical items are subject to controls, but also the relevant technology. Intra-EU transfer controls make it very complicated to include in a project suppliers or sub-contractors based outside the principal Member State. This applies also during the tendering phase. Consequently, cooperation between businesses located in different Member States suffers. This is particularly so within the nuclear technology sector⁹.

⁹ It should be noted that controls on intra-EU transfers of nuclear goods are also linked to the Additional Protocol with the IAEA.

Intra-EU transfer controls may even have the perverse effect of reducing the competitiveness of EU companies working in more than one EU Member State as compared to competitors from third countries.

Questions:

To all stakeholders:

- (30) What is your view concerning the current system of controls on intra-EU transfers? Have you observed procedural differences between Member States?
- (31) Is it appropriate to apply the same level of assessment to intra-EU transfers as to exports to 3rd countries?
- (32) How could the intra-EU transfer control provisions be reformed?

To exporters:

- (33) What is the impact of intra-EU controls on your business and the Single Market? Do these controls affect your competitiveness vis-à-vis exporters from 3rd countries who export to the EU? Please explain.
- (34) What is the approximate time needed to obtain a license for an intra-EU transfer of an Annex IV item?

To licensing authorities:

- (35) What measures could be taken to relax intra-EU transfer controls, while ensuring that international obligations are adhered to?

5.9. EU Control List

The EU list of controlled items set out in Annex I of the Dual-use Regulation is the basis for the identification of what items are subject to export controls, and what items are not. The EU list constitutes a consolidated version of the control lists agreed within the international export control regimes plus a few additional items. The list contains a set of criteria and parameters which decide whether a particular item is subject to export controls or not. Given its fundamental role in the export control process, the EU control list should be uniformly applied across all EU Member States, so that an identical level of control is attained across the EU.

Questions:

To all stakeholders:

- (36) How would you rate the quality of the EU control list? Is it updated regularly enough?
- (37) Have you experienced any differences in interpretation of control list entries across the EU Member States? Please explain.
- (38) Is the EU control list noticeably stricter than the control lists of 3rd countries? Has this ever caused you any problems?

6. THE EVOLUTION OF DUAL-USE EXPORT CONTROLS IN THE EU

6.1. Towards a new EU export control model

The current EU export control framework has distinct advantages and disadvantages. Putting aside possible differences concerning the main principles of export controls in the EU, it is clear that this framework will have to evolve in coming years in order to respond to challenges brought about by a quickly developing world. New threats to our security coupled with technological progress leading to increased availability of sensitive items, will mean that certain gradual changes may need to take place within the EU system.

New ideas sometimes take considerable time to implement. The opportunity created by this Green Paper, should be used to collect opinions about possible areas of reform and vectors of actions, so that the necessary preparatory work can be undertaken as early as possible.

This section of the Green Paper seeks to commence a debate on future strategic options for dual-use export controls at EU level.

6.2. Strategic objective and risk-driven EU export controls

Export controls will continue to be driven in the future by the need to prevent sensitive items from being used for proliferation or military purposes by both state and non-state actors. The strategic objective of EU export controls will therefore continue to be oriented at ensuring full compliance with international non-proliferation efforts. The tools needed to achieve this objective may, however, have to evolve over time.

Developments over the last few years have demonstrated that a certain prioritisation of measures may be needed in the field of export controls. The modern world is characterised by an ever-increasing availability of certain items, accelerating globalisation and new business methods that involve supply chains spread out across several continents. Companies that develop or have access to controlled items or technology are often multinational in nature and require rapid transfers of controlled technology for day-to-day business operations. Even for smaller companies located in a single country, the realities of doing business in today's world involve competing across the globe. Being able to deliver quickly and on time is a key element of today's dynamic business world.

It can legitimately be expected that dual-use exports will continue to account for a substantial part of EU trade in the future and that this trade will continue to be conducted in the vast majority of cases for legitimate purposes. Equally however, there will continue to be a small group of countries and criminal organizations that will be interested in gaining access to these goods because of their potential military uses. The solution to this conundrum needs to rely on measures and approaches adapted to today's world. Technological development and the increasing number of transactions taking place put a constantly growing burden on the limited resources of export control authorities. Fully risk-based controls, at all levels of the export control process, would seem to be the only prospective solution.

At the same time, the rewards of the EU Single Market and Common Commercial Policy should be reaped in full. The EU provides a unique economic environment which allows companies to seamlessly operate in several or all Member States and thereby gives them the underlying strength to compete globally. There would seem to be a need to concentrate efforts

on ensuring that various differences in approaches among the Member States do not jeopardise this competitiveness.

Consequently, it may be necessary to start working towards a more fully developed risk-driven model for EU export controls, where limited resources are invested into controlling the highest-risk items. In order to work, the following would have to be ensured:

- a common risk assessment approach would have to be used by all export control authorities;
- a greater exchange of information on suspicious transactions and licenses issued would have to take place in a systematic fashion;
- National General Export Authorisations would have to be progressively phased out in favour of EU General Export Authorisations;
- a common approach would have to be developed for catch-all controls;
- a satisfactory solution to the problem of intra-EU transfer controls would have to be found;
- coordinated enforcement across the EU would have to take place coupled with improved access to relevant information for customs.

Under this model, Member States would maintain control of their export control policies as they would continue being able to prevent exports from taking place if their security interests were at stake. On the whole however, a genuinely common approach to export controls would be launched across the entire EU leading to:

- equal treatment for exporters;
- an improved climate for businesses to operate;
- strengthened control over the most high-risk transactions;
- strengthened exports from the EU.

As a consequence, both security and EU competitiveness could be increased. The concept for a new EU export control model is discussed in further detail below.

6.3. Organisation of EU export controls in the future

The organisational approach to export controls under the model described above would be fundamentally similar to the current EU export control system in that a series of national export control authorities would be responsible for licensing decisions taken within their respective Member States. This approach would guarantee that the principle of subsidiarity is respected and that there continues to be a close link between exporters operating in a particular Member State and the authorities responsible for issuing export authorisations and controlling compliance.

On the other hand, the national authorities dealing with dual-use export controls would systematically work more closely together by way of greater use of common information technology tools, better information exchange and common risk assessment procedures. This

architecture would be similar in many ways to current levels of cooperation among customs authorities across the EU. Indeed, the level of systematic cooperation existing between EU customs authorities is a model that export control authorities should aspire to.

Questions:

- (39) What are your views concerning a possible new EU export control model based on a network of existing licensing authorities operating under more common rules?

6.4. Common risk assessment and appropriate review procedures

In order to achieve the required level of harmonisation with regard to export control procedures, there would be a need to agree on a common risk assessment approach, which would be used across the entire EU for the purpose of export control decisions. Fundamentally, such a common risk assessment approach should lead to similar decisions being taken concerning similar situations, including in catch-all cases. This would mean that situations where licensing authorities reach different conclusions in similar situations would be avoided.

Coupled with the risk assessment approach itself, appropriate review mechanisms might need to be established in order to ensure that a level playing field for EU exporters is established.

Questions:

- (40) What are your views concerning the establishment of a common approach to risk assessment, which would be used by all licensing authorities for the purpose of licensing procedures?

6.5. Systematic information exchange

Reliable information is the basis for efficient and robust export controls. Without access to appropriate information, licensing authorities do not have a solid enough basis to make qualified decisions about specific export transactions. Two types of information should be clearly distinguished:

- First, security related information – this type of information is collected by Member States within their national security prerogatives. It remains outside of the scope of the current Green Paper and should only be exchanged as Member States see fit. Nevertheless, as indicated in the New Lines of Action document adopted by the Council, better use could be made of EU-level analysis capacities.
- Second, information directly stemming from export control procedures – this type of information includes data on exporters, licensing decisions taken, suspicious entities and denials. Improving this type of information exchange should be the focus of the EU's efforts.

At the current moment, information relevant for export controls is exchanged primarily on an informal bilateral basis. Systematic data exchange only takes place concerning denials issued by licensing authorities and even this is done with a minimum degree of detail. Denials are exchanged in order to avoid so-called 'undercutting' from taking place, namely one Member State authorising an export, which is similar to another transaction denied by a different Member State. What is interesting is that the level of systematic data exchange concerning

denials across the 27 EU Member States does not exceed what is exchanged among the participating countries of international export control regimes, which include around 50 states. In some cases, more information is exchanged with certain international organisation than with EU partners. For example, in the nuclear field, Member States provide the International Atomic Energy Agency (IAEA) with information on licensed nuclear transfers, and some Member States even provide the IAEA with information on purchasing enquiries. There would therefore seem to be a certain disproportion of systematic information exchange, considering the level of integration achieved in the EU and the existence of a seemingly common export policy.

In order to ensure that a future EU export control architecture functions as expected, systematic information exchange would need to take place with regard to various aspects of export controls. At a minimum, this could include:

- the details of licenses issued by EU Member States;
- details of exporters engaged in the export of dual-use items;
- details of exporters registered to use general export authorisations;
- suspicious entities seeking to procure dual-use items.

Pooling such information would ensure that on the one hand, licensing offices have the necessary background concerning licensing issues to ensure uniform application of export controls across the EU. On the other hand, access to this information would allow for more efficient enforcement at EU borders as various transactions could easily be crosschecked against lists of valid licenses and exporters.

Questions:

- (41) What is your opinion about the information exchange model outlined above?
- (42) What other types of information would have to be exchanged among licensing authorities in order to ensure uniform application of export controls across the EU?

6.6. Extending the scope of EU General Export Authorisations

In order to ensure efficient export controls under the new export control model, agreement must be reached concerning the prioritisation of efforts. Many EU Member States as well as several third countries already prioritise their work by making low-risk transactions eligible for facilitated export procedures under general licenses. In the EU itself, no fewer than 7 Member States have National General Export Authorisations (NGAs) in force, which allow for the export of several controlled items to a broad range of destinations with only a minimum of formalities. Obviously, such general authorisations greatly facilitate exports for businesses having access to them and allow licensing offices to dedicate resources to assessing in detail more high risk transactions.

At EU level, there is currently in force one EU General Export Authorisation allowing for the export of most controlled items to 7 destinations. In order to extend the benefits of general licenses to exporters in the entire EU, the Commission proposed in 2008 the introduction of 6 new General Export Authorisations.

The Commission believes that a further effort will have to be made in the future to extend the availability of EU General Export Authorisations, in particular in areas where certain Member States already have NGAs in place. This issue is closely related to the way risk is assessed across the EU. At the current moment, different approaches to risk lead to diametrically different conclusions among the Member States concerning the potential scope of EU General Export Authorisations. Transactions which are considered low-risk enough to merit inclusion in NGAs in some Member States, are considered by others to be too risky and therefore require individual licenses. From the Commission's perspective however such situations should not occur in a Single Market – as on one hand they open the door to circumvention and on the other they create an unlevel playing field for EU operators. It should consequently be possible to reach broad agreements on low-risk exports. In particular, given the broad scope of several NGAs already in place and the broad scope of general licenses available in third countries, the EU should be able to agree on new broad EU General Export Authorisations. In order to safeguard national prerogatives in the field of security, certain safety clauses could be introduced into such broad EU General Export Authorisations, which would allow Member States to block certain transactions on a case-by-case basis, if they were to prejudice their essential security interests. If agreement could be reached on such a common approach, the use of NGAs could be phased out.

In the absence of agreement on new broad EU General Export Authorisations and the phasing out of NGAs, consideration will have to be given to the possibility of extending the availability of NGAs to exporters from all EU Member States.

Questions:

- (43) What are your views concerning the idea of phasing out NGAs if they would be replaced with EU General Export Authorisations? Such EU General Export Authorisations would have a similar item and destination scope, but would be available to exporters in all EU Member States.
- (44) What new types of EU General Export Authorisations would you like to see implemented in the EU?
- (45) How do you compare the currently available EU General Export Authorisation EU001 and NGAs, with similar types of authorisations available in third countries (e.g. license exceptions in the US)?

6.7. A common approach to catch-all controls

The possibility of prohibiting an export transaction concerning an item not specifically listed on the EU control list, but which could be used nevertheless for proliferation purposes, is a fundamental element of export control systems around the world. Such catch-all controls are necessary in order to ensure that items which could contribute to proliferation or military programmes do not make their way to such programmes in a situation when their technical parameters fall slightly below the controlled thresholds or the items haven't yet been included on the control list. Catch-all controls are consequently a logical extension of controls on listed items.

The use of catch-all controls is always difficult, but creates particular challenges within the EU context, given the need to ensure a level playing field for EU exporters. Two specific problems have appeared in the application of catch-all controls in the EU:

- First, if one Member State imposes a catch-all control and consequently requires an authorisation of the export of a specific item, similar transactions in other Member States are not affected. This means that an exporter in one Member State may be required to go through an authorisation process, while competitors in other Member States continue to export without any restrictions. The Dual-use Regulation currently only provides Member States with the possibility of informing each other about imposed catch-all controls, but does not require them to act upon such information. Consequently, a level playing field for EU exporters is not ensured and security objectives are not met as interested parties may 'shop' around the EU in order to get access to the items.
- Second, if one Member State issues an export denial following the imposition of a catch-all control other Member States do not necessarily undertake the necessary steps needed to implement the no-undercut principle. Even though the Dual-use Regulation requires Member States to consult the list of valid denials prior to issuing an authorisation and to consult among each other in case of similar transactions, in the case of catch-all situations, there may be no authorisation process implemented at all in some Member States. Consequently, even though an export denial may be issued by one Member State, competitors in other Member States may continue to trade without any restrictions, which clearly violates the principle of a level playing field for EU exporters and calls into question the point of imposing such controls in the first place.

The problems identified above are closely linked to the issue of having different risk assessment approaches used across the EU Member States. Fundamentally, situations where one Member State considers a transaction too risky to authorise because of proliferation concerns while other Member States continue to export items in similar or identical situations must be avoided.

In the future, Member States could be subject to a mandatory exchange of information about imposed catch-all controls and the reasons behind their decisions. Moreover, consideration could be given to the concept of creating an EU-wide catch-all control. Under such a mechanism and in specific situations, a concerned Member State or group of Member States could ask the Commission to issue an authorisation requirement applicable across all 27 EU Member States and valid for a certain period of time. Customs authorities across the EU could then be requested to pay particular attention to certain specific types of transactions. Introducing such a common approach would mean that the situation of exporters across the EU would become more stable, while at the same time, security efforts would receive a strong boost as potential proliferators would be effectively blocked from shopping around the EU for certain items.

Further thought will have to be given to the question of how to ensure that no undercutting takes place once a Member State has issued a denial following the imposition of a catch-all control. Consideration could be given in this regard to strengthening the role of customs authorities or possibly creating temporary lists of additional controlled items which would be based on recently issued denial decisions. Such a temporary list would introduce a license requirement for the export of certain items (not listed on the EU control list) to certain destinations and would thereby oblige Member States to assess these export transactions based on a set of common rules.

Questions:

- (46) Would you support the idea of obliging Member States to exchange information about imposed catch-all controls (authorisation requirements), which would replace the current approach of voluntarily exchanging information?
- (47) Would you support the idea of creating a mechanism for the issuing of an EU wide catch-all control?
- (48) What is your opinion about the idea of creating temporary lists of items and destinations which would be subject to controls under catch-all provisions?

6.8. Working towards a fully integrated internal market for dual-use items

A discussion about the future EU export control model would be incomplete without consideration being given to the question of intra-EU transfers, which continue to be one of the few exceptions to the principle of free circulation of goods in the EU. At a time when certain facilitation measures could be agreed on intra-EU transfers of military items, the reasons to maintain intra-EU transfer controls concerning dual-use items seems to be somewhat arcane. Subjecting intra-EU transfers to essentially identical licensing procedures as exports to third countries is hard to justify in an internal market. The problem is aggravated by the lack of clear harmonized procedures for granting intra-EU transfer authorisations. For several years, successive EU legal frameworks dealing with export controls have left open the possibility that such controls may be lifted following further steps towards the harmonization of export controls in the EU. Unfortunately no progress has as yet been made.

Intra-EU transfer controls inhibit development as companies try to avoid as much as possible cross-border cooperation requiring the completion of tedious licensing procedures and record-keeping. In general, there are a number of large-scale projects currently requiring high numbers of licenses, which could considerably benefit from a more streamlined approach to intra-EU transfer controls.

Within the concept of a new EU export control model, a serious effort should be made towards the objective of removing intra-EU transfer controls for dual-use items. Wherever necessary for security reasons, consideration could be given to alternative ways of ensuring that no diversion has taken place, including:

- Greater use of post-shipment verification mechanisms;
- Having lists of certified end-users in the EU who could receive specific items/technologies currently listed in Annex IV.

At a minimum and as a first phase of work in this area, record keeping requirements could be relaxed and general licenses could be introduced for certain items.

Questions:

- (49) Would you support the objective of progressively reducing intra-EU transfer controls?

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| (50) | Would you support the idea of replacing license requirements for intra-EU transfers with a post-shipment verification mechanism? |
| (51) | Would you agree with the idea of replacing license requirements for intra-EU transfers with the introduction of certified end-users described above? |
| (52) | Would you have any other ideas that would allow for a progressive reduction of intra-EU transfer controls? |

6.9. Improved enforcement of export controls

The enforcement of export control legislation is done by customs in two stages, namely at the location where goods are placed into the export procedure and at the EU border. At present, this is done on the basis of very limited information available to enforcement authorities.

With the improvement of information exchange mechanisms as described above, enforcement authorities could get access to pooled information concerning valid licenses, registered exporters as well as suspicious entities, which could be used to better identify high-risk transactions and concentrate enforcement efforts on them.

Further consideration should also be given to the issue of making better use of Authorised Economic Operator (AEO) status in the export control process.

Questions:

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|------|---|
| (53) | What type of information would customs authorities need to properly enforce export controls at EU borders? |
| (54) | Would customs find it useful to have access to pooled information concerning licenses issued in the EU and lists of exporters who have received licenses? |
| (55) | How could AEO status be used within the export control framework? |

7. CONCLUSIONS

7.1. Next steps

This Green Paper consultation is designed to start the review process of the EU dual-use export control system as required under Article 25 of Regulation 428/2009. The approximate timeline of subsequent steps is outlined below:

- 31 October 2011 – end of consultation;
- January 2012 – report on Green Paper results;
- September 2012 – formal report to EP and Council under Article 25;
- 2013 – 2014 – proposals for amendments of the Dual-use Regulation.

7.2. Consultation period

All interested stakeholders are invited to submit their views concerning the issues and questions outlined above. Submissions should be sent in an electronic format no later than **31 October 2011** to the following email address: TRADE-F1-DU-CONSULT-2011@ec.europa.eu.

7.3. Publication of submissions

The Commission foresees the possibility of publishing or disseminating the detailed submissions it receives to this Green Paper consultation. If you would like your submission to remain confidential, this must be clearly indicated in your response.