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 (Recast)

COUNCIL REGULATION (EC) No 428/2009

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(Recast)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 133 thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology[(1)] has been significantly amended on several occasions. Since further amendments are to be made, it should be recast in the interests of clarity.

(2) Dual-use items (including software and technology) should be subject to effective control when they are exported from the European Community.

(3) An effective common system of export controls on dual-use items is necessary to ensure that the international commitments and responsibilities of the Member States, especially regarding non-proliferation, and of the European Union (EU), are complied with.

(4) The existence of a common control system and harmonised policies for enforcement and monitoring in all Member States is a prerequisite for establishing the free movement of dual-use items inside the Community.

(5) The responsibility for deciding on individual, global or national general export authorisations, on authorisations for brokering services, on transits of non-Community dual-use items or on authorisations for the transfer within the Community of the dual-use items listed in Annex IV lies with national authorities. National provisions and decisions affecting exports of dual-use items must be taken in the framework of the common commercial policy, and in particular Council Regulation (EEC) No 2603/69 of 20 December 1969 establishing common rules for exports[(2)].

(6) Decisions to update the common list of dual-use items subject to export controls must be in conformity with the obligations and commitments that Member States have accepted as members of the relevant international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties.

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(7) Common lists of dual-use items, destinations and guidelines are essential elements for an effective export control regime.

(8) Transmission of software and technology by means of electronic media, fax or telephone to destinations outside the Community should also be controlled.

(9) Particular attention needs to be paid to issues of re-export and end-use.

(10) On 22 September 1998 representatives of the Member States and the European Commission signed Protocols additional to the respective safeguards agreements between the Member States, the European Atomic Energy Community and the International Atomic Energy Agency, which, among other measures, oblige the Member States to provide information on transfers of specified equipment and non-nuclear material.

(11) The Community has adopted a body of customs rules, contained in Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code[(3)] (hereinafter the Community Customs Code) and Commission Regulation (EEC) No 2454/93[(4)] implementing Regulation (EEC) No 2913/92 Which lay down, among other things, provisions relating to the export and re-export of goods. Nothing in this Regulation constrains any powers under and pursuant to the Community Customs Code and its implementing provisions.

(12) Pursuant to and within the limits of Article 30 of the Treaty and pending a greater degree of harmonisation, Member States retain the right to carry out controls on transfers of certain dual-use items within the Community in order to safeguard public policy or public security. Where these controls are linked to the effectiveness of controls on exports from the Community, they should be periodically reviewed by the Council.

(13) In order to ensure that this Regulation is properly applied, each Member State should take measures giving the competent authorities appropriate powers.

(14) The Heads of State or Government of the EU adopted in June 2003 an Action Plan on Non-Proliferation of Weapons of Mass Destruction (Thessaloniki Action Plan). This Action Plan was complemented by the EU Strategy against proliferation of Weapons of Mass Destruction adopted by the European Council on 12 December 2003 (EU WMD Strategy). According to Chapter III of this Strategy, the European Union must make use of all its instruments to prevent, deter, halt, and if possible eliminate proliferation programmes that cause concern at global level. Subparagraph 30.A(4) of that Chapter specifically refers to strengthening export control policies and practices.

(15) United Nations Security Council Resolution 1540, adopted on 28 April 2004, decides that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall, among others, establish transit and brokering controls. Related materials are materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design,

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development, production or use of nuclear, chemical and biological weapons and their means of delivery.

(16) This Regulation includes items which only pass through the territory of the Community, that is, those items which are not assigned a customs-approved treatment or use other than the external transit procedure or which are merely placed in a free zone or free warehouse and where no record of them has to be kept in an approved stock record. Accordingly, a possibility for Member States' authorities to prohibit on a case-by-case basis the transit of non-Community dual-use items should be established, where they have reasonable grounds for suspecting from intelligence or other sources that the items are or may be intended in their entirety or in part for proliferation of weapons of mass destruction or of their means of delivery.

(17) Controls should also be introduced on the provision of brokering services when the broker has been informed by competent national authorities or is aware that such provision might lead to production or delivery of weapons of mass destruction in a third country.

(18) It is desirable to achieve a uniform and consistent application of controls throughout the EU in order to promote EU and international security and to provide a level playing field for EU exporters. It is therefore appropriate, in accordance with the recommendations of the Thessaloniki Action Plan and the calls of the EU WMD Strategy, to broaden the scope of consultation between Member States prior to granting an export authorisation. Among the benefits of this approach would be, for example, an assurance that a Member State's essential security interests would not be threatened by an export from another Member State. Greater convergence of conditions implementing national controls on dual-use items not listed in this Regulation, and harmonisation of the conditions of use of the different types of authorisations that may be granted under this Regulation would bring about more uniform and consistent application of controls. Improving the definition of intangible transfers of technology, to include making available controlled technology to persons located outside the EU, would assist the effort to promote security as would further alignment of the modalities for exchanging sensitive information among Member States with those of the international export control regimes, in particular by providing for the possibility of establishing a secure electronic system for sharing information among Member States.

(19) Each Member State should determine effective, proportionate and dissuasive penalties applicable in the event of breach of the provisions of this Regulation,

HAS ADOPTED THIS REGULATION:

CHAPTER I

SUBJECT AND DEFINITIONS

Article 1

This Regulation sets up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

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Article 2

For the purposes of this Regulation:

1. ‘dual-use items’ shall mean items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices;

2. ‘export’ shall mean:

   (i) an export procedure within the meaning of Article 161 of Regulation (EEC) No 2913/92 (the Community Customs Code);

   (ii) a re-export within the meaning of Article 182 of that Code but not including items in transit; and

   (iii) transmission of software or technology by electronic media, including by fax, telephone, electronic mail or any other electronic means to a destination outside the European Community; it includes making available in an electronic form such software and technology to legal and natural persons and partnerships outside the Community. Export also applies to oral transmission of technology when the technology is described over the telephone;

3. ‘exporter’ shall mean any natural or legal person or partnership:

   (i) on whose behalf an export declaration is made, that is to say 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 Community. If no export contract has been concluded or if the holder of the contract does not act on its own behalf, the exporter shall mean the person who has the power for determining the sending of the item out of the customs territory of the Community;

   (ii) which decides to transmit or make available software or technology by electronic media including by fax, telephone, electronic mail or by any other electronic means to a destination outside the Community.

   Where the benefit of a right to dispose of the dual-use item belongs to a person established outside the Community pursuant to the contract on which the export is based, the exporter shall be considered to be the contracting party established in the Community;

4. ‘export declaration’ shall mean the act whereby a person indicates in the prescribed form and manner the wish to place dual-use items under an export procedure;

5. ‘brokering services’ shall mean:

   — the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country, or

   — the selling or buying of dual-use items that are located in third countries for their transfer to another third country.

   For the purposes of this Regulation the sole provision of ancillary services is excluded from this definition. Ancillary services are transportation, financial services, insurance or re-insurance, or general advertising or promotion;

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6. 'broker' shall mean any natural or legal person or partnership resident or established in a Member State of the Community that carries out services defined under point 5 from the Community into the territory of a third country;

7. 'transit' shall mean a transport of non-Community dual-use items entering and passing through the customs territory of the Community with a destination outside the Community;

8. 'individual export authorisation' shall mean an authorisation granted to one specific exporter for one end user or consignee in a third country and covering one or more dual-use items;

9. **[**F1'union general export authorisation' shall mean an export authorisation for exports to certain countries of destination available to all exporters who respect its conditions and requirements for use as listed in Annexes IIa to IIf;**]**

10. 'global export authorisation' shall mean an authorisation granted to one specific exporter in respect of a type or category of dual-use item which may be valid for exports to one or more specified end users and/or in one or more specified third countries;

11. 'national general export authorisation' shall mean an export authorisation granted in accordance with Article 9(2) and defined by national legislation in conformity with Article 9 and Annex IIIc;

12. 'customs territory of the European Union' shall mean the territory within the meaning of Article 3 of the Community Customs Code;

13. 'non-Community dual-use items' shall mean items that have the status of non-Community goods within the meaning of Article 4(8) of the Community Customs Code.

Textual Amendments

F1 Substituted by Regulation (EU) No 1232/2011 of the European Parliament and of the Council of 16 November 2011 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.

CHAPTER II

SCOPE

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 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 authorities of the Member State in which he is established that the items in question are or may be intended, in their entirety or in part, for use in connection with the development, production, handling, operation, maintenance, storage,