Council Regulation (EU) 2018/647 of 26 April 2018 amending Regulation (EU) No 401/2013 concerning restrictive measures in respect of Myanmar/Burma

COUNCIL REGULATION (EU) 2018/647

of 26 April 2018

amending Regulation (EU) No 401/2013 concerning restrictive measures in respect of Myanmar/Burma

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 215 thereof,

Having regard to Council Decision 2013/184/CFSP of 22 April 2013 concerning restrictive measures against Myanmar/Burma and repealing Decision 2010/232/CFSP[(1)],

Having regard to the joint proposal of the High Representative of the Union for Foreign Affairs and Security Policy and of the European Commission,

Whereas:

(1) On 26 February 2018, the Council adopted conclusions condemning the ongoing widespread, systematic grave human rights violations committed by the Myanmar/Burma military and security forces and calling on the Government of Myanmar/Burma and the security forces to ensure that security, the rule of law and accountability prevail in Rakhine, Kachin and Shan States.

(2) In this context the Council adopted Decision (CFSP) 2018/655[(2)] amending Decision 2013/184/CFSP, whereby it imposed further restrictive measures on Myanmar/Burma in the form of a prohibition on the export of dual-use goods for military and Border Guard Police end-users, restrictions on the export of equipment for monitoring communications that might be used for internal repression, and targeted restrictive measures against certain natural persons from the Myanmar Armed Forces (Tatmadaw) and the Border Guard Police responsible for serious human rights violations, responsible for obstructing the provision of humanitarian assistance to civilians in need and responsible for obstructing the conduct of independent investigations into alleged serious human rights violations or abuses, as well as persons, entities or bodies associated with them.

(3) Council Regulation (EU) No 401/2013[(3)] gives effect to the measures provided for in Decision 2013/184/CFSP. Certain measures provided for in Decision (CFSP) 2018/655 fall within the scope of the Treaty and therefore, with a view, in particular, to ensuring their uniform application by economic operators in all Member States, regulatory action at the level of the Union is necessary in order to implement them.

(4) The passage of humanitarian assistance for civilians in need, subject to control of the parties to the conflict and in accordance with international humanitarian law, should

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not be impeded. It is thus appropriate to apply restrictions on natural persons from the Myanmar Armed Forces (Tatmadaw) responsible for obstructing the rapid and unimpeded passage of humanitarian assistance for civilians in need. Such restrictions should not unduly affect the delivery of humanitarian assistance and should be applied in full consideration of human rights law and of the applicable rules of international humanitarian law.

(5) Regulation (EU) No 401/2013 should therefore be amended accordingly.

(6) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and a fair trial and the right to the protection of personal data. This Regulation should be applied in accordance with those rights.

(7) The power to amend the list in Annex IV to Regulation (EU) No 401/2013 should be exercised by the Council in order to ensure consistency with the process for amending and reviewing the Annex to Decision (CFSP) 2018/655.

(8) For the implementation of this Regulation, and in order to create maximum legal certainty within the Union, the names and other relevant data concerning natural and legal persons, entities and bodies whose funds and economic resources are to be frozen in accordance with this Regulation should be made public. Any processing of personal data should comply with Regulation (EC) No 45/2001 of the European Parliament and of the Council[(4)] and Directive 95/46/EC of the European Parliament and of the Council[(5)].

(9) In order to ensure that the measures provided for in this Regulation are effective, it should enter into force immediately,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 401/2013 is amended as follows:

(1) Article 1 is replaced by the following:

Article 1

For the purposes of this Regulation, the following definitions apply:

(a) "claim" means any claim, whether asserted by legal proceedings or not, made before or after the date of entry into force of this Regulation, under or in connection with a contract or transaction, and includes in particular:

(i) a claim for performance of any obligation arising under or in connection with a contract or transaction;

(ii) a claim for extension or payment of a bond, financial guarantee or indemnity of whatever form;

(iii) a claim for compensation in respect of a contract or transaction;

(iv) a counterclaim;

(v) a claim for the recognition or enforcement, including by the procedure of *exequatur*, of a judgment, an arbitration award or an equivalent decision, wherever made or given;

(b) "contract or transaction" means any transaction of whatever form and whatever the applicable law, whether comprising one or more contracts or similar obligations made between the same or different parties; for this purpose "contract" includes a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, and credit, whether legally independent or not, as well as any related provision arising under, or in connection with, the transaction;

(c) "competent authorities" refers to the competent authorities of the Member States as identified on the websites listed in Annex II;

(d) "economic resources" means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds, but may be used to obtain funds, goods or services;

(e) "freezing of economic resources" means preventing the use of economic resources to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them;

(f) "freezing of funds" means preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the funds to be used, including portfolio management;

(g) "funds" means financial assets and benefits of every kind, including, but not limited to:

(i) cash, cheques, claims on money, drafts, money orders and other payment instruments;

(ii) deposits with financial institutions or other entities, balances on accounts, debts and debt obligations;

(iii) publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts;

(iv) interest, dividends or other income on or value accruing from or generated by assets;

(v) credit, right of set-off, guarantees, performance bonds or other financial commitments;

(vi) letters of credit, bills of lading, bills of sale; and

(vii) documents showing evidence of an interest in funds or financial resources;

(h) "technical assistance" means any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, advice, training,

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transmission of working knowledge or skills or consulting services, including verbal forms of assistance;

(i) "brokering services" means:

(i) the negotiation or arrangement of transactions for the purchase, sale or supply of goods and technology from a third country to any other third country, or

(ii) the selling or buying of goods and technology that are located in third countries for their transfer to another third country;

(j) "import" means any entry of goods into the customs territory of the Union or other territories to which the Treaty applies, under the conditions laid down in Articles 349 and 355 thereof. It includes, within the meaning of Regulation (EU) No 952/2013 of the European Parliament and of the Council[(6)] laying down the Union Customs Code, placing in a free zone, placing under special procedure and release for free circulation, but it excludes transit or temporary storage;

(k) "export" means any departure of goods from the customs territory of the Union or other territories to which the Treaty applies, under the conditions laid down in Articles 349 and 355 thereof. It includes, within the meaning of Regulation (EU) No 952/2013, the departure of goods that requires a customs declaration and the departure of goods after their storage in a free zone or after their placement under a special procedure, but it excludes transit or temporary storage;

(l) "exporter" means any natural or legal person on whose behalf an export declaration is made, being the person who, at the time when the declaration is accepted, holds the contract with the consignee in the third country and has the power for determining the sending of the item out of the customs territory of the Union or other territories to which the Treaty applies;

(m) "territory of the Union" means the territories of the Member States to which the Treaty is applicable, under the conditions laid down in the Treaty, including their airspace.;

(2) in Article 3, paragraphs 3 and 4 are deleted;

(3) the following Articles are inserted:

Article 3a

1 It shall be prohibited to sell, supply, transfer or export, directly or indirectly, dual-use goods and technology as included in Annex I to Council Regulation (EC) No 428/2009[(7)], whether or not originating in the Union, to any natural or legal person, entity or body in Myanmar/Burma or for use in Myanmar/Burma, if those items are or may be intended, in their entirety or in part, for military use, military end-user or the Border Guard Police.

Where the end-user is the Myanmar's/Burma's military, any dual-use goods and technology procured by it shall be deemed to be for military use.

2 When deciding on requests for authorisations in accordance with Regulation (EC) No 428/2009, the competent authorities shall not grant an authorisation for exports to any natural or legal person, entity or body in Myanmar/Burma or for use in Myanmar/Burma, if they have reasonable grounds to believe that the end-user might

be a military end-user, the Border Guard Police or that the goods might have a military end-use.

3 Exporters shall supply the competent authorities with all relevant information required for their application for an export authorisation.

4 It shall be prohibited:

a to provide technical assistance, brokering services or other services related to goods and technology referred to in paragraph 1 and to the provision, manufacture, maintenance and use of these goods and technology, directly or indirectly to any military end-user, the Border Guard Police or for military use in Myanmar/Burma;

b to provide financing or financial assistance related to goods and technology referred to in paragraph 1, including in particular grants, loans and export credit insurance, for any sale, supply, transfer or export of these goods and technology, or for the provision of related technical assistance, brokering services or other services, directly or indirectly to any military end-user, the Border Guard Police or for military use in Myanmar/Burma.

5 The prohibitions in paragraphs 1 and 4 shall be without prejudice to the execution of contracts concluded before 27 April 2018 or ancillary contracts necessary for the execution of such contracts.

6 Paragraph 1 shall not apply to protective clothing, including flak jackets and military helmets, temporarily exported to Myanmar/Burma by UN personnel, personnel of the EU or its Member States, representatives of the media and humanitarian and development workers and associated personnel for their personal use only.

Article 3b

1 It shall be prohibited to sell, supply, transfer or export, directly or indirectly, equipment, technology or software identified in Annex III, whether or not originating in the Union, to any person, entity or body in Myanmar/Burma or for use in Myanmar/Burma, unless the competent authority of the relevant Member State, as identified on the websites listed in Annex II, has given prior authorisation.

2 The competent authorities of the Member States, as identified on the websites listed in Annex II, shall not grant any authorisation under paragraph 1 if they have reasonable grounds to determine that the equipment, technology or software in question would be used for internal repression by the Government of Myanmar/Burma, public bodies, corporations or agencies, or any person or entity acting on their behalf or at their direction.

3 Annex III shall include equipment, technology or software intended primarily for use in the monitoring or interception of internet or telephone communications.

4 The Member State concerned shall inform the other Member States and the Commission of any authorisation granted under this Article, within four weeks of the authorisation.

Article 3c

1 Unless the competent authority of the relevant Member State, as identified on the websites listed in Annex II, has given prior authorisation in accordance with Article 3b, it shall be prohibited: