

POSITION (EU) No 5/2014 OF THE COUNCIL AT FIRST READING

with a view to the adoption of a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items

Adopted by the Council on 3 March 2014

(2014/C 100/02)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure ⁽¹⁾,

Whereas:

- (1) Council Regulation (EC) No 428/2009 ⁽²⁾ requires dual-use items to be subject to effective control when they are exported from or transit through the Union, or are delivered to a third country as a result of brokering services provided by a broker resident or established in the Union.
- (2) In order to enable Member States and the Union to comply with their international commitments, Annex I to Regulation (EC) No 428/2009 establishes the common list of dual-use items that are subject to controls in the Union. Decisions on the items subject to controls are taken within the framework of the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group, the Wassenaar Arrangement and the Chemical Weapons Convention.
- (3) Regulation (EC) No 428/2009 provides for the list of dual-use items set out in Annex I to that Regulation to be updated in conformity with the relevant obligations and commitments, and any modifications thereto, that Member States have accepted as members of the international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties.
- (4) The list of dual-use items set out in Annex I to Regulation (EC) No 428/2009 needs to be updated regularly so as to ensure full compliance with international security obligations, to guarantee transparency, and to maintain competitiveness of exporters. Delays with regard to the updating of that list of dual-use items may have negative effects on security and international non-proliferation efforts, as well as on the performance of economic activities by exporters in the Union. At the same time, the technical nature of the amendments and the fact that those amendments are to be in conformity with decisions taken in the international export control regimes means that an accelerated procedure should be used to bring the necessary updates into force in the Union.
- (5) Regulation (EC) No 428/2009 introduces Union General Export Authorisations as one of the four types of export authorisations available under that Regulation. Union General Export Authorisations allow exporters established in the Union to export certain specified items to certain specified destinations subject to the conditions of those authorisations.

⁽¹⁾ Position of the European Parliament of 23 October 2012 (OJ C 68 E, 7.3.2014, p. 112) and position of the Council at first reading of 3 March 2014. Position of the European Parliament of ... [and decision of the Council of ...]

⁽²⁾ Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (OJ L 134, 29.05.2009, p. 1).

- (6) Annex II to Regulation (EC) No 428/2009 sets out the Union General Export Authorisations currently in force in the Union. Given the nature of such Union General Export Authorisations, there may be a need to remove certain destinations from the scope of those authorisations, in particular if changing circumstances show that facilitated export transactions should no longer be authorised under a Union General Export Authorisation for a particular destination. Such removal of a destination from the scope of a Union General Export Authorisation should not preclude an exporter from applying for another type of export authorisation under the relevant provisions of Regulation (EC) No 428/2009.
- (7) In order to ensure regular and timely updates of the common list of dual-use items in conformity with the obligations and commitments taken by Member States within the international export control regimes, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU) should be delegated to the Commission in respect of amending Annex I to Regulation (EC) No 428/2009 within the scope of Article 15 of that Regulation. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level.
- (8) In order to allow for a swift Union response to changing circumstances as regards the assessment of the sensitivity of exports under Union General Export Authorisations, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of amending Annex II to Regulation (EC) No 428/2009 as regards the removal of destinations from the scope of the Union General Export Authorisations. Given that such modifications should only be made in response to an increase in the assessment of the risk of the relevant exports, and that the continued use of Union General Export Authorisations for those exports could have an imminent adverse effect on the security of the Union and its Member States, an urgency procedure may be used by the Commission.
- (9) The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.
- (10) Regulation (EC) No 428/2009 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 428/2009 is amended as follows:

- (1) In Article 9(1), the following subparagraphs are added:

‘In order to ensure that only low-risk transactions are covered by the Union General Export Authorisations included in Annexes IIa to IIc, the Commission shall be empowered to adopt delegated acts in accordance with Article 23a to remove destinations from the scope of those Union General Export Authorisations, if such destinations become subject to an arms embargo as referred to in Article 4(2).

Where, in cases of such arms embargoes, imperative grounds of urgency require a removal of particular destinations from the scope of a Union General Export Authorisation, the procedure provided for in Article 23b shall apply to delegated acts adopted pursuant to this paragraph.’

- (2) In Article 15, the following paragraph is added:

‘3. The Commission shall be empowered to adopt delegated acts in accordance with Article 23a concerning updating the list of dual-use items set out in Annex I. The updating of Annex I shall be performed within the scope set out in paragraph 1 of this Article. Where the updating of Annex I concerns dual-use items which are also listed in Annexes IIa to IIc or IV, those Annexes shall be amended accordingly.’

(3) The following articles are inserted:

Article 23a

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Article 9(1) and Article 15(3) shall be conferred on the Commission for a period of five years from ... (*). The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.
3. The delegation of power referred to in Article 9(1) and Article 15(3) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to Article 9(1) and Article 15(3) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

Article 23b

1. Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.
2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article 23a(5). In such a case, the Commission shall repeal the act without delay following the notification of the decision to object by the European Parliament or by the Council.'

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at ...

For the European Parliament
The President

...

For the Council
The President

...

(*) Date of entry into force of this Regulation.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

On 7 November 2011 the Commission submitted to the European Parliament and to the Council its proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 428/2009 setting up a Community Regime for the control of exports, transfer, brokering and transit of dual use items ⁽¹⁾.

The European Parliament adopted its position at first reading on 23 October 2012 ⁽²⁾.

The 'Trade Omnibus' package, which was under negotiation at that point in time, also contained proposals concerning delegated acts relevant to the present proposal. In order to ensure consistency among those regulations and the present proposal, it was agreed to await the outcome of the Trade Omnibus package.

In June 2013, a compromise was found concerning the Trade Omnibus package ⁽³⁾. Subsequently, negotiations were pursued with a view to reaching an 'early second reading agreement' on the present proposal ⁽⁴⁾.

At the final informal trilogue meeting on 17 December 2013, provisional agreement on a compromise package was reached between the co-legislators.

On 21 January 2014, the Committee on International Trade of the European Parliament (INTA) approved the outcome of the trilogue negotiations.

On 21 January 2014, the Chair of INTA addressed a letter to the Presidency indicating that, should the Council transmit formally to the Parliament its position in the form that it was presented in the Annex to that letter, the Chair of INTA would recommend to the Plenary to accept the Council's position without amendment.

On that basis, the Council on 11 February 2014 (via COREPER on 29 January 2014) reached political agreement on the proposal ⁽⁵⁾.

Taking into account the above agreement and after legal and linguistic revision, the Council adopted its position at first reading on 3 March 2014, in accordance with the ordinary legislative procedure laid down in Article 294 of the Treaty on the Functioning of the European Union (TFEU).

II. OBJECTIVE

The proposed Regulation aims at ensuring regular and timely updates, through Commission delegated acts, of the EU control list of dual-use items in conformity with the obligations and commitments taken by Member States within the international export control regimes.

Furthermore, in order to allow for a swift EU response to changing circumstances as regards the assessment of the sensitivity of exports under EU General Export Authorisations, it provides for the removal of destinations from the scope of such Authorisations should this prove necessary in certain cases to ensure that only low-risk transactions are covered.

III. ANALYSIS OF THE COUNCIL'S POSITION AT FIRST READING

The Council agreed with the main thrust of the proposal as regards the procedure for updating the EU control list (Annex I) through delegated acts. Modifications were introduced regarding the following main issues:

- A more explicit scope was provided for the delegated acts to remove destinations from the EU General Export Authorisations, i.e. if such destinations become subject to an arms embargo;
- The period of the conferral of the power of delegation to the Commission was specified to be five years, tacitly renewable;
- In case the updates of the EU control lists (Annex I) concern dual-use items which are also listed in certain other Annexes of the Regulation, those Annexes are to be amended accordingly.

⁽¹⁾ Doc. 16726/11.

⁽²⁾ Doc. 15611/12.

⁽³⁾ Doc. 13284/13.

⁽⁴⁾ Docs 11454/13 and 12203/13.

⁽⁵⁾ Doc. 5480/14.

In addition, the European Parliament, the Council and the Commission recognised, in a Joint Statement, the importance of continuously enhancing the effectiveness and coherence of the EU's strategic export controls regime, ensuring high level of security and adequate transparency without impeding competitiveness and legitimate trade in dual-use items. This will continue to be addressed also in the context of the on-going review of EU dual-use export control policy.

IV. CONCLUSION

The Council's Position at first reading reflects the compromise reached in negotiations between the Council and the European Parliament as also facilitated by the Commission. This compromise was endorsed through the adoption of a political agreement by the Council on 11 February 2014, via COREPER on 29 January 2014.

The Chair of the European Parliament's INTA Committee has indicated, in a letter of 21 January 2014, to the Presidency that, should the Council transmit formally to the Parliament its position in the form as it stands in the annex to that letter, he would recommend to the Plenary that the Council's position be accepted without amendment, subject to legal-linguistic verification, at the Parliament's second reading.

Joint Statement by the European Parliament, the Council and the Commission on the review of the dual-use export control system

The European Parliament, the Council and the Commission recognise the importance of continuously enhancing the effectiveness and coherence of the EU's strategic export controls regime, ensuring a high level of security and adequate transparency without impeding competitiveness and legitimate trade in dual-use items.

The three institutions consider that modernisation and further convergence of the system is needed in order to keep up with new threats and rapid technological changes, to reduce distortions, create a genuine common market for dual-use items (uniform level playing field for exporters) and continue serving as an export control model for third countries.

To this end, it is essential to streamline the process for updating the control lists (Annexes to the Regulation); strengthen risk assessment and exchange of information, develop improved industry standards, and reduce disparities in implementation.

The European Parliament, the Council and the Commission acknowledge the issues regarding the export of certain information and communication technologies (ICT) that can be used in connection with human rights violations as well as to undermine the EU's security, particularly for technologies used for mass-surveillance, monitoring, tracking, tracing and censoring, as well as for software vulnerabilities.

Technical consultations have been initiated in this respect, including in the framework of EU Dual Use Peer Visit, the Dual Use Coordination Group, and the export control regimes, and actions continue to be taken to address situations of urgency through sanctions (pursuant to Article 215 TFEU), or national measures. Efforts will also be intensified to promote multilateral agreements in the context of export control regimes, and options will be explored to address this issue in the context of the on-going review of EU dual-use export control policy, and the preparation of a Commission Communication. In this context the three institutions took note of the agreement on 4 December 2013 by the Participating States of the Wassenaar Arrangement to adopt controls on complex surveillance tools that enable unauthorised access to computer systems, and on IP-network surveillance systems.

The European Parliament, the Council and the Commission also commit to further development of the existing 'catch-all' mechanism for dual-use items falling outside the Annex I of the Regulation, in order to further enhance the export control system and its application within the European single market.

Commission Statement on delegated acts

In the context of this Regulation, the Commission recalls the commitment it has taken in paragraph 15 of the Framework Agreement on relations between the European Parliament and the European Commission to provide to the Parliament full information and documentation on its meetings with national experts within the framework of its work on the preparation of delegated acts.

Commission Statement on updating the Regulation

In order to ensure a more integrated, efficient and coherent European approach to the movement (exports, transfer, brokering and transit) of strategic items, the Commission will put forward a new proposal for updating the Regulation as expeditiously as possible.
