



The European Union Export Control Regime: Comment of the Legislation: article-by-article

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Part I: The European Union Export Control Regime of Dual-Use Items

Introductory Remark: to facilitate the understandings of the EU export control regime of dual-use items and technology, we have in the present Part mixed together the **two** Council decisions which constitute the EU regime:

- Council Regulation (EC) No 428/2009 (in black in the present text),
- Council Joint Action 2000/401/CFSP (in red in the present text).

It should be kept in mind that the **legal value of both documents is rather different**. The Joint Action is an inter-governmental cooperation instrument set up by the Treaty on European Union (EU Treaty). To enter into force, it has to be transcribed by Member States into their national legislation. The Council Regulation is European Community legislation instituted by the Treaty establishing the European Community (EC Treaty) and is therefore directly applicable.

Important Remark: The Dual-Use Council Regulation (EC) No 1334/2000 has been largely amended (recasted) by the Council Regulation (EC) No 428/2009, thus in order to simplify the recognition of articles which have been amended we have coloured in grey provisions added or modified by the new regulation the present text.

Preamble

Text of 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

Official Journal L 134, 29/05/2009 P. 0001 - 0269

Council Joint Action of 22 June 2000 (2000/0401/CFSP) concerning the control of technical assistance related to certain military end-uses

Official Journal L 159, 30/06/2000 P. 0216 - 0217

THE COUNCIL OF THE EUROPEAN UNION,

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

Complementary information: Article 133

*"1. The common commercial policy shall be based **on uniform principles**, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, **export policy and measures to protect trade** such as those to be taken in the event of dumping or subsidies.*

*2. The **Commission shall submit proposals to the Council** for implementing the common commercial policy.*

*3. Where agreements with one or more States or **international organisations** need to be negotiated, the **Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations**. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are **compatible with internal Community policies and rules**.*

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee on the progress of negotiations.

The relevant provisions of Article 300 shall apply.

*4. In exercising the powers conferred upon it by this Article, the **Council shall act by a qualified majority**.*

5. Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, in so far as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.

By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.

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The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns the preceding subparagraph or the second subparagraph of paragraph 6.

This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations in so far as such agreements comply with Community law and other relevant international agreements.

6. An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.

In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. The Community and the Member States shall conclude agreements thus negotiated jointly.

The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300.

7. Without prejudice to the first subparagraph of paragraph 6, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property in so far as they are not covered by paragraph 5."

Complementary information:

When the Lisbon Treaty will enter into force Article 133 will be replaced and moved to Article 207. Provisions concerning the export policy will be slightly changed, notably any **amendment** to the regulation will have to be adopted by ordinary procedure. In comparison with the present procedure, it extends the role of the European Parliament who will have to approve and not only being consulted, as it was the case previously.

Preamble

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 technology¹ 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 exports².

¹ OJ L 159, 30.6.2000, p. 1.

² OJ L 324, 27.12.1969, p. 25.

Preamble

(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.

Comment: This Regulation was adopted at a time when all the EU Member States were still not members of the five relevant international export control regimes. The present situation is as follows:

- Regarding nuclear items:
 - o All EU Member States are members of the Nuclear Suppliers Group;
 - o Cyprus, Estonia, Latvia, Lithuania, Malta have applied to the Zangger Committee or their intentions are not yet known.
- Regarding chemicals and biological items:
 - o All EU Member States are members of the Australia Group.
- Regarding missiles technology:
 - o Cyprus, Estonia, Latvia, Lithuania, Malta, Slovenia, Slovakia and Romania have applied to the Missile Technology Control Regime (MTCR).
- Regarding the Wassenaar Arrangement (nuclear, biological, chemicals items):
 - o All EU Member States are members of the Wassenaar Arrangement apart from Cyprus that has applied thereto.

The participation of all EU Member States in all of export control regimes is a major challenge in ensuring the efficiency of the EU export control regime. Due to the fact that most transfers of dual-use items between Member States are not submitted to authorisation (implementation of the internal market), the efficiency of the EU export control regime could only be maintained if all Member States are bound by the same international export control commitments.

Preamble

(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.

Complementary information:

The text of the different additional protocols to safeguards agreements could be found on the IAEA website.

For Members States considered as non-nuclear-weapon States by the Nuclear Non-Proliferation Treaty, the agreement is published by the IAEA under [INFCIRC/193](#) (INFCIRC193/add.1 to add.7 for Member States who have acceded to EU after 1980 and before 1995) and [INFCIRC/193/add.8](#) (INFCIRC/add. 9 to add.20 for Member States who have acceded to the EU after 1995).

For EU nuclear-weapon States such as France and United Kingdom of Great Britain and Northern Ireland, the safeguards agreement and its additional protocol is published respectively under [INFCIRC263](#), [INFCIRC263/add.1](#) and [INFCIRC290](#) and [INFCIRC/290/add.1](#).

During their accession process new Member States have to change their bilateral safeguards agreement signed with the IAEA into a trilateral agreement signed with the IAEA and Euratom. Such rather technical process could take some time and presently the Czech Republic, Bulgaria and Romania are still ruled by their bilateral safeguard regime.

Preamble

(11) The Community has adopted a body of customs rules, contained in Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code³ (hereinafter: the Community Customs Code) and Commission Regulation (EEC) No 2454/93⁴ 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.

Comment: Regularly proposals have been tabled to review and reduce the number of dual-use items to be controlled within the European Community. Nevertheless, Member States unanimity could not be reached. See also comment under Article 22(2).

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

³ OJ L 302, 19.10.1991, p. 1. Regulation as last amended by Regulation (EC) No 955/1999 of the European Parliament and of the Council (OJ L 119, 7.5.1999, p. 1). At the 3 September 2008 meeting of the DUWP the CLS drew attention to the entry into force on 24 June 2008 of the "Modernised Customs Code" (Regulation (EC) No 450/2008 of the European Parliament and the Council of 23 April 2008), by which Regulation (EC) No 2913/92 is repealed.

⁴ OJ L 253, 11.10.1993, p. 1. Regulation as last amended by Regulation (EC) No 1662/1999 (OJ L 197, 29.7.1999, p. 25).

Preamble

(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, 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.

Comment: The United Nations Security Council Resolution 1540 calls upon States to adopt adequate national controls to “*prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials*”. The Resolution calls for the control of “*materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery*”. Such definition covers partly the terms of dual-use items as defined by Article 2(1) of this Regulation which are items that can be used for both civil and military purposes including WMD and conventional weapons.

Nevertheless, to implement the UN Resolution, the recast of this Regulation has introduced dedicated provisions on transit (Article 6) and on brokering (Article 5) of dual-use items as defined by Article 2(1). This extends indirectly the field of implementation required by the 1540 UNSCR presently limited to WMD dual-use items.

Preamble

(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.

Complementary information: Sub-paragraph 30(A) concerns the strengthening of export control policies and practices in co-ordination with partners of the export control regimes. It invokes the necessity of making the EU a leading co-operative player in the export control regimes by:

- **co-ordinating EU positions** within the different regimes;
- supporting the membership of acceding countries and where appropriate involvement of the Commission;
- promoting a **catch-all clause** in the regimes, where it was not agreed so far, as well as strengthening the information exchange, in particular with respect to sensitive destinations, sensitive end-users and procurement patterns;
- reinforcing the efficiency of export control in an enlarged Europe, and successfully conducting a Peer Review to disseminate good practices by taking special account of the challenges of the forthcoming enlargement;
- setting up a **programme of assistance** for States in need of technical knowledge in the field of export control;
- working to ensure that the Nuclear Suppliers Group makes the export of controlled nuclear and nuclear related items and technology conditional on ratifying and implementing the **Additional Protocol**;
- promoting in the regimes reinforced export controls with respect to intangible transfers of dual-use technology, as well as effective measures relating to **brokering** and **transshipment** issues;
- enhancing **information exchange** between Member States. Considering exchange of information between the EU SitCen and like-minded countries.

(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:

Preamble

THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on European Union, and in particular Article 14 thereof,
Whereas:

Complementary information: Article 14 of the Treaty on European Union

“1. The Council shall adopt joint actions. Joint actions shall address specific situations where operational action by the Union is deemed to be required. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.

2. If there is a change in circumstances having a substantial effect on a question subject to joint action, the Council shall review the principles and objectives of that action and take the necessary decisions. As long as the Council has not acted, the joint action shall stand.

3. Joint actions shall commit the Member States in the positions they adopt and in the conduct of their activity.

4. The Council may request the Commission to submit to it any appropriate proposals relating to the common foreign and security policy to ensure the implementation of a joint action.

5. Whenever there is any plan to adopt a national position or take national action pursuant to a joint action, information shall be provided in time to allow, if necessary, for prior consultations within the Council. The obligation to provide prior information shall not apply to measures which are merely a national transposition of Council decisions.

6. In cases of imperative need arising from changes in the situation and failing a Council decision, Member States may take the necessary measures as a matter of urgency having regard to the general objectives of the joint action. The Member State concerned shall inform the Council immediately of any such measures.

7. Should there be any major difficulties in implementing a joint action, a Member State shall refer them to the Council which shall discuss them and seek appropriate solutions. Such solutions shall not run counter to the objectives of the joint action or impair its effectiveness.”

(1) On 22 June 2000 the Council adopted Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, which provides an effective system of export controls of dual-use items, including software and technology. That Regulation, in Article 4, contains inter alia provisions concerning items not listed in Annex I which are or may be intended for use in connection with weapons of mass destruction or missiles for delivery of such weapons, or in connection with military goods for countries subject to EU, OSCE or UN arms embargoes.

(2) The commitments of the Member States of the European Union regarding the non-proliferation of weapons of mass destruction and the export of conventional military goods to countries subject to arms embargoes require an effective export control system which should also cover, on the basis of common standards, technical assistance, including oral transfers of technology required to be controlled by the international export control regimes, bodies and treaties for weapons of mass destruction and missiles and for conventional military goods exported to countries subject to arms embargoes of the above types. It is appropriate to define such common standards in a joint action,

HAS ADOPTED THIS JOINT ACTION:

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.

Comment: As mentioned in Recital 4 *“the existence of a common control system and harmonised policies for enforcement and monitoring in all Member States was a prerequisite for establishing the free movement of dual-use items inside the Community”*. Nevertheless, this Regulation does not substitute Member States Export Control Regime by a centralised EU Export Control Regime. This Regulation establishes common export controls rules and principles to be implemented by each Member States. It consists mostly in the adoption of:

- an identical list of items to control (see Article 3 and 15(1));
- a system of export authorisation for listed and not listed items (see Article 3 and 4);
- a possibility to control brokering activities (see Article 5);
- a possibility to control transit of dual-use items (see Article 6);
- a transfer authorisation for movements of certain items between EU Member States (see Article 22).

As principle this Regulation establishes that the authorisation is granted:

- by competent authorities of the Member State where the exporter is established; or
- directly by this Regulation, it is the Community General Export Authorisation (see Article 9).

This Regulation covers **exports** of dual-use items (see Article 1(2)) but does not concern import of such items. Nevertheless, some Members States (Poland for instance) imposed via national legislation special provisions on import of dual-use items.

The control of **brokering services** defined as any activities facilitating trade of listed and non-listed dual-use items between two third countries could be submitted to national authorisation. Previously, such activities were not covered by this Regulation and some Member States have adopted, on a national basis, controls leading to prior authorisation for brokering activities (Austria, Germany and Poland).

In Germany, a licence is required for brokering activities of items covered by Annex IV (Section 41 Foreign Trade and Payments Regulation). This licensing requirement does not apply if the purchasing country or the country of destination is listed in Annex II, Part 3 EC-REG. 1334/2000.

The licensing requirement also applies for brokering activities undertaken by German nationals outside German territory, if the purchasing country or the country of destination is a country as mentioned in Art. 4 para. 2 EC-REG. 1334/2000 or a country of the national country list *K* (at present Cuba and Syria).

Article 2

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;

Comment: Dual-use items covered by this Regulation are listed in Annex I. The list is **comprehensive and compulsory for Member States** export control authorities. It does not grant space for Member States appreciation or interpretation if an item should be or not submitted to authorisation.

Nevertheless, if a dual-use item is not listed in the Annex I, it does not mean that it is necessarily not submitted to export authorisation. Such authorisation could be required by a national export control list or could result from the implementation of a catch-all clause (see Article 4 and 8).

Comment: Understanding of the term technology by Member States

If technology in the public domain and basic scientific research is not covered by this Regulation (see below), it seems that for some Member States, industries do not conduct basic research because the aim thereof is always to develop a marketable product, and so the industry will not publish its results unrestricted. In this regard for those Member States any export of technology has to be submitted to authorisation without considering if it might be basic scientific research or technology in the public domain.

Comment: Technology not covered by this Regulation

The General Technology Note, the Nuclear Technology Note and the General Software Note of Annex I of this Regulation exempt from an export authorisation any technology which derives from the public domain and is necessary for the basic scientific research or constitutes the minimum necessary for patent application.

Public domain should be understood as technology available without any restrictions upon further dissemination (copyright do not remove technology from being in the public domain).

Basic scientific research means experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts not primarily directed towards a specific practical aim or objective.

The export authorisation covers the minimum technology necessary for the installation, operation, maintenance and repair of the items supplied. It provides operating instructions and some basic specification. An everyday parallel would be the type of technical manual supplied with a television or washing machine.

Technology normally not included in the export authorisation is:

- the technology required to develop a complete system if the items exported are only components of that system;
- the technology related to a previous authorisation, but not essentially different from the technology that was originally supplied (handbooks or publications relating to equipment that has been upgraded since its original supply).

Article 2

2. "export" shall mean:

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

Comment: This Regulation does not establish specific provisions for "temporary export" of dual-use items. Temporary exports could concern transfers of controlled items necessary to participate in a fair or an exhibition that will be re-imported unchanged to the EU after it. Such transfer should normally be submitted to the standard export control rules.

Complementary information:

The legal basis of the EC customs territory is:

- Article 299 and Annex II of the EC Treaty;
- Article 3 of the Community Customs Code as well as a number of other definitions found in the Community Customs Code.

It should be emphasised that the Community Customs Code was modernised by Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code⁵. The modernised Customs Code entered into force on 24 June 2008; however the application thereof is conditioned upon the application of the implementing rules that must enter into force between 24 June 2009 and 24 June 2013.

Community Customs Code:

Article 3⁶

"1. The customs territory of the Community shall comprise the following territories, including their territorial waters, internal waters and airspace:

- the territory of the Kingdom of Belgium,*
- the territory of the Republic of Bulgaria,*
- the territory of the Czech Republic,*
- the territory of the Kingdom of Denmark, except the Faeroe Islands and Greenland,*
- the territory of the Federal Republic of Germany, except the Island of Heligoland and the territory of Buesingen (Treaty of 23 November 1964 between the Federal Republic of Germany and the Swiss Confederation),*
- the territory of the Republic of Estonia,*
- the territory of Ireland,*
- the territory of the Hellenic Republic,*
- the territory of the Kingdom of Spain, except Ceuta and Melilla, the territory of the French Republic, except New Caledonia, Mayotte, Saint-Pierre and Miquelon, Wallis and Futuna Islands, French Polynesia and the French Southern and Antarctic Territories,*
- the territory of the Italian Republic, except the municipalities of Livigno and Campione d'Italia and the national waters of Lake Lugano which are between the bank and the political frontier of the area between Ponte Tresa and Porto Ceresio,*
- the territory of the Republic of Cyprus, in accordance with the provisions of the 2003 Act of Accession,*
- the territory of the Republic of Latvia,*

⁵ OJ L 145, 4.6.2008, p. 1.

⁶ OJ L 145, 4.6.2008, p. 1.

Article 2

— the territory of the Republic of Lithuania,
— the territory of the Grand Duchy of Luxembourg,
— the territory of the Republic of Hungary,
— the territory of Malta,
— the territory of the Kingdom of the Netherlands in Europe,
— the territory of the Republic of Austria,
— the territory of the Republic of Poland,
— the territory of the Portuguese Republic,
— the territory of Romania,
— the territory of the Republic of Slovenia,
— the territory of the Slovak Republic,
— the territory of the Republic of Finland,
— the territory of the Kingdom of Sweden,
— the territory of the United Kingdom of Great Britain and Northern Ireland and of the Channel Islands and the Isle of Man.

2. The following territories, including their territorial waters, internal waters and airspace, situated outside the territory of the Member States shall, taking into account the conventions and treaties applicable to them, be considered to be part of the customs territory of the Community:

(a) FRANCE

The territory of Monaco as defined in the Customs Convention signed in Paris on 18 May 1963 (Journal officiel de la République française (Official Journal of the French Republic) of 27 September 1963, p. 8679);

(b) CYPRUS

The territory of the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia as defined in the Treaty concerning the Establishment of the Republic of Cyprus, signed in Nicosia on 16 August 1960 (United Kingdom Treaty Series No 4 (1961) Cmd. 1252)".

Article 161⁷

"1. The export procedure shall allow Community goods to leave the customs territory of the Community.

Exportation shall entail the application of exit formalities including commercial policy measures and, where appropriate, export duties.

2. With the exception of goods placed under the outward processing procedure or a transit procedure pursuant to Article 163, and without prejudice to Article 164, all Community goods intended for export shall be placed under the export procedure.

3. Goods dispatched to Heligoland shall not be considered to be exports from the customs territory of the Community.

4. The case in which and the conditions under which goods leaving the customs territory of the Community are not subject to an export declaration shall be determined in accordance with the committee procedure.

5. The export declaration must be lodged at the customs office responsible for supervising the place where the exporter is established or where the goods are packed or loaded for export shipment. Derogations shall be determined in accordance with the committee procedure."

⁷ Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p. 1). This Article becomes the Articles 176, 177 and 178 of the modernised Customs Code.

Article 2

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

Complementary information: Community Customs Code⁸

Article 182

“1. Non-Community goods may be:

- re-exported from the customs territory of the Community;*
- destroyed;*

- abandoned to the exchequer where national legislation makes provision to that effect.

2. Re-exportation shall, where appropriate, involve application of the formalities laid down for goods leaving, including commercial policy measures.

Cases in which non-Community goods may be placed under a suspensive arrangement with a view to non-application of commercial policy measures on exportation may be determined in accordance with the committee procedure.

3. Destruction shall be the subject of prior notification of the customs authorities. The customs authorities shall prohibit re-exportation should the formalities or measures referred to in the first subparagraph of paragraph 2 so provide. Where goods placed under an economic customs procedure when on Community customs territory are intended for re-exportation, a customs declaration within the meaning of Articles 59 to 78 shall be lodged. In such cases, Article 161(4) and (5) shall apply.

Abandonment shall be put into effect in accordance with national provisions.

4. Destruction or abandonment shall not entail any expense for the exchequer.

5. Any waste or scrap resulting from destruction shall be assigned a customs-approved treatment or use prescribed for non-Community goods.

It shall remain under customs supervision until the time laid down in Article 37(2).”

⁸ Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p. 1). This Article becomes Articles 127, 168 and 179 of the modernised Customs Code.

Article 2

(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;

Comment: Basic principles regarding the export control of software and technology by intangible means of transfers (usually designed by the acronym ITT (Intangible Technology transfers)).

The basic principle applying to controls of intangible transfers of technology is that the "on line" world should be controlled in the same proportionate manner as the "off line" world (i.e. when a controlled technology is sent in the form of a CD-Rom **by post** to a third country it is subject to authorisation. Therefore if the same controlled information (as the information contained in the CD-Rom) is sent by **e-mail**, it should **also** be controlled).

It should be noted that the Community General Export Authorisation (CGEA) covers also ITT transfers to Australia, Canada, United States of America, Japan, Norway, New-Zealand and Switzerland (see comment relative to Article 9).

Some EU Member States grant **global** licence for ITT, which provides a flexible tailor-made instrument to avoid undue burden on industries.

Details of Member States provisions is listed under article 3.1

The difficulty with intangible transfer is that border controls by customs authorities are not, due to the nature of the transfers, possible. Therefore, in order to ensure compliance with export control regulations, national authorities could conduct audit of companies and institutions or intercept telecommunications to detect illegal transfers of software and technology.

Movement of natural persons

The transfer of technology happening through cross-border movement of natural persons is **not covered by this Regulation** (Article 7) but it is **partly** covered by **Joint Action CFSP/401/2000**. See comment relative to Article 1 of the Joint Action.

It should be noted that nor this Regulation nor the Joint Action cover ITT achieved through the move of **foreign citizens into the EU** (third country citizens following courses in Universities, Research Centres or participating in an industry training program in the EU). Nevertheless, it does not mean that such ITT is necessarily not controlled. It could be ruled by other policies such as visa policies or national security objectives outside the scope of this Regulation.

Web server

The question of which technology could be **installed on and download from** a web server has been controversial mainly due to the difficulty to define precisely the location of the server. Nevertheless, the new provisions added in 2008 (underlined in grey in above text) have included the transfer control of EU technology through a web server established outside of the EU.

Article 2

Therefore, such transaction should be in principle submitted to authorisation even if it remains unclear how Member States' export control authorities will implement it.

Intranet

Making technology accessible on a company's intranet constitutes an electronic transfer and therefore an authorisation will be necessary if such technology could be accessible by employees of the company situated **outside** to the EU. Moreover if company employees could have access to controlled technology through intranet while travelling outside the EU such access should be submitted to authorisation even if the employee abroad has no intention of passing the technology to another person abroad.

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;

Article 2

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;

Comment:

Generally speaking exclusion of auxiliary services from the scope of brokering services can be considered as a loophole of the Regulation. Nevertheless, other international instruments made several attempts to control auxiliary services in other domains of strategic control, notably the military one (see comment relative to article 2 of Council Common Position 2003/468/CFSP on the control of arms brokering p. 159).

Taking into account those initiatives aimed at the restriction of brokering services, it can be presumed that sooner or later the same dispositions would be introduced as concerns the control of brokering in dual-use goods.

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;

Comment:

Brokering services carried out by an EU broker (established in or resident of the EU) when he is travelling outside of the EU and if the transaction is not accounted in the EU will not be ruled by this Regulation.

Nevertheless, some Member States can introduce specific provisions covering services which occur outside of the Community. Indeed, according to UK legislation, notably to article 11 of the Export Control Order 2008, some software and technology transfers must be controlled even if they take place entirely outside the Community.

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;

Comment: Due to the principle of free movement of goods and technology within the European Union, a transfer of dual-use items between two Member States passing through a third one will not be considered as a transit operation by this Regulation.

If the items **change destination** when passing through the EU customs territory it will be considered by some Member States as an (re)export and not anymore as a transit operation. Therefore an export authorisation will be required for the owner of the items.

Quentin Michel 9/11/10 10:44

Mis en forme: Police :Gras

Quentin Michel 9/11/10 10:40

Mis en forme: Police :Non Gras

Article 2

The definition of transit used by this Regulation does not necessarily match with the one applied by national legislations of certain Member States. As for Benelux countries (Belgium, Netherlands and Luxembourg) transit means a transport of non-Community items entering and passing through the customs territory of the European Community if the items will have to change means of transport on the Benelux territory (carry out and/or carry in another means of transportation which could be the same plane, boat or truck). Regarding the implementation of this Regulation, this difference does not have direct consequences (see Article 3)

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. **"Community General Export Authorisation"** shall mean an export authorisation for exports to certain countries of destination available to all exporters who respect its conditions of use as listed in Annex II;

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.

Article 1 (Joint Action)

Article 1

For the purpose of this Joint Action:

- (a) "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, training, transmission of working knowledge or skills or consulting services;
- (b) "technical assistance" includes oral forms of assistance;

Comment: This provision completes the Article 2(2) iii of this Regulation (Intangible Technology Transfer) by controlling technical assistance through the **movement of persons** (see also comment under Article 7 of this Regulation).

Contrary to the Torture Regulation⁹, "*assistance provided by electronic means*" is not included in the present definition. Nevertheless, if such assistance is not mentioned specifically in the Joint Action, it is due to the fact that it is already covered by this Regulation (Article 2(2) iii).

- (c) "international export control regimes, bodies and treaties" means the Australia Group, Missile Technology Control Regime, Nuclear Suppliers Group, Wassenaar Arrangement, Zangger Committee and the Chemical Weapons Convention.

Comment: Information on International Export Control Regimes could be found on their respective website:

- Australia Group: <http://www.australiagroup.net/>;
- MTCR: <http://www.mtcr.info/english/index.html>;
- NSG: <http://www.nsg-online.org>;
- Wassenaar Arrangement: <http://www.wassenaar.org/>;
- Zangger Committee: <http://www.zanggercommittee.org/Zangger/default.htm>.

⁹ See Part II of the present document.

Article 3

CHAPTER II SCOPE

Article 3

1. An authorisation shall be required for the export of the dual-use items listed in Annex I.

Comment: The last amendment of Annex I (list of items submitted to authorisation) has been adopted by Council Regulation (EC) No 1167/2008 of 24 October 2008 amending and updating Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology (OJ L 325, 3.12.2008, p. 1)¹⁰.

It lay under the responsibility of the exporter to check if the item, he intends to export is listed in Annex I. The list of items should be considered as exhaustive, thus it does not offer room for interpretation. Nevertheless, it might appear that some items entries are not sufficiently detailed and consequently, all components of an item listed are not necessary mentioned as such in the list. Crosschecking with national export authority might be suitable.

Comment:

The term “**export**” should be understood as the transfer of dual-items from an EU Member State to a destination situated outside the EU. Intra-Community movements of dual-use items are called “**transfers**” (see Article 22). The authorisation could be general, global or individual (see Article 9(2)).

Comment: The list of different authorisations imposed by this Regulation is tabled below. Specific comments regarding each authorisation have been inserted under the concerned article.

Authorisation	Content	Reference
Community General Licence	Annex I dual-use items excepted items listed in Annex II in destination of countries listed in Annex II	Regulation Article 9(1)
National General Licence	Possible for Annex I dual-use items excepted items listed in Annex II Part 2	Regulation Article 9(4)
National Global Licence	Possible for all Annex I dual-use items unless covered by CGEA (items and destinations mentioned in Annex II)	Regulation Article 9(5)
National Individual Licence	Annex I dual-use items unless cover by CGEA (items and destinations mentioned in Annex II)	Article 3
National Individual Licence (Catch-all level 1)	<ul style="list-style-type: none">- Export of non-listed dual-use items,- Brokering activities for listed and non-listed items,- Transit of non-Community dual-use items and non-listed dual-use items, if exporter has been informed by its national authorities of its WMD potential application.	Regulation Article 4(1), 5(1) and 6(2)

¹⁰ Annex I could be found on the Commission website : http://trade.ec.europa.eu/doclib/docs/2007/october/tradoc_136622.pdf.

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National Individual Licence (Catch-all level 1)	- Export of non-listed dual-use items, - Brokering activities for dual-use items, - Transit of non-Community dual-use items, if end-user countries submit to arms embargos and items has an military end-use.	Regulation Article 4(2), 5(2) and 6(3)
National Individual Licence (Catch-all level 1)	Non-listed items which could be used to complete a military items exported without or in violation of an authorisation	Regulation Article 4(3)
National Individual Licence (Catch-all level 2)	Non-listed dual-use items if exporter is aware that it will contribute to a use referred for the Catch-all level 1.	Regulation Article 4(4)
National Individual Licence (Catch-all level 3)	Non-listed dual-use items and brokering activities of dual-use items if exporter has grounds for suspecting of a use referred for Catch-all level 1.	Regulation Article 4(5) and 5(3)
National Individual Licence	Dual-use items not listed in Annex I for reasons of public security or human rights considerations .	Regulation Article 8
National Transfer Authorisation (Intra-EU)	Dual-use items listed in Annex IV (no General Transfer Authorisation for Annex IV, Part 2).	Regulation Article 22
National Transfer Authorisation (Intra-EU)	Possible for dual-use items not listed in Annex IV if conditions defined by Article 22(2) are met.	Regulation Article 22(2)
National Individual Licence	Technical assistance in connection with WMD.	Joint Action Article 2
National Individual Licence	Technical assistance in connection with conventional weapons in embargoed countries .	Joint Action Article 3

Article 3

Table 1: Member State national provisions and requirements regarding the control of Intangible Technology Transfers (ITT)

Member State	National provisions and requirements
Austria	No specific forms for ITT licences except that no customs and shipping documents are issued. Licence could be individual and global.
Belgium	Licence could be individual and global.
Bulgaria	No specific licence forms. ITT transfers are considered as technology transfers. Ex-post compliance controls.
Cyprus	No specific licence forms.
Czech Republic	Both tangible and intangible transfers follow the same licensing procedure. Moreover, the exporter is obliged to keep a record of each transaction during 5 years. Ex-post compliance controls i.e. regular audits, compliance visits.
Denmark	No specific licence forms. Licence could be individual, global and general. Ex-post compliance controls.
Estonia	No specific licence forms. Licence has to be individual.
Finland	No specific form, the ITT application is reflected in some boxes of the form. Usual procedure for licence requirement. Regular compliance visits to the companies. Licence could be individual and global.
France	
Germany	No specific licence forms. Licence could be individual and global. Exporters have to keep record of their transfers of technology of all relevant information during 5 years. Customs authorities could conduct periodical and ad hoc compliance visits/audits at the exporter's site. Customs authorities have the right to inspect not only written documents, but also data processing systems.
Greece	No specific licence forms
Hungary	No specific licence forms. Licence could be individual, general and global. Ex-post compliance controls. All registered operators must have a functioning ICP that usually covers the ITT issue.
Italy	No specific licence forms. Licence has to be individual.
Ireland	
Latvia	

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Lithuania	
Luxembourg	
Malta	No specific licence forms
Netherlands	No specific licence forms. Licence could be individual and global. Ex-post compliance controls. Record keeping obligation.
Poland	
Portugal	No specific licence forms. Licence could be individual and global.
Romania	No specific licence forms Ex-post compliance controls. Exporters have to keep the documents regarding the operations carried out with dual-use items for 5 years, starting with the next year when the transfers were carried out.
Slovakia	
Slovenia	No specific licence forms. Licence has to be individual. Record keeping during 5 years
Spain	No specific licence forms. Licence has to be individual.
Sweden	No specific licence forms. Ex-post compliance controls. The exporters shall keep the records (i.e. product, receiver, date) during 5 years.
United Kingdom	No specific licence forms. Licence could be individual, global and general. Ex-post compliance controls to all exporters using global (OIELS) or general (OGELS) authorisations to export technology.

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.

Comment:

- Article 4 establishes and organises different catch-all clauses (principle of imposing an export authorisation for non-listed items in different specific cases).
- Article 8 authorises EU Member States to impose unilaterally an export authorisation to non-listed dual-use items.

Article 4

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, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons.

Comment: This paragraph authorises Member States Authorities to require, through a notification to exporters, an export authorisation for an items **not listed in Annex I** of this Regulation. The mechanism of notification diverges from one Member State to another. It varies from a general information note in the Official Journal of the Member State to dedicated letter to the concerned exporters.

2. An authorisation shall also be required for the export of dual-use items not listed in Annex I if the purchasing country or country of destination is subject to an **arms embargo** decided by a common position or joint action adopted by the Council or a decision of the Organisation for Security and Cooperation in Europe (OSCE) or an arms embargo imposed by a binding resolution of the Security Council of the United Nations and if the exporter has been informed by the authorities referred to in paragraph 1 that the items in question are or may be intended, in their entirety or **in part**, for a military end-use. For the purposes of this paragraph, "**military end-use**" shall mean:

Comment: This paragraph imposes to Member States Authorities to require, through a notification to exporters, an export authorisation for items not listed in Annex I of this Regulation when the final destination or the purchasing country is subject to an arms embargo decided by:

- The EU Council of Ministers;
- The OSCE;
- The Security Council of the United Nations.

Presently the list of countries under arms embargo includes: China, Congo, Côte d'Ivoire, Iran, Iraq, North Korea, Lebanon, Liberia, Myanmar (Burma), Sierra Leone, Somalia, Sudan, Uzbekistan, Zimbabwe¹¹.

However this list cannot be interpreted as the list of countries for which all EU Member States apply Article 4(2), therefore it should be checked with National Authorities if all present destinations are concerned by this catch-all clause¹².

It shall be noted that this provision remains optional; therefore the Member States are not obliged to introduce additional control on brokering of dual-use items. Indeed, United Kingdom explicitly specifies that it will not impose any additional measures of control.

¹¹ The list of destinations submitted to arms embargo is available at:
http://ec.europa.eu/external_relations/cfsp/sanctions/measures.htm.

¹² The list of National Authorities can be found at :
http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_114154.pdf.

Article 4

(a) **incorporation** into military items listed in the military list of Member States;

Comment: “military items”

The Member States have reached agreement on a Common list of military equipment covered by the EU Code of Conduct on Arms Exports. The Council declaration of 13 June 2000 established a common list of military equipment covered by the European Union Code of Conduct on Arms Exports¹³.

In 2008, the Code of Conduct has been included in the Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

(b) use of production, test or analytical **equipment** and components therefor, **for** the development, production or maintenance of military items listed in the abovementioned list;

Comment: The wording “**equipment ... for**” should be interpreted as covering only items making a **functional contribution** to the development, production or maintenance of military items. This Article does not affect items, which have no essential influence on the respective process. This normally applies to items with a wide range of applications, e.g. consumer goods (lubricants and auxiliary agents for maintaining operability, tools with use-related fast wear and tear) or electric wiring material.

(c) use of any unfinished products in a **plant** for the production of military items listed in the abovementioned list.

Comment: The term “**plant**” used in the present provision and in Annex I should be interpreted as production facilities serving, in their entirety or in part, the production of military items. Plants are also a number of facilities, machines, and equipment forming a unity.

To be covered by the present catch-all clause, it is sufficient that the entire plant partially produces military items. This shall also apply if only one part of these (primary) products is used for the final production of military items.

3. An authorisation shall also be required for the export of dual-use items not listed in Annex I if the exporter **has been informed** by the authorities referred to in paragraph 1 that the items in question are or may be intended, in their entirety or in part, **for use as parts or components** of military items listed in the national military list that **have been exported from the territory** of that Member State **without authorisation or in violation** of an authorisation prescribed by national legislation of that Member State.

Comment: The notion of “**being informed**” is not defined by this Regulation. Nevertheless, some Member States, as for instance the national authority of United Kingdom responsible for export control policies, Department for Business, Innovation and Skills, give their own understanding of this concept as concerns brokering services of dual-use items listed in Annex I (see comment relative to Article 5(1) of this Regulation).

¹³ The list has been updated and replaced by Council Decision of 10 March 2008: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:098:0001:0032:EN:PDF>.

Article 4

4. If an exporter is **aware** that dual-use items which he proposes to export, not listed in Annex I, are intended, in their entirety or in part, for any of the uses referred to in paragraphs 1, 2 and 3, he must notify the authorities referred to in paragraph 1, which will decide whether or not it is expedient to make the export concerned subject to authorisation.

Comment: The term of “**being aware**” is not defined by this Regulation. Some Member States, as for example the national authority of United Kingdom responsible for export control policies, Department for Business, Innovation and Skills, give their own understanding of this concept as concerns brokering services of dual-use items listed in Annex I (see comment relative to Article 5(1) of this Regulation).

Comment: This paragraph establishes the obligation for the exporter to **notify** to its National Authorities if he is aware that the dual-use item not listed in Annex I, he intends to export will contribute to the elaboration of a weapons of mass destruction or military items listed in the Military List. Conversely to the provisions of the three first paragraphs of Article 4, the **responsibility to estimate the possible diversion lays in the hands of the exporter**. After being informed the National Authorities might decide to submit such export to authorisation.

If an exporter, intentionally or by negligence omit to inform its authorities, its responsibility could be engaged and administrative and/or criminal penalties could be applied.

To engage the exporter responsibility, the Authorities will have to prove, on one hand, that the end user was involved in a WMD programme and, on the other hand, that the exporter was aware of those facts.

The term “**aware**” should be understood as evidences based on information received directly or indirectly by the exporter that the items will not be used for its usual application but will contribute to the elaboration of weapons of mass destruction or military items listed in the Military List.

The initial Commission proposal included provision that constrained Member States authorities to reply within a delay of 20 working days from the presentation of a complete request by the exporter. Such proposal did not obtain the necessary majority within the Council to be adopted. The initial Commission proposal included also an obligation for Member States to inform the Commission of such delays which shall be published in the Official Journal of the European Union. Once again Member States did not support such proposal.

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

Comment: This provision known also as the “suspicion clause” establishes the possibility for EU Member State to impose an export authorisation if the exporter has grounds for suspecting that the dual-use item not listed in Annex I, he intends to export will contribute to the elaboration of a weapons of mass destruction or military items listed in the Military List. The responsibility to appreciate the **risk**, and not only the possibility of diversion as imposed by paragraph 4, lays in

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the hands of the exporter.

If an exporter, intentionally or by negligence omits to apply for an export authorisation, his responsibility could be engaged and administrative and/or criminal sanctions could be applied.

The suspicion clause is **optional**, following Member States have introduced such clause in their national export control regime: Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Luxembourg, Malta, Netherlands, Poland, Slovakia, Spain and United Kingdom of Great Britain and Northern Ireland.

In his **evaluation** of the risk of diversion and grounds for suspecting such diversion, the exporter could review the following elements/questions¹⁴:

1. Do you know your customer? If not, is it difficult to find information about him/her?
2. Is the customer or the end-user tied to the military or the defence industry?
3. Is the customer or the end-user tied to any military or governmental research body?
4. If you have done business with the customer before - is this a usual request for them to make?
Does the product fit the business profile?
5. Does the customer seem familiar with the product and its performance characteristics or is there an obvious lack of technical knowledge?
6. Is the customer reluctant to provide an end-use statement or is the information insufficient compared to other negotiations?
7. Does the customer reject the customary installation, training or maintenance services provided?
8. Is unusual packaging and labelling required?
9. Is the shipping route unusual?
10. Does the customer order an excessive amount of spare parts or other items that are related to the product, but not to the stated end-use?
11. Is the customer offering unusually profitable payment terms, such as a much higher price?
12. Is the customer offering to pay in cash?

6. A Member State which imposes an authorisation requirement, in application of paragraphs 1 to 5, on the export of a dual-use item not listed in Annex I, shall, where appropriate, **inform** the other Member States and the Commission. The other Member States shall give all due consideration to this information and shall inform their customs administration and other relevant national authorities.

7. The provisions of Article 13(2) and (3) shall apply to cases concerning dual-use items not listed in Annex I.

Comment: Provision of Article 13(2) requires Member States to notify other Member States and the Commission their decision to prohibit an export, a transit, a brokering services of dual-use items (Article 6). Provision of Article 13(3) establishes the obligation for Member States Authorities to review regularly their denials of authorisations in order to evaluate if they have to be maintained, amended or renewed.

¹⁴ List established by the Wassenaar Arrangement.

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8. This Regulation is without prejudice to the right of Member States to take national measures under Article 11 of Regulation (EEC) No 2603/69.

Comment: Article 11 of the Regulation (EEC) No 2603/69 of the Council of 20 December 1969 authorises Member States to “*without prejudice to other Community provisions*” adopt or apply “*quantitative restrictions on exports on grounds of public morality, public policy or **public security**; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property.*”¹⁵

The term “**public security**” has been defined by the European Court of Justice in several case law: “*the concept of public security within the meaning of Article 11 of the Export Regulation covers both a Member State's **internal security and its external security** and that, consequently, the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the external security of a Member State*”¹⁶. In this regard the Court “*observed that it is common ground that the **exportation** of goods capable of being used for military purposes to a country at war with another country may affect the public security of a Member State*”¹⁷.

If a Member State could require an export authorisation based on Article 11 in case of threat to public security as defined above, it is not obvious that such authorisation could be applied to export of dual-use items. According to the Court, Article 11 “*ceases to be justified if Community rules provide for the necessary measures to ensure protection of the interests enumerated in that article*”¹⁸ which is precisely the case for dual-use items covered by Article 8 of this Regulation.

¹⁵ OJ L 324, 27.12.1969, p. 25. English special edition: Series I Chapter 1969(II), p. 590.

¹⁶ Ground 44 of Case 124/95 of 14 January 1997 The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England (http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61995J0124).

¹⁷ Ground 28 of Case C-70/94 of 17 October 1995. - Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994J0070:EN:HTML>).

¹⁸ Ground 46 of Case 124/95 of 14 January 1997, *op cit*.

Table 2: Conditions attached to Catch-all authorisation established by Member States

Member State	Catch-all conditions established by Member State
Austria	Only the exporter is covered (legal entity or natural person) not valid for mother/daughter companies. Valid for one specific transaction.
Belgium	Only the exporter is covered (legal entity or natural person) not valid for mother/daughter companies. Applies to one specific transaction and valid until revocation.
Bulgaria	Only the exporter is covered (legal entity or natural person). Valid at least 3 months from the date of denial. Usually based on the end-user and the nature of the item to be exported.
Cyprus	Only the exporter is covered (legal entity or natural person) not valid for mother/daughter companies. Valid until revocation.
Czech Republic	Only the exporter is covered (legal entity or natural person), valid for brokers and mother/daughter companies. Valid until revocation.
Denmark	Only the exporter is covered (legal entity or natural person) not valid for mother/daughter companies. Applies to one specific transaction and valid until revocation. Catch-all denials are issued according to specific end-user.
Estonia	Only the exporter is covered (legal entity or natural person) not valid for mother/daughter companies. Apply to one specific transaction and valid until revocation.
Finland	Only the exporter is covered (legal entity or natural person) valid for mother/daughter companies if located in Finland. Applies to one specific transaction and valid until revocation.
France	
Germany	Only the exporter is covered (legal entity or natural person) not valid for mother/daughter companies. Applies to one specific transaction and valid until revocation.
Greece	Only the exporter is covered (legal entity or natural person) not valid for mother/daughter companies. Applies to one specific transaction and valid until revocation.
Hungary	Only the exporter is covered (legal entity or natural person) not valid for mother/daughter companies. Case-by-case validity (valid for one transaction). Usually the licence is valid until revoked. Legally it would be possible to draw a series of transactions (several items, end-users or consignee and destinations) under licensing obligations.
Italy	Only the exporter is covered (legal entity or natural person) not valid for mother/daughter companies. Valid for three years and could be renewed.
Ireland	
Latvia	
Lithuania	
Luxembourg	
Malta	Only the exporter is covered (natural person only).

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Netherlands	Only the exporter is covered (legal entity or natural person) normally not valid for mother/daughter companies (depends on the level of control of mother company). Valid until revocation.
Poland	
Portugal	Only the exporter is covered (legal entity or natural person) and valid for related companies. Valid until revocation.
Romania	Only the exporter is covered (legal entity or natural person) not valid for mother/daughter companies. Also valid for residents in Romania that carry out operations involving dual-use items or technology. The catch-all executive order is valid until revocation.
Slovakia	
Slovenia	Only the exporter is covered (legal entity or natural person) and valid for mother/daughter companies. Valid until revocation.
Spain	Only the exporter is covered (legal entity or natural person) not valid for mother/daughter companies. Valid until revocation.
Sweden	Only the exporter is covered (legal entity or natural person) not valid for mother/daughter companies. Valid until revocation.
United Kingdom	Only the exporter is covered (legal entity or natural person) not valid for mother/daughter companies unless they are exporter.

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Table 3: Effects of the non-response of an authority of a Member State in case it has implemented a catch-all provision and average time to answer (4.3, 4.4 and 4.5)

Member State	Consequence of lack of answer from an authority of a Member State
Austria	
Belgium	If an exporter fails to await the decision of the licensing office and export or attempt to export, he commits a criminal offence in the event the licensing office decides to make the export subject to authorisation. The Belgian legislation does not provide a timeframe in which the licensing office is required to answer an exporter's request concerning (non-listed) dual-use goods. If an exporter has reported a transaction, a time to answer varies from one day to several weeks.
Bulgaria	
Cyprus	If an exporter has reported a transaction, a time to answer varies from one day to several weeks.
Czech Republic	Exporter has to await the answer of the authorities and it will be an offence if he fails to do so. The deadlines for decision process including processing of the application are 30 days or in special cases 60 days dating from the day when the application is submitted. If an exporter has reported a transaction, a time to answer is up to 30 days.
Denmark	Exporter has to await the decision of the authorities in relation to Article 4(4), if he failed such act would be seen as a criminal offence according to Danish Law. Exporter's failure to await might also entail an administrative sanction, i.e. fine. If an exporter has reported a transaction, an average time to answer is 7 days.
Estonia	There is no timeframe, but the exporter is obliged to await the decision. The authority answers usually within 30 days.
Finland	Answer shall be given without <i>undue delay</i> . Upon request, the authority shall supply the exporter with an estimated deadline to issue a decision. (Finnish Administrative Procedure Act 434/2003, Section 23).
France	
Germany	Exporter is obliged to await the decision of the authorities and it would be an offence according to German Law if he fails to do so. According to section 70 para 5a No. 3 of the Regulation implementing the Foreign Trade and Payments Act (AWV) in conjunction with section 33 paras 4 and 6 of the Foreign Trade and Payments Act (AWG) the exporter may be punished by a fine of up to €500,000 if he "...intentionally or negligently ... contrary to Article 4 para. 4 second half-sentence, exports dual-use items <u>without a decision by the responsible authority on the required authorisation</u> or without obtaining an authorisation from the responsible authority". Moreover, this action also constitutes a criminal offence under certain circumstances. According to section 34 para 2 AWG: "A prison sentence of up to five years or a fine shall be imposed on anyone who perpetrates with intent an act, which is likely to threaten 1. the external security of the Federal Republic of Germany, 2. the peaceful coexistence between nations or 3. the foreign relations of the Federal Republic of Germany". If an exporter has reported a transaction, an average time to answer is 28 days.
Greece	
Hungary	If an exporter has reported a transaction, an average time to answer is 10 days.
Italy	If an exporter has reported a transaction, a time to answer varies from one week to 10 days.
Ireland	

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Latvia	
Lithuania	<p>Exporter's (legal or natural person) request to provide information has to be considered within 20 working days dating from its receipt by the competent authority. If the request (application) consideration relates to the formation of a commission, summoning of a meeting or other organisational activities, the deadline is extended for 10 more working days.</p> <p>If the reply is not delivered within a specific deadline set for consideration of an request (application), or when the exporter objects to the reply delivered by the competent authority he is entitled to make a complaint in conformity to the procedures laid down within Chapter III of the Republic of Lithuania Law on Public Administration and other legal acts (Article 14 of the Republic of Lithuania Law on Public Administration (27.06.2006 No X-736) and Article 30 of the Government of the Republic of Lithuania Resolution No 875 dated 22.08.2007).</p>
Luxembourg	
Malta	
Netherlands	<u>If an exporter has reported a transaction, a time to answer is up to several weeks.</u>
Poland	<p>Exporter has to await the decision of the authorities and it would be an offence according to Polish Export Control Law if he fails to do so. According to the Polish Administrative Code the decision shall be given without undue delay, but not later than 30 days. However, in special cases this deadline can be postponed but the authority has to supply the exporter with an estimated deadline to issue a decision.</p>
Portugal	<u>If an exporter has reported a transaction, a time to answer is up to 10 days.</u>
Romania	<p>Exporter's (legal or natural person) addressed to competent authorities needs to be considered within 30 days, after all relevant information have been provided.</p> <p>Exporter is obliged to await the decision of the authorities.</p> <p>If an exporter fails to await the decision of the licensing agency and exports or attempts to export, he risks committing a criminal offence in the event that licensing office decides to make the export subject to authorisation.</p> <p>According to the Romanian legislation, the competent authorities must always provide an answer in response to an application.</p> <p><u>If an exporter has reported a transaction, a time to answer is up to 30 days.</u></p>
Slovakia	
Slovenia	
Spain	
Sweden	<u>If an exporter has reported a transaction, a time to answer varies from two to three weeks.</u>
United Kingdom	

Article 4

Table 4: Possibility to appeal against a catch-all denial by Member States

Member State	Possibility to appeal against a catch-all denial
Austria	Yes, during the administrative procedure and after a decision of the licensing authority has been issued. Only administrative appeal to administration court is possible.
Belgium	Yes, by an appeal before to the Administrative Court (State Council).
Bulgaria	No.
Cyprus	
Czech Republic	Yes.
Denmark	Yes against a catch-all denial.
Estonia	Yes.
Finland	Yes, an appeal to Highest Administrative Court is possible
France	
Germany	Yes.
Greece	Yes.
Hungary	Yes, firstly under administrative procedures (governed by law) of the licensing authority with the possibilities after of an appeal or a petition to the court.
Italy	Yes.
Ireland	
Latvia	
Lithuania	
Luxembourg	
Malta	
Netherlands	Yes, it is possible to appeal against a catch-all licensing decision, regardless if it is an approval or a denial.
Poland	
Portugal	Yes.
Romania	Yes.
Slovakia	
Slovenia	Yes.
Spain	Yes.
Sweden	Yes.
United Kingdom	Yes, only against an authorisation denial.

Article 4

Table 5: Catch-all controls other than these required by Article 4

Member State	Additional catch-all controls
Austria	In certain cases for countries not subject to an embargo (Article 7 of Foreign Trade Act. 2005)
Belgium	For non-listed goods with military end-use.
Bulgaria	Yes
Cyprus	None.
Czech Republic	None.
Denmark	None.
Estonia	None.
Finland	None.
France	
Germany	<p>Sect. 5c of the German Foreign Trade and Payments Act (AWV): Use of the goods for conventional armaments and Country of Country List K: The items are or may be intended, in their entirety or in part, for (conventional) military end-use. The definition of “military end-use” is given in sect. 5c para. 1 no. 1 to 3 AWV and is identical with the definition in Article 4 para. 2 EC-REG. A licence pursuant to section 5c AWV shall only be required if the purchasing country or country of destination is contained in Country List K: Cuba and Syria.</p> <p>Sect. 5d AWV: Use of the items in the nuclear area and specific country: The items are or may be intended, in their entirety or in part, for the setting-up, operation of or incorporation into a nuclear plant. The term “nuclear plant” is defined in Part I Section C category 0 of the German Export Control List (Ausfuhrliste). An authorisation pursuant to section 5d AWV shall only be required if the purchasing country or country of destination is one of the following: Algeria, India, Iran, Iraq, Israel, Jordan, Libya, North Korea, Pakistan, and Syria.</p>
Greece	
Hungary	None.
Italy	None.
Ireland	
Latvia	
Lithuania	
Luxembourg	
Malta	None.
Netherlands	Yes, brokering, transit, military items in transit
Poland	
Portugal	None.
Romania	Yes.

Article 4

Slovakia	
Slovenia	None.
Spain	None.
Sweden	Yes.
United Kingdom	<p>The Export Control Order 2008:</p> <p>Control of software or technology within the UK where the transferor has been informed by the Secretary of State that it maybe intended for WMD purposes or is aware that it is intended for WMD purposes and knows will be used outside the Customs territory;</p> <p>Control of software or technology from outside the Customs territory for WMD purposes by a UK person; and</p> <p>Control of software or technology by non-electronic means from the UK for WMD purposes.</p>

Article 5

Article 5

1. An authorisation shall be required for brokering services of dual-use items listed in Annex I if the broker **has been informed** by the competent authorities of the Member State in which he is resident or established that the items in question are or may be intended, in their entirety or in part, for any of the uses referred to in Article 4(1). If a broker **is aware** that the dual-use items listed in Annex I for which he proposes brokering services are intended, in their entirety or in part, for any of the uses referred to in Article 4(1), he must notify the competent authorities which will decide whether or not it is expedient to make such brokering services subject to authorisation.

Comment: The term of “being informed” and “being aware” remain undefined by the Regulation.

As regards the term “being informed”, some Member States, as for instance the United Kingdom, give their own understanding of this concept. Therefore, being informed means that an individual has received a formal notice from the National Authority that items that are subject of a proposed transaction are or may be intended for WMD or Military Use.

As concerns the definition of “being aware”, UK authorities established a guidance for WMD end-use controls¹⁹ as well as Goods Checker online tool which will give a first appreciation as regards an eventual implication of items in a WMD end-use.

Bulgaria has introduced an obligation for brokers dealing with Annex I dual-use items to be register (article 46 of the Law on export control of arms and dual use items and technologies).

Germany allows that brokering activity of a German resident in a third country can be subject to end-use related controls if an items listed in Annex I of the dual-use Regulation is subject of this brokering activity.

2. A Member State may extend the application of paragraph 1 to non-listed dual-use items for uses referred to in Article 4(1) and to dual-use items for military end use and destinations referred to in Article 4(2).

Comment: Presently Czech Republic, Germany, Estonia, Latvia, Romania and Slovakia have used such provision to extend their brokering controls to non-listed dual-use items for uses in “connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons” (article 4(1)).

The possibility to extend brokering controls to non-listed dual-use items for military end use has been used and implemented by Bulgaria, Belgium, Czech Republic, Germany, Estonia, Spain, Latvia, Romania and Slovakia.

Quentin Michel 9/11/10 08:57

Mis en forme: Couleur de police : Bleu, Automatique

Quentin Michel 8/11/10 11:38

Mis en forme: Couleur de police : Bleu, Non Surlignage

Quentin Michel 8/11/10 11:38

Mis en forme: Couleur de police : Bleu, Non Surlignage

Quentin Michel 8/11/10 11:44

Mis en forme: Police :Italique

¹⁹

Guidance for WMD end-use controls can be found at:

<http://www.berr.gov.uk/whatwedo/europeandtrade/strategic-export-control/licensing-policy/end-use-control/page12719.html>

Article 5

3. A Member State may adopt or maintain national legislation imposing an authorisation requirement on the brokering of dual-use items, if the broker has grounds for suspecting that these items are or may be intended for any of the uses referred to in Article 4(1).

Comment: Presently Estonia, Latvia, Romania and Slovakia have implemented this provision by adopting national legislation imposing an authorisation when the broker has grounds for suspecting that these items are or may be intended for uses in “*connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons*” (article 4(1)).

Quentin Michel 8/11/10 12:07

Mis en forme: Bordure :Bas: (Simple, Automatique, 0,5 pt Épaisseur du trait)

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

Comment:

Article 5 organises the control of brokering activities. This provision concerns transactions between two (or more) third countries organised by an entity/person established within the EU. If the item is **inside** the EU territory and will be exported to a third country, it will not require brokering authorisation but a normal export authorisation established by Article 9 in spite the fact that it might involve some brokering activities.

The fact that Article 5 covers brokering activities involving two third countries being organised by a broker located within EU, does not prohibit Member States to extend such control to other brokering activities, such as transactions between two third countries organised and negotiated outside the EU by an entity/person established within the EU.

Article 5(1) appears to be drafted like the catch-all provisions established by Article 4. Nevertheless, if the mechanism of the first paragraph of this Article is similar to the one established by the first paragraph of Article 4, it should not be assimilated to a catch-all clause as long as it does not control export of dual-use items not listed in Annex I. It only allows Member States to submit to authorisation brokering services of dual-use items **listed** in Annex I.

Contrary to the control of export where all transactions linked to listed dual-use items have to be authorised, brokering activities of listed items have to be authorised by Member States **only** if the broker has been informed by his Member State authorities that the transaction required an authorisation **and/or** he is aware that the concerned dual-use items are intended for WMD end-use.

Complementary paragraphs 2 and 3 allow Member States to adopt or maintain in their national legislation a real **catch-all clause** for brokering activities for non-listed dual-use items, for military end-use and countries submitted to embargoes. Such catch-all clause could be extended to cases where the broker “has grounds for suspecting” that the items might contribute to WMD end-use (see comment under Article 4). This last national catch-all could be apply to listed and not listed dual-use items.

Quentin Michel 9/11/10 09:23

Supprimé:

Article 6

Article 6

1. The transit of non-Community dual-use items listed in Annex I may be prohibited by the competent authorities of the Member State where the transit occurs if the items are or may be intended, in their entirety or in part, for uses referred to in Article 4(1). When deciding on such a prohibition the Member States shall take into account their obligations and commitments they have agreed to as parties to international treaties or as members of international non-proliferation regimes.

2. Before deciding whether or not to prohibit a transit a Member States may provide that its competent authorities may impose in individual cases an authorisation requirement for the specific transit of dual-use items listed in Annex I if the items are or may be intended, in their entirety or in part, for uses referred to in Article 4(1).

Comment: Presently Belgium, Bulgaria, Germany, Estonia, Latvia, Luxembourg and Netherland have used the option to impose an **authorisation** for specific transits if the items are or may be use in “connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons” (article 4(1)).

Quentin Michel 9/11/10 09:31

Mis en forme: Couleur de police : Bleu

Quentin Michel 9/11/10 11:17

Mis en forme: Police :Gras, Couleur de police : Bleu clair

Quentin Michel 9/11/10 09:31

Mis en forme: Couleur de police : Bleu

Quentin Michel 9/11/10 09:31

Mis en forme: Couleur de police : Bleu clair

3. Member State may extend the application of paragraph 1 to non-listed dual-use items for uses referred to in Article 4(1) and to dual-use items for military end use and destinations referred to in Article 4(2).

Comment: Presently Belgium, Cyprus, Czech Republic, Estonia, Luxembourg, Spain, France, Latvia Netherland and Slovakia have used the option to prohibit the transit of **non-listed items** for uses in “connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons” (article 4(1)).

Quentin Michel 9/11/10 10:12

Mis en forme: Police :Gras

Quentin Michel 9/11/10 10:13

Mis en forme: Police :Gras

Germany didn't use this option but has decided to extend the option to prohibit the transit to items listed nationally.

Belgium, Cyprus, Czech Republic, Estonia, Luxembourg, Spain, France, Latvia and Netherland have used the option to prohibit the transit **listed items** “if the purchasing country or country of destination is subject to an **arms embargo** decided by a common position or joint action adopted by the Council or a decision of the Organisation for Security and Cooperation in Europe (OSCE) or an arms embargo imposed by a binding resolution of the Security Council of the United Nations and if the exporter has been informed by the authorities referred to in paragraph 1 that the items in question are or may be intended, in their entirety or **in part**, for a military end-use” (article 4(2)).

Quentin Michel 9/11/10 10:13

Mis en forme: Police :Gras

Quentin Michel 9/11/10 09:36

Mis en forme: Police :Italique

Article 6

Cyprus extended the possibility to prohibit a transit of listed and non-listed dual use items for reasons of public order, the protection of Cyprus vital interests and the protection of human rights.

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

Comment:

This article establishes the **possibility** for Member States to submit on case-by-case basis a transit operation to authorisation. It does not submit all transit operations, like it is the case for export, to authorisation. Therefore this **provision might be not equally applied** by the 27 Member States. Considering their national export control policy some Member States might prohibited or required an authorisation and other not for the same transit operation.

If dual-use items are brought as non-Community goods from third countries into the EU territory and remain **at all times** assigned to a **customs approved treatment or use** without having as their destination a port or airport situated in those Member States, it **might** be prohibited or submitted to authorisation by Member States competent authorities. Such authorisation could be required for listed and non-listed dual-use items **if** the items are or may be intended for use in a WMD application. If such condition appears to be necessary to extend the control to non-listed dual-use items, it is not appropriate for listed dual-use items. The necessity to list dual-use items is precisely founded on its potential military use. Therefore inserting such condition to submit to authorisation the transit of listed dual-use items seems to be unnecessary as far as its potential non-peaceful application is doubtless by the fact that it is precisely listed. Nevertheless, it should be admitted that Article 4(1) focuses essentially on WMD potential use and not on broad military use like dual-use items defined by Article 2(1).

Dual-use items **imported** from third countries (non-EU Member States) and subsequently **released** for free circulation in the Community are not covered by Article 6 and should be considered as Community goods and will be subject to an export **authorisation** if transferred outside the EU afterwards.

It should be noted that in the context of the fight against terrorism, the new article **36A of the Customs Code** exempts from the summary declaration (pre-arrival, pre-departure declaration) only goods in external transit carried by means of transport passing through the territorial waters or the airspace of the customs territory of the EU without a stop within this territory. In this context, Member States Custom Authorities could monitor appropriate controls to verify the accuracy of the summary declaration.

Complementary to this article, it should be recalled that some Member States have a transit definition slightly different to the one used by this Regulation (see comment under Article 2(7)). Therefore, they might have to extend the scope of control of transfer activities that they presently monitored. Furthermore, some Member States require an authorisation for all external transit of dual-use items. In this regard, the scope of transit operations concerned will be the one of the national legislation and not the one of this Regulation. Member States concerned are Belgium,

Article 6

Luxembourg, Malta, Netherlands, Poland, and United Kingdom of Great Britain and Northern Ireland.

Article 7

Article 7

This Regulation does not apply to the supply of services or the transmission of technology if that supply or transmission involves cross-border movement of persons.

Comment: on the question of cross-border movement of persons see comment relative to Article 2(2) iii.

The transmission of technical assistance by **oral forms** through the cross border movement of persons is considered by the Joint Action (see Article 1 of the Joint Action). Nevertheless, the export of technology by an intangible means of transfers such as phone, email, fax is covered by this Regulation.

Article 8

Article 8

1. A Member State may **prohibit** or impose an **authorisation** requirement on the export of dual-use items **not** listed in Annex I for reasons of public security or human rights considerations.

Comment: Three Member States require systematically an authorisation for items not listed in Annex I in application of Article 8 (see table below). No Member State has applied Article 8 to impose an export prohibition of non-listed items. Some Member States have based a catch-all authorisation/denial on this provision.

An authorisation may also be required for non-listed items on a national basis: see table relative to Article 4.

Country	Items submitted to an export authorisation
France	Two categories of items: <ol style="list-style-type: none"> 1. Notice to exporters of certain types of helicopters and their spare parts to third countries, published in the French Official Journal of 18 March 1995, 2. Notice to exporters on export of tear gas and riot control agents to third countries, published in the French Official Journal of 28 June 1995.
Germany	<p>The following paragraphs of the Regulation "AWV" (Außenwirtschaftsverordnung), (Foreign Trade and Payment Regulation), adopted on 18 December 1986, are relevant for the implementation of Article 8(1) of the Regulation:</p> <ol style="list-style-type: none"> a. § 5 para. 2 Foreign Trade and Payments Regulation (AWV) in connection with certain items that are only controlled on a national basis; b. § 5 c Foreign Trade and Payments Regulation (AWV); c. § 5 d Foreign Trade and Payments Regulation (AWV); d. § 2 para. 2 Foreign Trade and Payments Law (AWG). <p>§ 2 para. 2 AWG is not a licensing requirement but an enabling clause. It enables the Federal Ministry of Economics and Technology, in consent with other Ministries mentioned there, to impose a prohibition to any economic activity, if certain interests are endangered.</p> <p>Details of the law can be found via the internet at the following address: http://www.ausfuhrkontrolle.info/vorschriften/awv_auszug.htm</p> <p>Brokering referring to a special range of very sensitive dual-use items in Annex IV of the Dual-Use Regulation (§4c No 6, §41 AWV).</p>
United Kingdom	<p>Details of goods controlled at national level pursuant to Article 8 of the Regulation are listed in Schedule 1, Part II and Schedule 2 of the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (S.I. 2003/2764), as amended by S.I. 2006/1331; S.I. 2006/1696; and S.I. 2007/1863. Text detailed on the DTI website at: http://www.dti.gov.uk/exportcontrol</p>
Latvia	<p>Regulation of the Cabinet of Ministers No 645, 25 September 2007 'Regulation on the National List of Strategic Goods and Services' (issued in accordance with the 'Law on the Handling of Strategic Goods', Article 3, Part One)</p> <ol style="list-style-type: none"> 1. The Regulation establishes the National List of Strategic Goods and Services. 2. The export, import, transit or transfer of goods listed in the National List of Strategic Goods and Services requires a licence issued by the Control Committee for Strategic Goods.

2. Member States shall notify the Commission of any measures adopted pursuant to paragraph 1 immediately after their adoption and indicate the precise reasons for the measures.

Article 8

3. Member States shall also immediately notify the Commission of any modifications to measures adopted pursuant to paragraph 1.
4. The Commission shall publish the measures notified to it pursuant to paragraphs 2 and 3 in the C series of the Official Journal of the European Union.

Article 2 and 3 (Joint Action)

Article 2

Technical assistance shall be subject to controls (prohibition or an authorisation requirement) adopted pursuant to Article 5 where it is provided outside the European Community by a natural or legal person established in the European Community and is intended, or the provider is aware that it is intended, for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons.

Article 3

Member States shall consider the application of such controls also in cases where the technical assistance relates to military end-uses other than those referred to in Article 2 and is provided in countries of destination subject to an arms embargo decided by a common position or joint action adopted by the Council or a decision of the OSCE or an arms embargo imposed by a binding resolution of the Security Council of the United Nations.

Comment: Articles 2 and 3 of the Joint Action organise the control of technical assistance through a mechanism similar to a catch-all clause. The scope of implementation is like for a catch-all clause not limited to a list of items but potentially extended to all technical assistance if it is related to items controlled by international export control regimes (see Article 4 of this Regulation).

Member States authorities shall submit technical assistance to export authorisation or shall prohibit the transfer when it is provided outside the EU **and** the exporter:

- has been informed that such transfer is submitted to authorisation/prohibition through individual/general notification or by a publication in the National Official Journal;
- is aware that it will contribute to the elaboration of weapons of mass destruction or will have a military end-use in a country submitted to an arms embargo.

This catch-all clause mechanism is usually implemented by the exporter obligation to notify such potential end-use to its Licensing Authorities (see comment under Article 4 of this Regulation).

Member State	Prohibition or authorisation requirement for technical assistance in connection with WMD or, in connection with conventional weapons in specific (embargoed) countries
Austria	Prohibition in context of WMD, authorisation for military end-uses
Belgium	Authorisation requirement
Bulgaria	Authorisation requirement
Denmark	Prohibition
Finland	Authorisation requirement (notification mechanism based on provision contained in Article 4 of Regulation (EC) No 1334/2000)
France	
Germany	Authorisation and prohibition requirement (notification mechanism based on provision contained in Article 4 of Regulation (EC) No 1334/2000)
Greece	Authorisation requirement
Ireland	
Italy	Prohibition

Article 2 and 3 (Joint Action)

Member State	Prohibition or authorisation requirement for technical assistance in connection with WMD or, in connection with conventional weapons in specific (embargoed) countries
Luxembourg	Authorisation requirement
Netherlands	Prohibition
Portugal	
Romania	Prohibition
Spain	Authorisation requirement
Sweden	Prohibition (except when assistance is provided as part of international collaboration on research for countermeasures to WMD, or when authorisation is in accordance with the Military Equipment Act)
United Kingdom	Authorisation requirement (notification mechanism based on provision contained in Article 4 of Regulation (EC) No 1334/2000), unless prohibited under specific sanction legislation.
Cyprus	
Czech Republic	Authorisation requirement. Prohibition as regards countries under embargo.
Estonia	Prohibition
Hungary	Prohibition
Latvia	
Lithuania	
Malta	Authorisation requirement
Poland	Prohibition. Since 2000, Poland has implemented prohibition (a formal ban) as a very general rule for all kinds of trade with strategically relevant goods, including brokering, technical assistance, etc. Obviously, it means that CERTIFIED (ISO-9001 + ICP) applicant can apply for the license (individual or global) for providing technical assistance services.
Slovakia	Authorisation requirement
Slovenia	Authorisation requirement

Article 4 (Joint Action)

Article 4

Article 2 does not apply to "technical assistance":

(a) where it is provided in a country listed in Part 3 of Annex II to Regulation (EC) No 1334/2000;

Comment: The Joint Action exempts the following destinations from ITT controls: Australia, Canada, United States of America, Japan, Norway, New Zealand and Switzerland (destinations covered by CGEA).

(b) where it takes the form of transferring information that is "in the public domain" or "basic scientific research" as these terms are respectively defined in the international export control regimes, bodies and treaties; or

Comment:

- **"In the public domain"** should be understood as information, which has been made available without restrictions upon its further dissemination (copyright restrictions do not remove information from being in the public domain).

- **"Basic scientific research"** means experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts, not primarily directed towards a specific practical aim or objective.

The term **"basic scientific research"** does not seem to be equally understood by Member States (see comment under Article 2(2) of the Regulation)

(c) where it is in oral form and not related to items required to be controlled by one or more of the international export control regimes, bodies and treaties.

CHAPTER III EXPORT AUTHORISATION AND AUTHORISATION FOR BROKERING SERVICES

Article 9

1. A Community General Export Authorisation for certain exports as set out in Annex II is established by this Regulation.

Comment: The Community General Export Authorisation (CGEA) is one of the essential elements of this Regulation. It constitutes the only authorisation granted directly at the EU level. **It is important to note that no complementary national authorisation** will be necessary to export dual-use items listed in Part 1 of Annex II to the following destinations: Australia, Canada, United States of America, Japan, Norway, New-Zealand, Switzerland (list of countries contained in Part 3 of Annex II). Nevertheless, in order to use the CGEA exporters have to respect the following **conditions**:

1. Not using the CGEA if he has been informed by its National Authorities that the items in question are or may be intended, in their entirety or in part, for use in connection with weapons of mass destruction or for a military end-use as defined in Article 4(2) or if he is aware that the items in question are intended for such use.

2. Not using the CGEA when the relevant items are exported to a customs free zone or free warehouse that is located in a destination covered by this authorisation.

3. Registration and reporting requirements attached to the use of the CGEA and additional information imposed by National Authorities. National registration and reporting requirements applied by EU Member States are listed in the table below.

A new paragraph has been added allowing Member States to submit the use of the CGEA to registration “*prior to the first use of this Community General Export Authorisation. Registration shall be automatic and acknowledged by the competent authorities to the exporter without delay and in any case within ten working days of receipt*”²⁰. Such registration should not be assimilated to a national export authorisation; it has been established only to allow Member States to know who is using the CGEA.

In January 2008, the Commission has tabled to the Council a proposal of six new CGEA. It essentially concerns:

- Transfer of low value of dual-use items;
- Export of dual-use item after repair or for replacement;
- Temporary transfer for fair trade or exhibition;
- Transfer of computers;
- Transfer of dual-use items dedicated to telecommunications and information security;
- Transfer of chemical substances.

²⁰ Point 3, Part 2 of Annex II of this Regulation:

Table 6: CGEA conditions of use imposed by Member States

Member State	Conditions and requirements for use of this Authorisation	Validity of the registration of the exporter to Licence Office	Reporting requirements of the use of the CGEA
Austria	No special conditions required. Due to the fact that Austria does not issue General Licences, Annex IIIb is not applicable for the Austrian system so far. When using CGEA the exporter is obliged to refer to this licence in the customs documents.	/	Requirement to notify the authorities of the first use of the CGEA within 30 days after the first export.
Belgium (Brussels)	Prior registration required.	Two years.	No regular reporting. Only on request of the Ministry.
Belgium (Flemish Region)	Prior registration required.	Two years.	No regular reporting. Only on request of the Ministry.
Belgium (Walloon Region)	Prior registration required.	Two years.	No regular reporting. Only on request of the Ministry.
Bulgaria	Prior registration required.	Three years.	30 days before the use of the CGEA the exporter shall inform the Licensing Authority about the export and to provide information on request. Report on use of the CGEA every 6 months (January and July).
Czech Republic	Prior registration required within 10 days after first export.	Without time limit. If the exporter has not made any exports one year after the export has taken place, then the registration should be repealed..	On request of the Ministry.
Cyprus	Prior registration required.	Indefinite	Requirement to notify the authorities of the first use of the CGEA within 30 days after the first export.
Denmark	Ex-post reporting. Re-export clause imposes to ensure that the items would not leave the country of destination of Annex II Part 3 without authorisation.		Documents have to be presented to authorities on request of the Ministry. Requirement to notify the authorities of the first use of the CGEA within 30 days after the first export.
Estonia	In order to use (either national or Community) General Export Authorisation an exporter has to obtain General Export Authorisation User Certificate.	Up to the validity of the General Export Authorisation.	Yes, every three months even if no export took place.

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Member State	Conditions and requirements for use of this Authorisation	Validity of the registration of the exporter to Licence Office	Reporting requirements of the use of the CGEA
Finland			
France	Prior registration required. A document travels with the goods and is required for the custom declaration.	Until the “raison social” of the exporter is not modified.	Report on use of the CGEA every 6 months for some types of items (cryptology).
Germany	If the exporter intends to use the CGEA he must give a written notice of his intention prior to the first export and within 30 days afterwards. This registration paper does not travel with the goods and is not used for customs procedures (see above). The exporter has to enter “EU001” in Box 44 of the custom declaration. The conditions for the use of the CGEA are laid down in Annex II, Part 3.	No time limit. The registration is only used for internal purposes of German Authorities (e.g. statistical reasons).	Report on use of the CGEA every 6 months (July and January). Some items are exempted from reporting, e.g. transfers of Annex I items below a certain value (in general 5000 €), but others as well.
Greece	Prior registration required. Special export registration number attributed by the National Authorities after complete investigation of the request made by the exporter (same condition as for national Greek export license). Exceptions and prohibitions and specific destination are detailed in MD 125695/569/2000.		
Hungary	Prior registration requirement.	Valid until suspended or revoked.	Within 30 days after the end of the year. Reporting on the use of CGEA on a yearly basis.
Ireland	Prior registration requirement. The exporter enters EU001 in Box 44 of the SAD document. No document accompanies the goods covered by CGEA.	Indefinite.	Requirement to notify the authorities of the first use of the CGEA within 30 days after the first export. No. Licensing authority can inspect the records kept by exporters referred to in Article 20 of this Regulation. Exports of dual-use items and technology under the CGEA are also assessed during audit visits by the Licensing Authority to exporter companies.

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Member State	Conditions and requirements for use of this Authorisation	Validity of the registration of the exporter to Licence Office	Reporting requirements of the use of the CGEA
Italy	Prior registration required. Exporter must apply for the CGEA. Answer is given within 60 days. Exporter's name is registered and a progressive number of orders are given to the recorded exporting firm. An authorisation is released afterwards. The goods are accompanied with a travel document indicating that they are covered by CGEA and that re-export is submitted to authorisation granted by Italian authorities.	The registration is unlimited.	Within 30 days from the end of each calendar semester, the exporter shall send to the competent authority, by post, e-mail, or fax, a list of the export transactions made under the regime of the CGEA. Such a notice shall contain the following information: entries of invoice and contract, quantity and value of the items; categories and sub-categories of reference, corresponding customs tariff section country of destination, particulars of the consignee and of the end-user, dispatch date, type of export (final, temporary, transit).
Latvia	No special conditions required.		
Lithuania			Requirement to notify the authorities of the first use of the CGEA within 30 days after the first export.
Luxembourg	Prior registration required. No paper travelling with the goods but mention of EU001 on customs documents.		No specific reporting obligations.
Malta	Ex-post registration. 30 days after the first use of the CGEA. Same conditions and requirements as those set out in Annex II of this Regulation.	Not defined. Registration must be renewed if there is a change in address where records of the exports are kept.	No.
Poland	Prior notification of the intention to use CGEA. Mandatory certification (ISO-9001+ICP)	Not defined.	Report on use of the CGEA every 6 months.
Portugal	Prior registration required.		Yes, quarterly.
Romania	Prior registration required. The exporter shall: - demonstrate the implementation of a good control and management of export controls experience for at least 3 years time period; - implement the internal compliance programme, which shall be certified by the national authority. The exporter has to enter "EU001" in Box 44 of the custom declaration. Other conditions for the use of the CGEA are laid down in Annex II.	Without time limit; the exporter shall apply to cancel the registration if he makes no use of the authorisation for a period of 1 year.	Report on use of the CGEA every 6 months.

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Member State	Conditions and requirements for use of this Authorisation	Validity of the registration of the exporter to Licence Office	Reporting requirements of the use of the CGEA
Slovakia	Prior registration required.		No.
Slovenia	No registration requirement. Notification to the authorities of the first use of the CGEA within 30 days after the first export.		Yes twice a year.
Spain	Prior registration required Notification of the use of the CGEA should be made 30 days prior to the first export. The invoice and shipping documents should mention the conditions of use of CGEA.		Submit to the Secretariat General of Foreign Trade and to the Customs Department of the Spanish State Tax Agency, the documents and any other relevant information on the exports carried out, to the purposes of any audits which may be necessary, and also all total or partial customs clearance documents within the term of 1 month since they took place, for all exports included under a General Export Authorisation.
Sweden	No prior registration required. No paper accompanies the goods but reference to EU001 on customs declaration. Ex-post notification within 30 days after the first export.		Reporting on the use of CGEA has to be done every six months.
Netherlands	Prior registration required. Reference EU001 to be made on documents.	No limit, no expiration date. Unique registration number for each exporter assigned by government.	Input of the unique registration number and of code "EU001" in the customs export control computer system "Sagitta" for any export.
United Kingdom	Ex-post registration. Any person established in the UK shall give written details of name and address where records can be inspected within 30 days after first use of CGEA. Any person established in UK shall maintain records of exports under the CGEA for at least 3 years. Reference of CGEA/EU001 on customs paperwork - exporter should complete the Box 44 with 'Li=C999' with the title of the CGEA No EU001 in plain language. Any person who exports cryptographic items from the UK under the CGEA	Registration of intention to use the CGEA is valid until withdrawn.	Details of export of cryptographic items should be provided in writing to the Secretary of State not later than 30 days after first export, to the extent that the information is available or can reasonably be expected to be obtained within that time.

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	<p>shall provide additional details (as defined in national legislation) in writing within 30 days.</p> <p>The authorisation:</p> <ul style="list-style-type: none">- may not be used if informed of WMD use;- may not be used if informed of military end-use (Article 4(2) of EC Regulation);- may not be used if exported to CFZ or Free Warehouse. <p>Full detailed information available on website: http://www.dti.gov.uk/export.control/pdfs/cgeaguidnote.pdf</p>		
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Table 7: CGEA registration requirements imposed by Member States

Member State	Registration form to be filled by Exporter	Content of the registration form	Update of registration form
Austria	/		
Belgium (Brussels)	Yes. Official document granted to the exporter.	Items “authorised” to the applicant are listed.	No.
Belgium (Flemish Region)	Yes. Official document granted to the exporter.	Items “authorised” to the applicant are listed.	No.
Belgium (Walloon Region)	Yes. Official document granted to the exporter.	Items “authorised” to the applicant are listed.	No.
Bulgaria	Yes. Official document granted to the exporter.	A certificate is given to the exporter certifying that he is registered.	Registered exporter shall notify the Interministerial commission (Licensing Authority) of any changes in the information in the register within 14 days.
Czech Republic	Letter of the company in recommended form.	Reference to this Regulation and to Act No 594/2004; Exporter’s name; Exporter’s registered office; Exporter’s registration number; Name/position of statutory representative; Signature and stamp. The trade register certificate must be enclosed.	<ul style="list-style-type: none"> - exporter shall notify the Ministry of any changes in the information in the register within fifteen days; - the exporter shall specify the number of the authorisation in the customs declaration; - the exporter shall apply to cancel the registration if, for a period of one year, he makes no use of the authorisation.
Cyprus	No special form provided. A register is kept at the Import and Export Licensing Unit of the Ministry of Commerce, Industry and Tourism.	A letter is given to the exporter certifying that he is registered and entitled to use the CGEA.	No.
Denmark	The usual form (Annex IIIa) must be used but only specific fields are to be filled out.	A letter is given to the exporter certifying that he is registered and is entitled to use the CGEA.	No.
Estonia	Yes.	Data on the exporter and the General Export Authorisation. Number and validity of the certificate.	Exporter shall notify the Strategic Goods Commission of any changes in the information contained in the register within five days, otherwise there will be penalty.

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Member State	Registration form to be filled by Exporter	Content of the registration form	Update of registration form
Finland	Special form provided.	A reference to the CGEA (EU001) has to be made in customs documents by the exporter.	Every time when the data given to the licensing authorities was modified
France			
Germany	There is no form. In Germany, the publication of EU001 is considered to be a licence; there are no individual licences granted.	There is no form.	According to Article 6 paragraph 2 of Council Regulation (EC) No 1334/2000 in connection with Annex II, Part 3 collateral clause No 4 Germany stipulated registration and reporting requirements. Referring to Article 20 of this Regulation the exporter has to keep detailed record of their export transactions.
Greece			
Hungary	No special form provided.	Identification of company, coordinator, ICP.	No.
Ireland	Letter submitted by exporter to notify use within 30 days of first export of dual use-items under CGEA.	Registration form includes name of exporter and address at which the exporter will keep and make available for inspection.	Exporter has to notify Minister for Enterprise, Trade and Employment immediately of any change in information submitted.
Italy	/	No special registration form to be filled for applying. Exporter shall apply by standard letter to National Authority to obtain the right to use the CGEA. Exporter's application shall contain: Signature of the legal representative of the firm, copy of the trade register certificate. In the application a reference shall be made to Article 6(2) of Council Regulation (EC) No 1334/2000 and to Article 7 of the Italian Legislative Decree 96/2003.	Exporters shall notify the Ministry of Productive Activities immediately of any change in information submitted.
Latvia			
Lithuania	/		
Luxembourg	/		

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Member State	Registration form to be filled by Exporter	Content of the registration form	Update of registration form
Malta	No.	Name of the person and the address at which the records are kept. Any changes of these elements should be notified within 30 days after such changes.	Any additional conditions and requirements may be imposed by the Director including an end-use statement. Cannot be used if the exporter knows at the time of the export that the final destination of those items is outside the specified countries and no processing or working is to be performed on those items in those countries to which they are to be exported.
Poland	No.	No.	
Portugal			
Romania	There is no form. The usual form (Annex IIIa) must be used. In Romania, the publication of EU001 is considered to be a licence.	- Reference to Council Regulation; - Exporter's name; Exporter's registered office; - Exporter's registration number; - Name/position of statutory representative; - Signature and stamp. The trade register certificate must be enclosed.	The exporter shall notify the competent authority of any changes of the information in the register within fifteen days. The exporter shall also specify the number of the authorisation in the customs declaration.
Slovakia	/		

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Member State	Registration form to be filled by Exporter	Content of the registration form	Update of registration form
Slovenia	Special registration form.		
Spain	No, only through a letter.		If items exported include items listed in Annex I originate from non-EU Member State or items listed in Annex IV, the exporter has to detail it and set out the percentage of incorporation in the items exported. The IIC is applicable and should also be included.
Sweden	Specific registration form. It contains following data: company name and contact details, date of first use un order to plan compliance visits, etc.		
Netherlands	Letter by exporter.	Exporter declares intention to use EU001.	None.
United Kingdom	UK exporters are required to register within 30 days of first export. Specific reporting of certain category 5(2) goods are also required. Done online using SPIRE. Use of the CGEA is confirmed by reference to the CGEA No EU001 as published in Annex II of this Regulation.	No specific form used for either registration or use of CGEA.	Registration and record keeping; and additional reporting requirements for cryptographic items.

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2. For all other exports for which an authorisation is required under this Regulation, such authorisation shall be granted by the competent authorities of the Member State where the **exporter is established**. Subject to the restrictions specified in paragraph 4, this authorisation may be an individual, global or general authorisation.

Comment: Due to the fact that an **agency or branch** of an **exporter** may be established in a Member State where the exporter's headquarters office is located, it is considered that the competent authorities of the Member State where the agency or branch of an exporter is established may grant an export authorisation to that agency only if it is effectively involved in the proposed export. An agency or branch is effectively involved in a proposed export inter alia when it has **autonomous** decision-making powers on the contract underlying the export and has independent accounting system, when it has negotiated the contract and when it is able to discharge the exporter's obligations concerning export control regulations

Comment: The common understanding of the different licences is the following:
An **Individual Licence** is granted to one specific exporter for one end-user covering a number of items (one or several).
A **Global Licence/Open Individual Licence** is granted to one specific exporter in respect of a type or category of dual-use items that may be valid for exports to one or more specified end-users in one or more specified third countries (as defined by Article 2(10)).
A **National General Authorisation** is valid for all national exporters to one or more specified countries covering a number of determined items (as defined by Article 2(10) a model is proposed in Annex IIIc).

All the authorisations shall be valid throughout the Community.

Comment: This provision establishes one of the essential principles of this Regulation consisting in the recognition of the validity of a licence granted by another Member State. Normally, once the authorisation has been granted the items could leave the EU through any custom offices (unless Member States have limited the procedure to dedicated customs offices (see Article 17)). If this principle is always applied for CGEA, Global and General National licences, for certain individual licences consultations between the concerned Member States Licensing Authorities are established (see Article 11).

It should be noted that the EC validity concerns only export and brokering authorisations and not transit authorisation. Therefore if a dual-use item has to pass through more than one Member States, it might be submitted to more than one transit authorisations.

Exporters shall supply the competent authorities with all relevant information required for their applications for individual and global export authorisation so as to provide complete information to the national competent authorities in particular on the end user, the country of destination and the end use of the item exported. The authorisation may be subject, if appropriate, to an **end-use statement**.

Comment: The content of “**relevant information**” is requested and defined by Member States Authorities and may be listed and published. End-use statement usually takes the form of an End-User Certificate which is a document, issued by the recipient Government or by recipient company. It contains usually information on the items transferred, on the exporter, on the intermediary if used, on the end-user, on the application authorised and finally a commitment of the recipient to not export or re-export without the prior consent of the selling country. It should be noted that there is no official legally binding form of End-User Certificate, however some international agreements, notably Wassenaar Arrangement, give a common understandings of the information to be included in this document²¹.

Best practice recommendations for elements of Community End-Use Certificate have been adopted by the Council Working Group on Dual-Use Goods on 31 October 2008. Such non-legally binding recommendations have been published in the C series of the Official Journal of the European Union and contain information on parties, on items and on commitments to be certified by the foreign consignee who might act as end-user or as trader, whole or re-seller²². The document is published as an End-User Certification “form” which could be implemented directly by Member States Authorities.

Another document which might be required by MS export control authorities is the International Import Certificate (IIC). It confirms the importer’s credentials and also the fact that the import transaction involving strategic goods has been subject to control exercised by the competent authorities. It was initially established within the bounds of Co-ordinating Committee (COCOM), an informal non-treaty organisation established in 1949 to assist in efforts to control the export of goods and technologies of strategic concern to the Warsaw Pact and China. Nowadays several third countries, i.e. Austria, Singapore and Switzerland, require ICC while undertaking their export transactions. The intended purpose of the IIC is to reduce the risk of diversion of sensitive strategic goods and technology. The requirement for an IIC is sometimes supplemented by the need for a Delivery Verification Certificate (DVC).

Indeed, a DVC implies that the customs service of importing country validates a certificate confirming that the items have entered, which afterwards will be submitted by the exporter to the authorities of the exporting country. In addition, DVC request is often coupled with the requirement of Import Certificate, also known as IC/DV procedure. Under this procedure importers are required to provide their foreign suppliers with an IIC that is validated by the

²¹ The Wassenaar Guidelines concerning End-User certificate as updated on December 2005 can be found on the following website: http://www.wassenaar.org/publicdocuments/docs/End-user_assurances_as_updated_at_the_December_2005_PLM.pdf

²² OJ C 11, 16.1.2009, p. 1. This document can be found on the following website: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:011:0001:0003:EN:PDF>

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importing government. This certificate conforms to the government of the exporter's country that the items covered by the certificate will be imported and will not be re-exported except as authorised by export control regulations of importing country.

Such IC/DV procedure is required by several Member States, i.e. Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, United Kingdom.

If all Member States require an End-User Certificate/CCI and quite often a DVC, the request for additional documents varies tremendously. Some Member States require an excerpt from the commercial register or to carry out reliability checks in certain cases.

Common understandings of the additional documents to be provided by the applicant have not been adopted but the overwhelming majority of Member States requires the submission of an export contract and of the technical specifications of the goods to be exported.

Comment: Eligibility to apply for an export authorisation

Using the term “**exporter**” as defined by Article 2(3) of this Regulation seems to limit the right of the exporter to apply for an export authorisation (global or individual). Whether Member States Authorities can open such right to carriers and other intermediaries who might act on behalf of the exporter is not clear and no Member State seems to allow such possibility.

3. Member States shall process requests for individual or global authorisations within a period of time to be determined by national law or practice.

Comment: In the Commission's initial proposal, it was suggested that Member States should determine “*targets for the treatment of the requests of export authorisation within certain deadlines and communicate them to the Commission and national exporters*”. The objective was to increase transparency of Member States decision-making process by publishing the different deadlines and therefore allowing exporters to refer such deadlines to their potential customers. It could have also contributed to counter the risk of unfair competition between EU exporters by inducing Member States to gradually harmonise their deadlines.

Table 8: List of Member States who have adopted National General Authorisation

Member State	Content of National General Licences	Publication reference
Austria	One National General Licence: - Re-export to the country of origin without the item being processed and if it has not stayed in the EU for more than 3 months.	
Bulgaria	Legislation offers the necessary framework for National General Licence but none have been issued.	Article 44 of Law on export controls of arms and dual-use items and technologies.
Czech Republic	Legislation offers the necessary framework for National General Licence but none have been issued.	Article 6 of Act No 594/2004 of 4 November 2004.
Estonia	Legislation offers the necessary framework for National General Licence but none have been issued.	Estonian Act on Strategic Goods, 5 February 2004.
Finland	Legislation offers the necessary framework for National General Licence but none have been issued.	Act 562/1996 on the control of exports of dual-use goods as amended by Government Decree 924/2000.
France	Four National General Licences: - Chemicals (1C350.2, 1C.350.7, 1C.350.9, 1C350.38, 1C350.46); - Biological items; - Graphite (0C004); - Industrial items.	Publication in Official Journal 176 of 30 July 2002 (Pages 12972).
Germany	Five National General Licences (AGG): - AGG No 9 Graphite and certain finished products from graphite; - AGG No 10 Computers and related equipment; - AGG No 12 Items of Annex I of EC REG 1334/2000 having a value of less than €2,500, except all positions of the categories d and e and items of the "Very Sensitive List" of WA; - AGG No 13 Items of Annex I of EC REG 1334/2000 except in certain (non-sensitive) cases; - AGG No 16 Goods and Technology in the area of telecommunications; - AGG No 18 Clothing and equipment with signature suppression; - AGG No 19 certain categories of all-terrain cars; - AGG No 20 Brokering. The General Authorisations number 18 and 19 do not refer to dual-use, but to military items. Three additional General Authorisations have been published (21, 22 and 23) and are related to certain military items as well. All National General Licences do not cover items specified in Part 2 of Annex II or countries named in Part 3 of Annex II.	Federal Gazette No 72 of 16.04.2005, p 6289f. As German National General Licences are subject to yearly modifications, the actual version is available on the website http://www.bafa.de

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Greece	National General License covers all items of Annex I with the exception of those described in Part 2 of Annex II as well as items, which are included in the annexes of the Australian Group and the Nuclear Suppliers Group. The license is used for exports to non-EU Wassenaar Members and to Wassenaar Members not listed in Part 3 of Annex II. It covers all items of Annex I except Part 2 of Annex II. It can be used for transfers to EU Member States for items listed in Part 1 of Annex IV.	Ministerial Decision (Re: 126119 /E3 6119/ 23.1.2003). Min. Decisions n° 145915/E3/25915/17-4-06 (OJ, n° 650B/24-5-06) and n° 125263/E3/25263/6-2-07 (OJ, n° 302B/7-3-07).
Hungary	Legislation offers the necessary framework for National General Licence but none have been issued.	Government Decree No 50/2004 (III.23.01) On Licensing foreign trade in dual-use goods and technologies.
Italy	One National General Licence on the same items as CGEA, may be required for all dual-use items under one of the entries in Annex I (except: 0C001, 0C002, 0D001, 0E001, 1A102, 1C351, 1C352, 1C353, 1C354, 7E104, 9A009.a, 9A117) and these items may be exported towards Antarctica (Italian base), Argentina, South Korea, Turkey.	Ministerial Decree of 4 August 2003 issued in the Official Journal No 202 of 25 July 2003.
Netherlands	One National General Licence covering non-sensitive Wassenaar Arrangement items and excluding 8 countries from its geographical scope. The licence covers certain items of Cat 1 to Cat 5 to all countries with the exception of 8 countries.	
Poland	Legislation offers the necessary framework for National General Licence but none have been issued.	Law of 29 November 2000.
Romania	Legislation offers the necessary framework for National General Licence but none have been issued.	Act 136/2007 on the control of exports of dual use goods.
Slovakia	Legislation offers the necessary framework for National General Licence but none have been issued.	Act No 26/2002.
Sweden	One for repair, replacement and demonstration purposes for the same 60 countries.	Swedish Custom's Code of Statues.
United Kingdom	There are 15 National General Licences (OGEL) covering for instance: - Chemicals, - Cryptographic Development, - Export After Exhibition: Dual-Use Items, - After Repair/replacement under warranty: Dual-Use Items, - Export For Repair/Replacement Under Warranty: Dual-Use Items, - Dual-Use Items: Hong Kong Special Administrative Region, - Low Value Shipments, - OIL and GAS Exploration Dual-Use Items, - Technology for Dual-Use Items, - Turkey, - Military and Dual-Use Goods: UK Forces deployed in embargoed destinations, - Military and Dual-Use Goods: UK Forces deployed in non-embargoed destinations,	Reference of Export Control Organisation: http://www.businesslink.gov.uk/bdotg/action/laver?r.11=1079717544&r.lc=en&topicId=1084228483&furlname=exportcontrol&furlparam=exportcontrol&ref=&domain=www.businesslink.gov.uk

Article 9

	- Exports of non-lethal military and Dual-Use goods: To Diplomatic Missions or Consular Posts).	
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4. National general export authorisations shall:

(a) exclude from their scope items listed in part 2 of Annex II;

Comment: Items concerned are items which are not covered by the CGEA and therefore it was considered that neither national general licences could be granted for such items.

(b) be defined by national law or practice. They may be used by all exporters, established or resident in the Member State issuing these authorisations, if they meet the requirements set in this Regulation and in the complementary national legislation. They shall be issued in accordance with the indications set out in Annex IIIc. They shall be issued according to national laws and practice;

Member States shall notify the Commission immediately of any national general export authorisations issued or modified. The Commission shall publish these notifications in the C series of the Official Journal of the European Union;

Comment: If national general export authorisation could only be used by exporters established in the Member State issuing these authorisations, they could export their items through any Member State even if it has not adopted a similar authorisation.

(c) not be used if the exporter has been informed by his authorities that the items in question are, or may be intended, in their entirety or in part, for any of the uses referred to in paragraphs 1 and 3 of Article 4 or in paragraph 2 of Article 4 in a country subject to an arms embargo decided by a common position or joint action adopted by the Council or a decision of the OSCE or an arms embargo imposed by a binding resolution of the Security Council of the United Nations, or if the exporter is aware that the items are intended for the abovementioned uses.

Comment: Uses referred in paragraphs 1, 2 and 3 of Article 4 are:

- Contribution to development, production, handling, operation, maintenance, storage, detection, identification or dissemination of **chemical, biological or nuclear** weapons or other nuclear explosive devices or the development, production, maintenance or storage of **missiles** capable of delivering such weapons;
- The final destination is subject to an **arms embargo** decided by the EU Council of Ministers or by the OSCE or by a binding resolution of the Security Council of the United Nations and if the items have to be used for military purposes;
- Use as parts or components of military items listed in the national military list that have been exported from the territory of that Member State **without authorisation or in violation of an authorisation** prescribed by national legislation of that Member State.

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5. Member States shall maintain or introduce in their respective national legislation the possibility of granting a **global export authorisation**.

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Table 9: List of Member States who have adopted Global Export Authorisation

Member State	Global Licence
Austria	X
Belgium	X
Bulgaria	X
Czech Republic	X
Denmark	X
Estonia	X (not granted yet)
France	X
Finland	X
Germany	X
Greece	X
Hungary	X
Ireland	X
Italy	X
Latvia	X (not granted yet)
Lithuania	X (not granted yet)
Luxemburg	X
Malta	X (not granted yet)
Netherlands	X
Poland	X
Portugal	X (not granted yet)
Romania	X (not granted yet)
Slovakia	X (not granted yet)
Slovenia	X (not granted yet)
Spain	X
Sweden	X
United Kingdom	X

Table 10: Restriction of the use of National General or Global Export Authorisations

Member State	Restriction of the use of National General or Global Export Authorisations
Austria	None.
Cyprus	None.
Bulgaria	Exporters shall be registered in the list of authorised exporters according to the provisions of the Export control law. There are special licensing rules and reasons for denial, suspension or revocation of licence are specified.
Czech Republic	Access to global export authorisation is not restricted. There is only specific condition that the applicant must prove that he is capable of respecting the regime applicable to the export control (e.g. checking the end use of individual supplies). If this condition is not met the exporter is entitled to submit an application for an individual export authorisation.
Denmark	Yes.
Estonia	There are special licensing rules and reasons for denial, suspension or revocation of licences. Conditions are specified in Estonian Act on Strategic Goods, 5 February 2004.
France	None.
Finland	MFA may decide (in detail) when it issues to the exporter individual authorization or global authorization
Germany	Export licences could be denied in case of unreliability (sect. 3.2 AWG). Possibility to revoke the National General Licence for individual exporters.
Greece	Exporters have to be registered in the list of authorised exporters according to the provisions of Greek legislation. In order this registration to be effected the exporter should not have violated certain provisions of the Greek Penal Code. They must also provide information that certifies the establishment and proper operation of the exporting company.
Hungary	Global Export Authorisation cannot be issued neither for the WMD-related end-use, nor for embargoed destinations.
Italy	In principle the penalty for the infringement of the dual-use law (both community and national) may reflect on the assessment and release of all kinds of licences existing in the Italian system: individual, global, national general, community general (see Article 8(2) point c of Legislative Decree 96/2003).
Latvia	No. Violations could be taken into account for future applications of export licences.
Lithuania	There are licensing rules in which grounds for suspension or even revocation of licence are set.
Poland	General Licences and the Community General Export Licence may be used by any natural or legal person who is able to provide relevant documentation to confirm the use of the internal system of trade control and management for the past three years, and who submits a statement to the trade control authority defining the intention and starting date of intended trade.
Romania	There are no restrictions but some conditions to be considered. General Licences and the Community General Export Licence may be used by any natural or legal person that is able to provide relevant documentation to confirm the use of the internal compliance programme and the management of export controls for the past three years, and that submits a statement to the trade control authority defining the intention and starting date of intended trade.
Slovakia	
Slovenia	None.
Sweden	None.

Article 9

Member State	Restriction of the use of National General or Global Export Authorisations
United Kingdom	Yes.

Article 9

6. Member States shall supply the Commission with a list of the authorities empowered to:
- (a) grant export authorisations for dual-use items;
 - (b) decide to prohibit the transit of non-Community dual-use items under this Regulation.

The Commission shall publish the list of these authorities in the C series of **the Official Journal of the European Union**.

Comment:

The list of Member States Authorities is regularly published in the Official Journal of the European Union as Information note on Council Regulation (EC) No 1334/2000. The list is also available on the website of the Commission at the following address:
http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_114154.pdf

Article 10

1. Authorisations for brokering services under this Regulation shall be granted by the competent authorities of the Member State where the broker is resident or established. These authorisations shall be granted for a set quantity of specific items moving between two or more third countries. The location of the items in the originating third country, the end-user and its exact location must be clearly identified. The authorisations shall be valid throughout the Community.

Comment: The generalisation of this disposition must be underlined. The wording thereof, notably *“these authorisations shall be granted for a set quantity of specific items moving between two or more third countries”*, resembles to that what is usually called open licence. Nevertheless, some Member States (i.e. United Kingdom) opted for sole standard individual trade control licence (SITCL). Indeed, SITCL is a temporary authorisation, specific to a named broker. It covers brokering activities for established quantity of specific goods between a specific source and destination country. Neither open individual licence, nor open general licence has been established in the UK.

2. Brokers shall supply the competent authorities with all relevant information required for their application for authorisation under this Regulation for brokering services, in particular details of the location of the dual-use items in the originating third country, a clear description of the items and the quantity involved, third parties involved in the transaction, the third country of destination, the end-user in that country and its exact location.

Comment: The content of “**relevant information**” is requested and defined by Member States Authorities and may be listed and published. Common understandings of the information to be provided by the applicant have not been adopted.

3. Member States shall process requests for authorisations for brokering services within a period of time to be determined by national laws or practice.

Comment: This paragraph has been included to increase transparency as well as to allow exporters to anticipate the time necessary in the different Member States to know if the intended brokering activities shall be submitted to authorisation. The initial Commission proposal included provision which constrained Member States authorities to reply within a delay of 20 working days from the presentation of a complete request by the broker. Such proposal did not obtain the necessary majority within the Council to be adopted.

The initial Commission proposal included also an obligation for Member States to inform the Commission of such delays which shall be published in the Official Journal of the European Union. Once again such proposal was not supported by Member States.

4. Member States shall supply the Commission with a list of the authorities empowered to grant authorisations under this Regulation for the provision of brokering services. The Commission shall publish the list of these authorities in the C series of the Official Journal of the European Union.

Article 10

Comment:

The list of Member States Authorities will be published in the Official Journal of the European Union as Information note on Council Regulation (EC) No 1334/2000. The list is not available presently.

Article 11

Article 11

1. If the dual-use items in respect of which an application has been made for an individual **export** authorisation to a destination **not** listed in **Annex II** or to **any** destination in the case of dual-use items listed in **Annex IV** are or will be **located** in one or more Member States other than the one where the application has been made, that fact shall be indicated in the application. The competent authorities of the Member State to which the application for authorisation has been made shall **immediately consult** the competent authorities of the Member State or States in question and provide the relevant information. The Member State or States consulted shall make known within 10 working days any objections it or they may have to the granting of such an authorisation, which shall **bind** the Member State in which the application has been made.

If no objections are received within 10 working days, the Member State or States consulted shall be regarded as having no objection.

In exceptional cases, any Member State consulted may request the extension of the 10-day period. However, the extension may not exceed 30 working days.

Comment: This provision alters the principle of validity recognition of a licence granted by another Member State by establishing the obligation of consultation between the Member State responsible for issuing the licence (the one where the exporter is established) and the Member State where the item is or will be located. This provision concerns only a limited number of items submitted to individual licences:

- all items of Annex IV for any destination;
- all items of Annex I for a destination other than Australia, Canada, United States of America, Japan, Norway, New Zealand, Switzerland (Part 3 of Annex II).

It should be noted that the decision of the Member State consulted delineates the decision of the Member State where the application has been made. A negative answer imposes the denial of the authorisation.

Article 11

2. If an export might prejudice its **essential security interests**, a Member State may request another Member State **not to grant** an export **authorisation** or, if such authorisation has been granted, request its annulment, suspension, modification or revocation. The Member State receiving such a request shall immediately engage in consultations of a non-binding nature with the requesting Member State, to be terminated within 10 working days. In case the requested Member State decides to grant the authorisation, this should be notified to the Commission and other Member States using the electronic system mentioned in Article 13(6).

Comment: The term “**essential security interests**” has not been defined and it is left under Member States appreciation. Contrary to the provision of paragraph 1, the consulted Member State is free after engaging consultation to grant or maintain the authorisation.

Article 12

1. In deciding whether or not to grant an **individual or global export authorisation or to grant an authorisation for brokering services** under this Regulation, the Member States shall take into account all **relevant considerations** including:

(a) the **obligations and commitments** they have each accepted as members of the relevant international **non-proliferation regimes** and export control arrangements, or by ratification of relevant international treaties;

(b) their obligations under **sanctions** imposed by a common position or a joint action adopted by the Council or by a decision of the OSCE or by a binding resolution of the Security Council of the United Nations;

(c) considerations of **national foreign and security policy**, including those covered by the Council Common Position 2008/994/CFSP defining common rules governing control of exports of military technology and equipment²³;

(d) considerations about intended **end use and the risk of diversion**.

Comment:

To grant or not the authorisation, Member States take their decision on two kinds of elements which are conditions and criteria.

Conditions are objective elements that recipient countries have to meet to obtain the export authorisation from the supplier. Those elements could be the ratification of a treaty, the conclusion of a safeguard system or the submission of an End-User Certificate.

Criteria are subjective elements to be considered by the supplier State, on a case-by-case analysis, to authorise or not the transfer. Criteria could be the internal situation in the country of final destination, the existence of tensions or armed conflicts, the risk that the recipient would use the proposed export aggressively against another country or to assert by force a territorial claim.

Article 12 establishes a non-exhaustive list of **criteria** to be taken into consideration by Member States Authorities to grant or not the export authorisation.

Cross reference to the Council Common Position 2008/944/CFSP of December 2008 defining common rules governing control of export of military technology and equipment is made by both Joint Action and this Regulation. Shall Member States take into consideration when assessing an export application for dual-use the eight criteria of the Common Position? If politically such mechanism might be considered, the Common Position cannot legally extend the Member States obligation to consider such criteria in the consultation mechanism for an essentially identical transaction previously denied established by Article 13(5) neither extended the criteria list of Article 12.

The list is an “abstract” of conditions and criteria adopted by the **five international export control regime**. In this regard, it should be referred to each export control regime to have an accurate list of conditions and criteria by dual-use items categories.

Nuclear dual-use items

The **Nuclear Suppliers Group (NSG)** has adopted two groups of guidelines. The first set of

²³ OJ L 335, 13.12.2008, p. 99.

guidelines governs the export of items that are especially designed or prepared for nuclear use (trigger list)²⁴. The second set of guidelines governs the export of nuclear-related dual-use items and technologies, that are, items that can make a major contribution to an unsafeguarded nuclear fuel cycle or nuclear explosive activity, but which have as well non-nuclear uses in chemical industry for instance²⁵.

NSG guidelines imposed an obligation to submit all items of the trigger and dual-use lists to a national export authorisation. Both guidelines did not formally forbid transfers but suppliers are invited to refrain their transfers of sensitive facilities, technology and material usable for nuclear. If enrichment or reprocessing facilities, equipment or technology are to be transferred, suppliers should encourage recipients to accept, as an alternative to national plants, supplier involvement and/or other appropriate multinational participation in resulting facilities. In principle, transfers to nuclear-weapon States are prohibited except to the five States recognised as such by the Nuclear Non-Proliferation Treaty (China, France, Russia, United Kingdom of Great Britain and Northern Ireland and United States of America). Since September 2008, one more exception has been included in the NSG Guidelines authorising transfers to India.

To take the decision to authorise or not the transfer, supplier States should examine the demand in the light of the **non-proliferation principle** which invites suppliers to authorise the transfer only when they are satisfied that it would not contribute to the proliferation of nuclear weapons or other nuclear explosive devices or be diverted to an act of nuclear terrorism. This principle, largely criticised by non-participating States, introduces a subjective approach in nuclear export control regime by the fact that it gives to suppliers the right to appreciate if an end-user country conforms its non-proliferation policy to the standards of the suppliers. The different criteria, which should be considered in connexion with the non-proliferation principle, are defined for nuclear dual-use items. These criteria are:

“(a) Whether the recipient State is a party to the Nuclear Non-Proliferation Treaty (NPT) or to the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), or to a similar international legally binding nuclear non-proliferation agreement, and has an IAEA safeguards agreement in force applicable to all its peaceful nuclear activities;

(b) Whether any recipient State that is not party to the NPT, Treaty of Tlatelolco, or a similar international legally-binding nuclear non-proliferation agreement has any facilities or installations listed in paragraph 3(b) above that are operational or being designed or constructed that are not, or will not be, subject to IAEA safeguards;

(c) Whether the equipment, materials, software, or related technology to be transferred is appropriate for the stated end-use and whether that stated end-use is appropriate for the end-user;

(d) Whether the equipment, materials, software, or related technology to be transferred is to be used in research on or development, design, manufacture, construction, operation, or maintenance of any reprocessing or enrichment facility;

(e) Whether governmental actions, statements, and policies of the recipient State are supportive

²⁴ INFCIRC/254/Rev.8/Part 1 Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology.

²⁵ INFCIRC/254/Rev.7/Part 2 Communications Received from Certain Member States Regarding Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software and Related Technology.

²⁶ INFCIRC/254/Rev.7/Part 2 Communications Received from Certain Member States Regarding Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software and Related Technology, Establishment of Export Licensing Procedures, Point 4.

²⁷ The Convention has its own website: <http://www.opcw.nl>.

of nuclear non-proliferation and whether the recipient State is in compliance with its international obligations in the field of non-proliferation;

(f) Whether the recipients have been engaged in clandestine or illegal procurement activities; and

(g) Whether a transfer has not been authorised to the end-user or whether the end-user has diverted for purposes inconsistent with the Guidelines any transfer previously authorised; and

(h) Whether there is a reason to believe that there is a risk of diversion to acts of nuclear terrorism.

(i) Whether there is a risk of retransfers of equipment, material, software, or related technology identified in the Annex or of retransfers of any replica thereof contrary to the Basic Principle, as a result of a failure by the recipient State to develop and maintain appropriate, effective national export and transshipment controls, as identified by UNSC Resolution 1540²⁶.

Before granting the authorisation the supplier should verify if the State end-user fulfils the different **export conditions** defined by the NSG guidelines.

The first condition of supply concerns the obligation for the end-user to have brought into force an agreement with the IAEA requiring the application of **safeguards** on all sources and special fissionable material in its current and future peaceful activities (Comprehensive Safeguards Agreement (CSA)). This condition suffers one exception for transfers to a non-nuclear-weapon State when they are deemed essential for the safe operation of existing facilities and only if safeguards are applied to those facilities. Before granting such authorisation suppliers should inform and, if appropriate, consult in the event that they intend to authorise or to deny such transfers. This exception has been used twice by Russia to supply fissile material for a nuclear power plant to India in 2000 and 2006.

The second condition of supply concerns the submission of **government-to-government assurances** regarding the retransfers of items previously transferred. In this regard, suppliers should transfer trigger list items or related technology only upon the recipient's assurance that in the case of retransfer of the concerned items and of items derived from facilities originally transferred, or with the help of equipment or technology originally transferred by the supplier, the recipient of the retransfer or transfer will have to provide the same assurances as those required by the supplier for the original transfer.

Complementary to the conditions, suppliers should require from the recipient country that nuclear material and facilities should be placed under effective physical protection to prevent unauthorised use and handling. The levels of physical protection on which these measures have to be based are the subject of an agreement between supplier and recipient.

Biological and chemicals dual-use items

Regarding transfers of chemicals for purposes not prohibited, the **Chemical Weapons Convention** (CWC)²⁷ divided chemicals in three categories for which a specific regime is organised.

Category I which contains chemicals considered as very sensitive and for which State Parties shall not produce, acquire, retain or use them outside the territories of States Parties and shall not transfer such chemicals outside its territory except to another State Party. Moreover, quantities of chemicals that States Parties could acquire per year through production, withdrawal from chemical weapons stocks and transfer, strictly limited to or less than 1 tonne. The production of

such chemicals should be carried in out at a single small-scale facility.

The transfers of equipment specifically designed for use in connection with chemicals are not submitted to specific conditions. Nevertheless, due to the general commitment to not assist, encourage or induce, in any way, anyone to engage in any activity forbidden by the Convention, it could be pretended that States Parties should not export such equipment.

Category II contents chemicals considered as sensitive for which States Parties have to declare annually data on the quantities produced, processed, consumed, imported and exported of each chemicals listed, as well as a quantitative specification of import and export for each country involved. Like for the first Category, chemicals of Category II should only be transferred to or received from States Parties. This obligation has taken effect in April 2001 three years after entry into force of the Convention. Before it was possible to transfer to non-States Parties as far as the supplier State ensured the necessary measures that the transferred chemicals shall only be used for purposes not prohibited under the Convention and if the supplier has required an End-Use Certificate to recipient State.

Category III contents chemicals considered as less sensitive for which States Parties have, like for Category II, to declare annually data on quantities produced, imported and exported, as well as a quantitative specification of import and export for each country involved. Transfers of Category III items to non-States Parties of the CWC is authorised if the supplier has adopted the necessary measures to ensure that the transferred chemicals shall only be used for purposes not prohibited under this Convention. Inter alia, the supplier State shall require from the recipient State a certificate stating, in relation to the transferred chemicals:

- (a) That they will only be used for purposes not prohibited under this Convention;
- (b) That they will not be retransferred;
- (c) Their types and quantities;
- (d) Their end-use(s); and
- (e) The name(s) and address(es) of the end-user(s).

The **Convention on the Prohibition of the Development, Production and stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction (BTWC)** stated explicitly in its Article III that States Parties should not transfer *“to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organisations to manufacture or otherwise acquire any of agents, toxins, weapons, equipment or”* their means of delivery.

The Guidelines of the **Australia Group** establishes a list of non-exhaustive criteria to take into account in the export licence decision-making process. Those **criteria** are:

- Information about proliferation and terrorism involving chemicals and biological weapons (CBW), including any proliferation or terrorism-related activity, or about involvement in clandestine or illegal procurement activities, of the parties to the transaction;
- Capabilities and objectives of the chemical and biological activities of the recipient State;
- Significance of the transfer in terms of the appropriateness of the stated end-use, including any relevant assurances submitted by the recipient State or end-user and the potential development of CBW;
- Assessment of the end-use of the transfer, including whether a transfer has been previously denied to the end-user, whether the end-user has diverted for unauthorised

- purposes any transfer previously authorised, and, to the extent possible, whether the end-user is capable of securely handling and storing the item transferred;
- Applicability of relevant multilateral agreements including the BTWC and the CWC.

The transfers should be denied if the Government estimates that the items will be used in a chemical or biological weapons program or for CBW terrorism or there is a significant risk of diversion.

Complementary to the criteria analysis, State should “satisfy itself” that the items are not intended to be retransferred to a third State. In case of further re-export items should be submitted to the guidelines principles in the recipient State and the prior consent of the initial exporter should be required. Government-to-government assurance confirming such obligation should be exchanged before authorising the transfer.

Missile technology dual-use items

The **Missile Technology Control Regime (MTCR)** has established a list of 20 items divided in two categories.

The transfers of **Category I** items are, like those of the NSG “sensitive export”, almost forbidden even if the text of the MTCR guidelines is not as restrictive. Participating States are encouraged to consider transfer of Category I items with particular restraint and with “*a strong presumption to deny such transfer*”. There is one absolute prohibition in the regime, which is the transfer of Category I production facilities.

In the rare case where the transfer might be contemplated, binding government-to-government assurance on end-use and retransfer prohibition should be required. Moreover, the responsibility of the supplier and not only of the recipient is involved. The MTCR guidelines specified that suppliers should “*assume responsibility for taking all steps necessary to ensure that the item is put only to its stated end-use*”.

The transfers of **Category II** items should be submitted to export control authorisation when the supplier State “*judges on the basis of all available, persuasive information, evaluated according to factors, that they are intended to be used for the delivery of weapons of mass destruction, and there will be a strong presumption to deny such transfers*”. Factors to be considered by the supplier in the authorisation decision making are following: concerns about proliferation of weapons of mass destruction, capabilities and objectives of missile and space programs of the recipient State, significance of the transfer in terms of a potential development of WMD delivery systems, assurances given by the recipient, applicability of relevant multilateral agreements and risk of controlled items falling into the hands of terrorist groups and individuals.

Article 12

2. In addition to the criteria set in paragraph 1, when assessing an application for a global export authorisation Member States shall take into consideration the application by the exporter of proportionate and adequate means and procedures to ensure compliance with the provisions and objectives of this Regulation and with the terms and conditions of the authorisation.

Comment: The objective of this paragraph is to constraint Member State to require from exporters the adoption of an effective Internal Compliance Program before granting the global authorisation. Such program might take the form of the Authorised Economic Operator as established by the Community Customs Code.

Article 13

1. The competent authorities of Member States, acting in accordance with this Regulation, may refuse to grant an export authorisation and may annul, suspend, modify or revoke an export authorisation which they have already granted. Where they refuse, annul, suspend, substantially limit or revoke an export authorisation or when they have determined that the intended export is not to be authorised, they shall notify the competent authorities of the other Member States and the Commission thereof and share the relevant information with them. In case the competent authorities of a Member State have suspended an export authorisation, the final assessment shall be communicated to the Member States and the Commission at the end of the period of suspension.

Comment: As mentioned in comment relative to Article 12, due to the introduction of criteria, the fulfilment of the conditions imposed by the application form does not grant to the applicant the right to obtain his licence. Moreover, when the authorisation has been granted and until the items leave the territory of the EU, Member States Licensing Authorities could always retrieve a licence they have granted.

Article 13

2. The competent authorities of Member States shall review denials of authorisations notified under paragraph 1 within three years of their notification and revoke them, amend them or renew them. The competent authorities of the Member States will notify the results of the review to the competent authorities of the other Member States and the Commission as soon as possible. Denials which are not revoked shall remain valid.

3. The competent authorities of the Member States shall notify the Member States and the Commission of their decisions to prohibit a transit of dual-use items listed in Annex I taken under Article 6 without delay. These notifications will contain all relevant information including the classification of the item, its technical parameters, the country of destination and the end user.

4. Paragraphs 1 and 2 shall also apply to authorisations for brokering services.

5. Before the competent authorities of a Member State, acting under this Regulation, grant an authorisation for export or brokering services or decide on a transit they shall examine all valid denials or decisions to prohibit a transit of dual-use items listed in Annex I taken under this Regulation to ascertain whether an authorisation or a transit has been denied by the competent authorities of another Member State or States for an essentially identical transaction (meaning an item with essentially identical parameters or technical characteristics to the same end user or consignee.) They shall first consult the competent authorities of the Member State or States which issued such denial(s) or decisions to prohibit the transit as provided for in paragraphs 1 and 3. If following such consultation the competent authorities of the Member State decide to grant an authorisation or allow the transit, they shall notify the competent authorities of the other Member States and the Commission, providing all relevant information to explain the decision.

Comment:

The term “**authorisation or a transit has been denied**” could covers denials of transfer authorisation of items listed in Annex I but also of items not listed when Member States has implemented article 6.3. Nevertheless, the obligation to consult another Member States concerns only transit denials and transit prohibition of items listed. and therefore if a Member State denied an export authorisation on the base of the catch-all clause the consultation mechanism will not have to be initiated if a Member State intend to authorize a similar transaction.

Due to the fact, that the EU no-undercut mechanism is initiated **only** if an export authorisation has been previously denied, it is essential that exporters do not refrain themselves in applying for licence authorisation even if they know that the authorisation will be denied

6. All notifications required under this Article will be made via secure electronic means including via a secure system that may be set up in accordance with Article 19(4).

7. All information shared in accordance with the provisions of this Article shall be in compliance with the provisions of Article 19(3), (4) and (6) concerning the confidentiality of such information.

Article 14

Article 14

1. All individual and global export authorisations and authorisations for brokering services shall be issued in writing or by electronic means on forms containing at least all the elements and in the order set out in the models which appear in Annex IIIa and IIIb.

Comment: The form proposed in Annex III should be seen as a reference for EU Member States on which they established their national forms. The objective of such reference is to ensure that there is mutual recognition of the licenses used by national authorities and that there are no obstacles for international dual-use trade.

2. At the request of exporters, global export authorisations that contain quantitative limitations shall be split.

Comment: See comments relative to Article 9 above.

CHAPTER IV UPDATING OF LIST OF DUAL-USE ITEMS

Article 15

1. The lists of dual-use items set out in Annex I shall be updated in **conformity with the relevant obligations and commitments**, and any modification thereof, that Member States have accepted as members of the international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties.

Comment: Council Regulation (EC) No 1334/2000 is based on Article 133, which means that presently the Commission has the exclusive right of initiative to make proposals of modification of the Regulation. The process implies that a proposal is made to the College, which after decision (at simple majority voting), transmits its proposal to the Council, which adopts it with qualified majority voting.

When the Treaty on the Functioning of the European Union will enter into force, the process will be changed and the proposal will have to be voted by the Council and the European Parliament in accordance with the ordinary legislative procedure (Article 204 of the TFUE). In its proposal the Commission has suggested that the annual review of the list could have been done through a Comitology process but such proposal was not retained by the Member States.

2. Annex IV, which is a subset of Annex I, shall be updated with regard to Article 30 of the Treaty establishing the European Community, namely the public policy and public security interest of the Member States

Comment: Chapter III of the EC Treaty prohibits quantitative restrictions between Member States. Annex IV of this Regulation establishes the list of items to be controlled between Member States. This intra-Community restriction to the free circulation of goods might be considered as a quantitative restriction. Therefore it has to be ruled in conformity with the exception provisions established by Article 30 of the EU Treaty which states that: *“the provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”*.

CHAPTER V CUSTOMS PROCEDURES

Article 16

1. When completing the formalities for the export of dual-use items at the customs office responsible for handling the export declaration, the exporter shall furnish **proof** that any necessary export authorisation has been obtained.

2. A translation of any documents furnished as proof into an official language of the Member State where the export declaration is presented may be required of the exporter.

3. Without prejudice to any powers conferred on it under, and pursuant to, the Community Customs Code, a **Member State** may also, for a period not exceeding the periods referred to in paragraph 4, **suspend the process of export from its territory**, or, if necessary, otherwise prevent the dual-use items listed in Annex I which are covered by a valid export authorisation from leaving the Community via its territory, where it has grounds for suspicion that:

- (a) relevant information was not taken into account when the authorisation was granted, or
- (b) circumstances have materially changed since the grant of the authorisation.

4. In the case referred to in paragraph 3, the competent authorities of the Member State which granted the export authorisation shall be **consulted** forthwith in order that they may take action pursuant to Article 13(2). If such competent authorities decide to maintain the authorisation, they shall reply within 10 working days, which, at their request, may be extended to 30 working days in exceptional circumstances. In such case, or if no reply is received within 10 or 30 days, as the case may be, the dual-use items shall be released immediately. The Member State which granted the authorisation shall inform the other Member States and the Commission.

Comment: This provision allows a Member State to hold for a short period of time the export of dual-use items authorised by another Member State. After consultation if the authorisation is maintained by the Member State who has granted it, the dual-use items should be released and exported.

Article 17

1. Member States may provide that **customs formalities** for the export of dual-use items may be completed **only at customs offices empowered to that end**.
2. Member States availing themselves of the option set out in paragraph 1 shall inform the Commission of the duly empowered customs offices. The Commission shall publish the information in the C series of the **Official Journal of the European Union**.

Comment: This option has been implemented by Bulgaria, Latvia, Lithuania, Poland and Romania. The list of Customs authorities empowered has been published by the Commission in the C series of the Official Journal of the European Union²⁸.

Comment: After the terrorist attacks in New York and Madrid, it appears necessary to respond to global concern about protecting the international supply chain from terrorism. A new mission has been devoted to Customs in the field of trade security. The Community Customs Code has been amended and an electronic information exchange system between Member States Customs Administrations has been established. This system introduce an exporter obligation to notify to Customs Authorities information on items prior to import or export from the EU via an electronic pre-arrival and pre-departure declarations. This system concerns all categories of goods and therefore will be applicable to export and import of dual-use items. Nevertheless, exporters could be granted the statute of “authorised economic operator” which will provide facilitations regarding customs controls relating to security and safety.

²⁸ The information is also available on the Commission website at the following address:
http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc_126488.pdf.

Article 18

The provisions of Articles 843 and 912b to 912g of Regulation (EEC) No 2454/93²⁹ shall apply to the restrictions relating to the export, re-export and exit from the customs territory of dual-use items for the export of which an authorisation is required under this Regulation.

Comment: The following reference included in the Article 14 of Council Regulation (EC) No 1334/2000 have been modified by the Article 1 of Council Regulation (EC) No 2432/2001³⁰ amending and updating Regulation (EC) No 1334/2000 setting up a Community Regime for the control of exports of dual-use items and technology:

- Articles 463 to 470 and Article 843 of Regulation (EEC) No 2454/93 are thereby replaced by Article 843 and Article 912 b to 912 g of Regulation (EEC) No 2454/93.

Those provisions concern the procedure applicable to transfers of dual-use items when leaving **temporarily** the EU territory.

Below the text of these articles³¹.

Article 843 of Regulation (EEC) No 2454/93 worded as follow:

“ 1. This Title lays down the conditions applicable to goods moving from one point in the customs territory of the Community to another which temporarily leave that territory, whether or not crossing the territory of a third country, whose removal or export from the customs territory of the Community is prohibited or is subject to restrictions, duties or other charges on export by a Community measure in so far as that measure so provides and without prejudice to any special provisions which it may comprise.

These conditions shall not, however, apply:

- *Where, on declaration of the goods for export from the customs territory of the Community, proof is furnished to the customs office at which export formalities are carried out that an administrative measure freeing the goods from restriction has been taken, that any duties, taxes or other charges due have been paid or that, in the circumstances obtaining, the goods may leave the customs territory of the Community without further formalities, or*
- *Where the goods are transported by direct flight without stopping outside the customs territory of the Community, or by a regular shipping service within the meaning of Article 313a. 2.*

Where the goods are placed under a Community transit procedure, the principal shall enter on the document used for the Community transit declaration, specifically in box 44 ('Additional information') of the Single Administrative Document where that is used, one of the following phrases:

- *Salida de la Comunidad sometida a restricciones o imposiciones en virtud del (de la) Reglamento/Directiva/Decisión no ...*

²⁹ As amended by Regulation (EC) No 2432/2001 of 20 November 2001 amending and updating Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual use items and technology (OJ L 338, 20.12.2001, p. 1); entered into force the thirtieth day following that of its publication.

³⁰ OJ L 338, 20.12.2001, p. 1.

³¹ Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, as amended by Commission Regulation (EC) No 1602/2000 of 24 July 2000 (OJ L 188, 26.7.2000, p. 1).

Article 18

- *Udpassage fra Fællesskabet undergivet restriktioner eller afgifter i henhold til forordning/direktiv/afgørelse nr. ...*
- *Ausgang aus der Gemeinschaft — gemäß Verordnung/Richtlinie/ Beschluß Nr. ... Beschränkungen oder Abgaben unterworfen.*
- *Η έξοδος από την Κοινότητα υποβάλλεται σε περιορισμούς ή σε επιβαρύνσεις από τον κανονισμό/την οδηγία/την απόφαση αριθ. ...*
- *Exit from the Community subject to restrictions or charges under Regulation/Directive/Decision No ...*
- *Sortie de la Communauté soumise à des restrictions ou à des impositions par le règlement ou la directive/décision no ...*
- *Uscita dalla Comunità soggetta a restrizioni o ad imposizioni a norma del(la) regolamento/direttiva/decisione n. ...*
- *Bij uitgang uit de Gemeenschap zijn de beperkingen of heffingen van Verordening/Richtlijn/Besluit nr. ... van toepassing.*
- *Saída da Comunidade sujeita a restrições ou a imposições pelo(a) Regulamento/Diretiva/Decisão no ...*
- *Yhteisöstä vientiin sovelletaan asetuksen/direktiivin/ päätöksen N:o ... mukaisia rajoituksia tai maksuja*
- *Utförsel från gemenskapen omfattas i enlighet med förordning/ direktiv/beslut ... av restriktioner eller pålagor*

3. *Where the goods are: (a) placed under a customs procedure other than the Community transit procedure, or (b) moved without being under a customs procedure. The T5 control copy shall be made out in accordance with Articles 912a to 912g. In box 104 of the T5 form a cross shall be entered in the square 'Other (specify)' and the phrase stipulated in paragraph 2 added. In the case of goods falling within point (a) of the first subparagraph, the T5 control copy shall be made out at the customs office at which the formalities required for consignment of the goods are completed. In the case of goods falling within point (b) of the first subparagraph, the T5 control copy shall be presented with the goods at the competent customs office for the place where the goods leave the customs territory of the Community. Those offices shall specify the latest date by which the goods, must be presented at the customs office of destination and, where appropriate, shall enter in the customs document under cover of which the goods are to be transported the phrase specified in paragraph 2. For the purposes of the T5 control copy, the office of destination shall be either the office of destination for the customs procedure under point (a) of the first subparagraph or, where point (b) of the first subparagraph applies, the competent customs office for the place where the goods are brought back into the customs territory of the Community.*

4. *Paragraph 3 shall also apply to goods moving from one point in the customs territory of the Community to another through the territory of one or more of the EFTA countries referred to in Article 309(f) which are reconsigned from one of those countries.*

5. *If the Community measure referred to in paragraph 1 provides for the lodging of a guarantee, that guarantee shall be lodged in accordance with Article 912b(2).*

6. *Where the goods, on arrival at the office of destination, either are not immediately recognised as having Community status or do not immediately undergo the customs formalities required for goods brought into the customs territory of the Community, the office of destination shall take all the measures prescribed for them.*

7. *In the circumstances described in paragraph 3, the office of destination shall return the original of the T5 control copy without delay to the address shown in box B 'Return to ...' of the*

T5 form once all the required formalities have been completed and annotations made.

8. Where the goods are not brought back into the customs territory of the Community, they shall be deemed to have left the customs territory of the Community irregularly from the Member State where either they were placed under the procedure referred to in paragraph 2 or the T5 control copy was made out.

Article 912a

1. For purposes of this part:

(a) 'competent authorities' means: the customs authorities or any other Member State authority responsible for applying this part;

(b) 'office' means: the customs office or body responsible at local level for applying this part;

(c) 'T5 control copy' means: a T5 original and copy made out on forms corresponding to the specimen in Annex 63 accompanied where appropriate by either one or more original and copy forms T5 bis corresponding to the specimen in Annex 64 or one or more original and copy loading list T5 corresponding to the specimen in Annex 65. The forms shall be printed and completed in accordance with the explanatory note in Annex 66 and, where appropriate, any additional instructions laid down in other Community rules.

2. Where application of Community rules concerning goods imported into, exported from, or moving within the customs territory of the Community is subject to proof of compliance with the conditions provided for or prescribed by that measure for the use and/or destination of the goods, such proof shall be furnished by production of a T5 control copy, completed and used in accordance with the provisions of this part.

3. All goods entered on a given T5 control copy shall be loaded on a single means of transport within the meaning of the second subparagraph of Article 349(1), intended for a single consignee and the same use and/or destination. The competent authorities may allow the form corresponding to the specimen in Annex 65 to be replaced by T5 loading lists made out by an integrated electronic or automatic data-processing system or by descriptive lists drawn up for the purposes of carrying out dispatch/ export formalities which include all the particulars provided for in the Annex 65 specimen form, provided such lists are designed and completed in such a way that they can be used without difficulty by the authorities in question and offer all the safeguards considered appropriate by those authorities.

4. In addition to obligations imposed under specific rules, any person who signs a T5 control copy shall be required to put the goods described in that document to the declared use and/or dispatch the goods to the declared destination. That person shall be liable in the event of the misuse by any person of any T5 control copy which the former has drawn up.

5. By way of derogation from paragraph 2 and unless otherwise provided in the Community rules requiring a control on the use and/or destination of the goods, each Member State shall have the right to require that the proof of goods having been assigned to the use and/or destination provided for or prescribed shall be furnished in accordance with a national procedure, provided that the goods do not leave its territory before they have been assigned to that use and/or destination.

Article 912b

1. A T5 control copy shall be made out in one original and at least one copy. Each of their forms must bear the original signature of the person concerned and include all the particulars regarding the description of goods and any additional information required by the provisions relating to the Community rules imposing the control.

2. Where the Community rules imposing the control provide for the lodging of a guarantee, it shall be lodged:

- at the agency designated by those rules or, failing that, at either the office which issues the T5 control copy or another office designated for that purpose by the Member State to which that office belongs, and
- in that manner laid down in those rules or, failing that, by the authorities of that Member State.

In that case, one of the following phrases shall be entered in box 106 of the T5 form:

- Garantía constituida por un importe de ... euros
- Sikkerhed på ... EUR
- Sicherheit in Höhe von ... EURO geleistet
- Κατατεθείσα εγγύηση ποσού ... ΕΥΡΩ
- Guarantee of EUR ... lodged
- Garantie d'un montant de ... euros déposée
- Garanzia dell'importo di ... EURO depositata
- Zekerheid voor ... euro
- Entregue garantia num montante de ... EURO
- Annettu ... euron suuruinen vakuus
- Säkerhet ställd till et belopp av ... euro.

3. Where the Community rules imposing the control specify a time limit for assigning the goods to a particular use and/or destination, the statement 'Time limit of ... days for completion' in box 104 of the T5 form shall be completed.

4. Where the goods are moving under a customs procedure, the T5 control copy shall be issued by the customs office where the goods are dispatched. The document for the produce shall bear a reference to the T5 control copy issued. Similarly, box 109 of the T5 form issued shall contain a reference to the document used for the procedure.

5. Where the goods are not placed under a customs procedure, the T5 control copy shall be issued by the office where the goods are dispatched. One of the following phrases shall be entered in box 109 of the T5 form:

- Mercancías no incluídas en un régimen aduanero
- Ingen forsendelsesprocedure
- Nicht in einem Zollverfahren befindliche Waren
- Εμπορεύματα εκτός τελωνειακού καθεστώτος
- Goods not covered by a customs procedure
- Marchandises hors régime douanier
- Merci non vincolate ad un regime doganale
- Geen douaneregeling
- Mercadorias não sujeitas a regime aduaneiro
- Tullimenettelyn ulkopuolella olevat tavarat
- Varorna omfattas inte av något tullförfarande.

6. The T5 control copy shall be endorsed by the office referred to in paragraphs 4 and 5. Such endorsement shall comprise the following, to appear in box A (office of departure) of those documents: (a) in the case of the T5 form, the name and stamp of the office, the signature of the competent person, the date of authentication and a registration number which may be pre-printed; (b) in the case of the T5bis form or T5 loading list, the registration number appearing on the T5 form. That number shall be inserted either by means of a stamp incorporating the name of the office or by hand; in the latter case it shall be accompanied by the official stamp of the said

office. 7. Unless otherwise provided in the Community rules requiring a control on the use and/or destination of the goods, Article 357 shall apply *mutatis mutandis*. The office referred to in paragraphs 4 and 5 shall verify the consignment and shall complete and endorse box D, 'Control by office of departure', on the front of the T5 form.

8. The office referred to in paragraphs 4 and 5 shall keep a copy of each T5 control copy. The originals of these documents shall be returned to the person concerned as soon as all administrative formalities have been carried out, and boxes A (Office of departure), and B (Return to ...) of the T5 form, duly completed.

9. Article 360 shall apply *mutatis mutandis*.

Article 912c

1. The goods and the originals of the T5 control copies shall be presented at the office of destination. Unless otherwise provided in the Community rules requiring a control on the use and/or destination of the goods, the office of destination may allow the goods to be delivered direct to the consignee on such conditions as it shall lay down to enable it to carry out its control on or after arrival of the goods. Any person who presents a T5 control copy and the consignment to which it relates to the office of destination may, on request, obtain a receipt made out on a form corresponding to the specimen in Annex 47. The receipt may not replace the T5 control copy.

2. Where the Community rules require a control on the exit of goods from the customs territory of the Community:

- for goods leaving by sea, the office of destination shall be the office responsible for the port where the goods are loaded on the vessel operating a service other than a regular shipping service within the meaning of Article 313a,
- for goods leaving by air, the office of destination shall be the office responsible for the international Community airport, within the meaning of Article 190(b), at which the goods are loaded on an aircraft bound for an airport outside the Community,
- for goods leaving by any other modes of transport, the office of destination shall be the office of exit referred to in Article 793(2).

3. The office of destination shall carry out controls on the use and/or destination provided for or prescribed. It shall register the particulars of the T5 control copy by keeping a copy of the said document where appropriate, and the result of the controls which have been carried out.

4. The office of destination shall return the original of the T5 control copy to the address shown in box B ('Return to ...') of the T5 form once all the required formalities have been completed and annotations made.

Article 912d

1. Where the issue of the T5 control copy calls for a guarantee under Article 912b(2), the provisions of paragraphs 2 and 3 shall apply:

2. Where quantities of goods have not been assigned to the prescribed use and/or destination, by the expiry of a specified time limit under Article 912b(3) where applicable, the competent authorities shall take the necessary steps to enable the office referred to in Article 912b(2) to recover, where applicable from the guarantee lodged, the proportion corresponding to those quantities. However, at the request of the person concerned, those authorities may decide to collect, where applicable from the guarantee, an amount obtained by taking the proportion of the guarantee corresponding to the amount of goods not assigned to the specified use and/or destination by the end of the prescribed time limit, and multiplying that by the quotient obtained

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from dividing the number of days over the time limit required for those quantities to be assigned their use and/or destination by the length, in days, of the time limit. This paragraph shall not apply where the person concerned can show that the goods in question have been lost through force majeure.

3. If, within six months either of the date on which the T5 control copy was issued or of expiry of the time limit entered in box 104 of the T5 form under 'Time limit of ..., days for completion', as the case may be, that copy, duly endorsed by the office of destination, has not been received by the return office specified in box B of the document, the competent authorities shall take the necessary steps to require the office referred to in Article 912b(2) to recover the guarantee provided for in that Article.

This paragraph shall not apply where the delay in returning the T5 control copy was not attributable to the person concerned.

4. The provisions of paragraphs 2 and 3 shall apply unless otherwise provided in the Community rules requiring a control on the use and/or destination of the goods and, in any event, without prejudice to the provisions concerning the customs debt.

Article 912e

1. Unless otherwise provided in the Community rules requiring a control on the use and/or destination of the goods, the T5 control copy and the consignment which it accompanies may be divided before completion of the procedure for which the form was issued. Consignments resulting from such division may themselves be further divided. 2. The office at which the division takes place shall issue, in accordance with Article 912b, an extract of the T5 control copy for each part of the divided consignment. Each extract shall contain, inter alia, the additional information shown in boxes 100, 104, 105, 106 and 107 of the initial T5 control copy, and shall state the net mass and net quantity of the goods to which that extract applies. One of the following phrases shall be entered in box 106 of the T5 form used for each extract:

- Extracto del ejemplar de control T5 inicial (número de registro, fecha, oficina y país de expedición): ...
- Udskrift af det oprindelige kontrolseksemplar T5 (registreringsnummer, dato, sted og udstedelsesland): ...
- -n Auszug aus dem ursprünglichen Kontrollexemplar T5 (Registriernummer, Datum, ausstellende Stelle und Ausstellungsland): ...
- Απόσπασμα του αρχικού αντιτύπου ελέγχου T5 (αριθμός πρωτοκόλλου, ημερομηνία, τελωνείο και χώρα έκδοσης): ...
- Extract of the initial T5 control copy (registration number, date, office and country of issue): ...
- Extrait de l'exemplaire de contrôle T5 initial (numéro d'enregistrement, date, bureau et pays de délivrance): ...
- Estratto dell'esemplare di controllo T5 originale (numero di registrazione, data, ufficio e paese di emissione): ...
- Uittreksel van het oorspronkelijke controle-exemplaar T5 (registratienummer, datum, kantoor en land van afgifte): ...
- Extracto do exemplar de controlo T5 inicial (número de registo, data, estância e país de emissão): ...
- Ote alun perin annetusta T5-valvontakappaleesta (kirjaamisnumero, antamispäivämäärä, -toimipaikka ja -maa): ...
- Utdrag ur ursprungligt kontrollexemplar T5 (registreringsnummer, datum, utfärdande

kontor och land):

Box B 'Return to ...' of the T5 form shall contain the information shown in the corresponding box of the initial T5 form. One of the following phrases shall be entered in box J 'Controls on the use and/or destination' of the initial T5 form:

- ... (número) extractosexpedidos — copias adjuntas
- ... (antal) udstedte udskrifter — kopier vedføjet
- ... (Anzahl) Auszüge ausgestellt — Durchschriften liegen bei
- ... (αριθμός) εκδοθέντα αποσπάσματα — συνημμένα αντί- γραφα
- ... (number) extracts issued — copies attached
- ... (nombre) extraits délivrés— copies ci-jointes
- ... (numero) estratti rilasciati — copie allegate
- ... (aantal) uittreksels afgegeven — kopieën bijgevoegd
- ... (número) de extractosemitidos— cópiasjuntas
- Annettu ... (lukumäärä) otetta — jäljennökset liitteenä
- ... (antal) utdrag utfärdade — kopier bifogas.

The initial T5 control copy shall be returned without delay to the address shown in box B 'Return to ...' of the T5 form, accompanied by copies of the extracts issued. The office where the division takes place shall keep a copy of the initial T5 control copy and extracts. The originals of the extract T5 control copies shall accompany each part of the divided consignment to the corresponding offices of destination where the provisions referred to in Article 912c shall be applied.

3. In the case of further division pursuant to paragraph 1, paragraph 2 shall be applied mutatis mutandis.

Article 912f

1. The T5 control copy may be issued retrospectively on condition that:

- *the person concerned is not responsible for the failure to apply for or to issue that document when the goods were dispatched or he can furnish proof that the failure is not due to any deception or obvious negligence on his part,*
- *the person concerned furnishes proof that the T5 control copy relates to goods in respect of which all the formalities have been completed,*
- *the person concerned produces the documents required for the issue of the said T5 control copy,*
- *it is established to the satisfaction of the competent authorities that the retrospective issue of the T5 control copy cannot give rise to the securing of financial benefits which would not be warranted in the light of the procedure used, the customs status of the goods and their use and/or destination.*

Where the T5 control copy is issued retrospectively, the T5 form shall contain in red one of the following phrases:

- *Expedido a posteriori*
- *Udstedt efterfølgende*
- *nachträglich ausgestellt*
- *Εκδοθέν εκ των υστέρων*
- *Issued retrospectively*
- *Délivré a posteriori*
- *Rilasciato a posteriori*
- *achteraf afgegeven*

- *Emitido a posteriori*
- *Annettu jälkikäteen*
- *Utfärdat i efterhand*

and the person concerned shall enter on it the identity of the means of transport by which the goods were dispatched, the date of departure and, if appropriate, the date on which the goods were produced at the office of destination.

2. Duplicates of T5 control copies and extract T5 control copies may be issued by the issuing office at the request of the person concerned in the event of the loss of the originals. The duplicate shall bear the stamp of the office and the signature of the competent official and in red block letters, one of the following words:

- *DUPLICADO*
- *DUPLIKAT*
- *DUPLIKAT*
- *ANTIΓΡΑΦΟ*
- *DUPLICATE*
- *DUPLICATA*
- *DUPLICATO*
- *DUPLICAAT*
- *SEGUNDA VIA*
- *KAKSOISKAPPALE*
- *DUPLIKAT.*

3. T5 control copies issued retrospectively and duplicates may be annotated by the office of destination only where that office establishes that the goods covered by the document in question have been assigned to the use and/or destination provided for or prescribed by the Community rules.

Article 912g

1. The competent authorities of each Member State may, within the scope of their competence, authorise any person who fulfils the conditions laid down in paragraph 4 and who intends to consign goods in respect of which a T5 control copy must be made out (hereinafter referred as 'the authorised consignor' not to present at the office of departure either the goods concerned or the T5 control copy covering them.

2. With regard to the T5 control copy used by authorised consignors, the competent authorities may:

(a) prescribe the use of forms bearing a distinctive mark as a means of identifying the authorised consignors;

(b) stipulate that box A of the form, 'Office of departure':

- be stamped in advance with the stamp of the office of departure and signed by an official of that office; or
- be stamped by the authorised consignor with a special approved metal stamp conforming to the specimen in Annex 62, or
- be pre-printed with the imprint of the special stamp conforming to the specimen in Annex 62 if printed by a printer approved for that purpose.

This imprint may also be entered by an integrated electronic or automatic data-processing system; (c) authorise the authorised consignor not to sign forms stamped with the special approved stamp referred to in Annex 62 which are made out by an integrated electronic or automatic data-processing system. In this event, the space reserved for the signature of

the declarant in box 110 of the forms shall contain one of the following phrases:

- *Dispensa de la firma, artículo 912 octavo del Reglamento (CEE) no 2454/93*
- *Underskriftsdispensation, artikel 912g i förordning (EØF) nr. 2454/93*
- *Freistellung von der Unterschriftsleistung, Artikel 912g der Verordnung (EWG) Nr. 2454/93*
- *Απαλλαγή από την υποχρέωση υπογραφής, άρθρο 912 ζ του κανονισμού (ΕΟΚ) αριθ. 2454/93*
- *Signature waived — Article 912g of Regulation (EEC) No 2454/93*
- *Dispense de signature, article 912 octies du règlement (CEE) no 2454/93 1993R2454*
- *Dispensa dalla firma, articolo 912 octies del regolamento (CEE) n. 2454/93*
- *Vrijstelling van ondertekening — artikel 912 octies van Verordening (EEG) nr. 2454/93*
- *- Dispensada a assinatura, artigo 912o — G do Regulamento (CE) n. 2454/93*
- *Vapautettu allekirjoituksesta — asetuksen (ETY) N:o 2454/93 912g artikla*
- *Befriad från underskrift, artikel 912g i förordning (EEG) nr 2454/93.*

3. The authorised consignor shall complete the T5 control copy, entering the required particulars, including:

- in box A ('Office of departure') the date on which the goods were consigned and the number allocated to the declaration, and

- in box D ('Control by office of departure') of the T5 form one of the endorsements:

- *Procedimiento simplificado, artículo 912 octavo del Reglamento (CEE) no 2454/93*
- *Forenklet fremgangsmåde, artikel 912g i forordning (EØF) nr. 2454/93*
- *Vereinfachtes Verfahren, Artikel 912g der Verordnung (EWG) Nr. 2454/93*
- *Απλουστευμένη διαδικασία, άρθρο 912 ζ του κανονισμού (ΕΟΚ) αριθ. 2454/93*
- *Simplified procedure — Article 912g of Regulation (EEC) No 2454/93*
- *Procédure simplifiée, article 912 octies du règlement (CEE) no 2454/93*
- *Procedura semplificata, articolo 912 octies del regolamento (CEE) n. 2454/93*
- *Vereenvoudigde procedure, artikel 912 octies van Verordening (EEG) nr. 2454/93*
- *Procedimento simplificado, artigo 912o — G do Regulamento (CE) no 2454/93*
- *Yksinkertaistettu menettely — asetuksen (ETY) N:o 2454/93 912g artikla*
- *Förenklat förfarande, artikel 912g i förordning (EEG) nr 2454/93 and,*

where appropriate, particulars of the period within which the goods must be presented at the office of destination, the identification measures applied and references to the dispatch document. That copy, duly completed and, where appropriate, signed by the approved consignor, shall be deemed to have been issued by the office indicated by the stamp referred to in paragraph 2(b). After dispatch of the goods, the authorised consignor shall without delay send the office of departure a copy of the T5 control copy, together with any document on the basis of which the T5 control copy was drawn up.

4. The authorisation referred to in paragraph 1 shall be granted only to persons who frequently consign goods, whose records enable the competent authorities to check on their operations and who have not committed serious or repeated offences against the legislation in force. The authorisation shall specify in particular:

- *the office or offices competent to act as offices of departure for consignments,*
- *the period within which, and the procedure by which, the authorised consignor is to inform the office of departure of the consignment to be sent, in order that the office may carry out any controls, including any required by Community rules, before the departure of the goods,*
- *the period within which the goods must be presented at the office of destination; this*

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period shall be determined according to the conditions of transport or by Community rules,

- the measures to be taken to identify the goods, which may include the use of special seals approved by the competent authorities and affixed by the authorised consignor,*
- the means for providing guarantees where the issue of the T5 control copy is conditional thereon.*

5. The authorised consignor shall take all necessary measures to ensure the safekeeping of the special stamp or of the forms bearing the imprint of the stamp of the office of departure or the imprint of the special stamp. The authorised consignor shall bear all the consequences, in particular the financial consequences, of any errors, omissions or other faults in the T5 control copies which he draws up or in the performance of the procedures incumbent on him under the authorisation provided for in paragraph 1. In the event of the misuse by any person of T5 control copy forms stamped in advance with the stamp of the office of departure or with the special stamp, the authorised consignor shall be liable, without prejudice to any criminal proceedings, for the payment of duties and other charges which have not been paid and for the repayment of any financial benefits which have been wrongly obtained following such misuse, unless he can satisfy the competent authorities by whom he was authorised that he took all the measures required to ensure the safekeeping of the special stamp or of the forms bearing the imprint of the stamp of the office of departure or the imprint of the special stamp.”

CHAPTER VI ADMINISTRATIVE COOPERATION

Article 19

1. Member States, in cooperation with the Commission, shall take all appropriate measures to establish direct cooperation and exchange of information between competent authorities, in particular to eliminate the risk that possible disparities in the application of export controls to dual-use items may lead to a deflection of trade, which could create difficulties for one or more Member States.

2. Member States shall take all appropriate measures to establish direct cooperation and exchange of information between competent authorities with a view to enhance the efficiency of the Community export control regime. Such information may include:

- (a) details of exporters deprived, by national sanctions, of the right to use the national general export authorisations or Community General Export Authorisations;
- (b) data on sensitive end users, actors involved in suspicious procurement activities, and, where available, routes taken.

3. Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters³², and in particular the provisions on the confidentiality of information, shall apply mutatis mutandis, without prejudice to Article 22 of this Regulation.

Comment: The Council Regulation (EC) No 515/97 of 13 March 1997 can be found in the *Official Journal L 082, 22/03/1997 P. 0001 – 0016*.

4. A secure and encrypted system for the exchange of information among Member States and whenever appropriate the Commission may be set up by the Commission, in consultation with the Dual-Use Coordination Group set up under Article 22.

5. The provision of guidance to exporters and brokers will be the responsibility of the Member States where they are resident or established. The Commission and the Council may also make available guidance and/or recommendations for best practices for the subjects referred to in this Regulation.

6. The processing of personal data shall be in accordance with the rules laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the movement of such data³³ and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data³⁴.

³² OJ L 82, 22.3.1997, p. 1.

³³ OJ L 281, 23.11.1995, p. 31.

³⁴ OJ L 8, 12.1.2001, p. 1.

CHAPTER VII CONTROL MEASURES

Article 20

1. Exporters of dual-use items shall keep detailed **registers** or records of their **exports**, in accordance with the national law or practice in force in the respective Member States. Such registers or records shall include in particular commercial documents such as invoices, manifests and transport and other dispatch documents containing sufficient information to allow the following to be identified:

- (a) the description of the dual-use items;
- (b) the quantity of the dual-use items;
- (c) the name and address of the exporter and of the consignee;
- (d) where known, the end-use and end-user of the dual-use items.

2. In accordance with national law or practice in force in the respective Member States, brokers shall keep registers or records for brokering services which fall under the scope of Article 5 so as to be able to prove, on request, the description of the dual-use items that were the subject of brokering services, the period during which the items were the subject of such services and their destination, and the countries concerned by those brokering services.

3. The registers or records and the documents referred to in paragraph 1 shall be kept for at least three years from the end of the calendar year in which the export took place or the brokering services was provided. They shall be produced, on request, to the competent authorities of the Member State in which the exporter is established or the broker is established or resident.

Comments: Several Members States have laid down a longer period than the three years period imposed by Article 20(3) the registers or records and the documents shall be kept for:

- five years in Denmark, Finland, Poland, Slovenia, Spain and Sweden;
- seven years, in the Netherlands and Austria;
- ten years in Estonia.

Article 21

Article 21

In order to ensure that this Regulation is properly applied, each Member State shall take whatever measures are needed to permit its competent authorities:

- (a) to gather information on any order or transaction involving dual-use items;
- (b) to establish that the export control measures are being properly applied, which may include in particular the power to enter the premises of persons with an interest in an export transaction or brokers involved in the supply of brokering services under circumstances set out in Article 5.

CHAPTER VIII OTHER PROVISIONS

Article 22

1. An authorisation shall be required for intra-Community transfers of dual-use items listed in Annex IV.

Comment: This regulation uses the term “**transfer**” when it concerns intra-Community controls of dual-use items and the term “**export**” when it concerns a transaction which results in a Community item been exported outside the EU.

A transfer cannot be compared to an export given that the principle is that the item, listed in Annex IV, will circulate within the single market provided that the item is “authorised” to do such moves in the internal market. A transfer concerns the move of an item from a member State A to another Member State B. A transfer authorisation under this assumption is imposed for the item located in A to be authorised to move into B territory. The authorities allowed to grant the authorisation are defined by the geographical location of the item and not by the “exporter definition” (given that the transaction is not an export).

Due to the fact that the term “**transfer**” required by Article 22 could not be considered as an “**export**”, an authorisation should be required only for tangible transfers and not for intangible transfers (this Regulation only specifies intangible controls for exports under the definition of exporter).

Dual-use items listed in Annex IV are considered as more sensitive in terms of potential contribution to the elaboration of weapons of mass destruction. It concerns:

- items related to stealth technology;
- items related to the Community strategic control: high explosives, detonators and multipoint initiation systems, cryptography, towed acoustic hydrophone, etc.);
- items related to the MTCR technology.

It seems that several Member States have issued a general licence for transfers of dual-use items listed in Part 1 of Annex IV. The number of yearly transactions per Member State goes from zero to 340.

Items listed in Part 2 of Annex IV shall not be covered by a general authorisation.

Comment: If a national general transfer licence cannot be issued by Member States for transfers of dual-use items listed in Part 2 of Annex IV, a global transfer licence could be granted to the concerned industries. Nevertheless, some Member States rather preferred to apply a case-by-case policy and submit such transfers to individual authorisation.

Items concerned by Part 2 of Annexe IV are:

- Ricin and saxitoxin (Chemical Weapons Convention);
- Most items listed by the Nuclear Suppliers Group (certain materials, equipments and technologies).

2. A Member State may impose an authorisation requirement for the transfer of **other** dual-use items from its territory to another Member State in cases where at the time of transfer:

Article 22

- the operator knows that the final destination of the items concerned is **outside** the Community,
 - export of those items to that final destination is subject to an authorisation requirement pursuant to Article 3, 4 or 8 in the Member State from which the items are to be transferred, and such export directly from its territory is not authorised by a general authorisation or a global authorisation,

- no processing or working as defined in Article 24 of the Community Customs Code is to be performed on the items in the Member State to which they are to be transferred.

3. The transfer authorisation must be applied for in the Member State from which the dual-use items are to be transferred.

4. In cases where the subsequent export of the dual-use items has already been accepted, in the consultation procedures set out in Article 11, by the Member State from which the items are to be transferred, the transfer authorisation shall be issued to the operator immediately, unless the circumstances have substantially changed.

5. A Member State which adopts legislation imposing such a requirement shall inform the Commission and the other Member States of the measures it has taken. The Commission shall publish this information in the C series of the Official Journal of the European Union.

Comment: Few Member States have used the possibility to impose a national authorisation for transfer of items not listed in Annex IV (see table below). It should bear in mind that such authorisation applies only if the four conditions listed in Article 22(2)-(5) are met.

Table 11: National authorisation for transfer of items not listed in Annex IV imposed by Members States

Member State	National authorisation for transfer of items not listed in Annex IV
France	Special formalities apply to the transfer of cryptographic items listed in Category 5, Part 2 of Annex I of this Regulation (see Article 18 of the Order of 13 December 2001 on the control of exports to third countries and the transfer to Member States of the European Community of dual-use items and technology).
Bulgaria	Yes.
Germany	<p>"AWV" (Außenwirtschaftsverordnung), (Foreign Trade and Payment Regulation), adopted on 18 December 1986, (details of the law can be accessed via the internet at the following address: http://www.ausfuhrkontrolle.info/vorschriften/awv_auszug.htm) are relevant:</p> <ul style="list-style-type: none"> - § 7 Para. 2 Foreign Trade and Payments Regulation (AWV); - § 7 Para. 3 Foreign Trade and Payments Regulation (AWV); - § 7 Para. 4 Foreign Trade and Payments Regulation (AWV); - § 2 Para. 2 Foreign Trade and Payments Law (AWG). <p>§ 2 Para. 2 AWG is not a licensing provision but an enabling clause, allowing the Federal Ministry of Economics and Technology, in consent with other Federal Ministries mentioned there, to prohibit any activity in foreign trade, if certain interests of the Federal Republic of Germany are endangered.</p>
United Kingdom	<p>The UK has implemented that optional clause in its national legislation under Article 4(2)(a) and Article 7(2)(a) of the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (S.I. 2003/2764).</p> <p>See http://www.dti.gov.uk/export.control</p>

Article 22

6. The measures pursuant to paragraphs 1 and 2 shall not involve the application of internal frontier controls within the Community, but solely controls which are performed as part of the normal control procedures applied in a non-discriminatory fashion throughout the territory of the Community.

Comment: The possibility to control intra-Community transfers of certain dual-use items appears to be in contradiction with the essence of internal market principle. Therefore, if for CFSP issue it has been decided to establish such control, at first sight incompatible with Title II, Chapter 9 of Euratom Treaty (The Nuclear Common Market) as well as with Article 30 of the EC Treaty, aforesaid control has to be periodically reviewed by the Council in order to be abolished if the appropriateness thereof has disappeared. See also the Recital 12 of this Regulation.

7. Application of the measures pursuant to paragraphs 1 and 2 may in no case result in transfers from one Member State to another being subject to more restrictive conditions than those imposed for exports of the same items to third countries.

8. Documents and records of intra-Community transfers of dual-use items listed in Annex I shall be kept for at least three years from the end of the calendar year in which a transfer took place and shall be produced to the competent authorities of the Member State from which these items were transferred on request.

9. A Member State may, by national legislation, require that, for any intra-Community transfers from that Member State of items listed in Category 5, Part 2 of Annex I which are not listed in Annex IV, additional information concerning those items shall be provided to the competent authorities of that Member State.

Comment: This provision concerns certain dual-use items related to cryptography not listed in Annex IV and therefore not submitted to transfer licence. It gives the possibility for Members States to require additional information to the concerned industries which could not take the form or lead indirectly to a transfer authorisation.

10. The relevant commercial documents relating to intra-Community transfers of dual-use items listed in Annex I shall indicate clearly that those items are subject to controls if exported from the Community. Relevant commercial documents include, in particular, any sales contract, order confirmation, invoice or dispatch note.

Article 23

Article 23

1. A Dual-Use Coordination Group chaired by a representative of the Commission shall be set up. Each Member State shall appoint a representative to this Group.

It shall examine any question concerning the application of this Regulation which may be raised either by the chair or by a representative of a Member State.

2. The Chair of the Dual-Use Coordination Group or the Coordination Group shall, whenever it considers it to be necessary, consult exporters, brokers and other relevant stakeholders concerned by this Regulation.

Comment: The Coordination Group meets on regularly basis and at least once a year.

Article 24

Article 24

Each Member State shall take appropriate **measures to ensure proper enforcement** of all the provisions of this Regulation. In particular, it shall lay down the **penalties** applicable to infringements of the provisions of this Regulation or of those adopted for its implementation. Those penalties must be effective, proportionate and dissuasive.

Table 12: Penalties applicable to infringements of the Regulation imposed by Members States

Member State	Penalties imposed in application of Article 24
Austria	Fines and imprisonment of up to 5 years (Austrian Foreign Trade Act). The Austrian Federal Foreign Trade Law (Aussenhandelsgesetz) allows the forfeiture of goods, subsidiary the payment of money in the amount of the goods' value
Belgium	Imprisonment of up to 5 years (Loi générale sur les douanes du 11 septembre 1962).
Bulgaria	Administrative sanctions: Fines of up to 250,000 BGN and up to 500,000 BGN for second infringement (Articles 77-79 of the Law on export controls of arms and dual-use items and technologies). Criminal penalties: Imprisonment of up to 8 years, fine of up to 500,000 BGN, and forfeiting of property, or ban of activity (Articles 233 of Penal Code as amended).
Cyprus	Imprisonment of up to 3 years or fine of up to 1,500 CP or both, including liability for directors, employees or partners, confiscation of goods (Order 355/2002 Regulation of export of dual use goods and technology (26.7.2002)).
Czech Republic	Administrative sanctions: Fines of up to 20 million CZK or five times the value of the goods, whichever is the higher, and or forfeiture of the controlled goods (Articles 24 and 25 of Act No 21/1997 on Control of Exports and Imports of Goods and Technologies Subject to International Control Regimes, as amended by Act No 204/2002). Criminal penalties: Imprisonment of up to 8 years, or penalty, or forfeiting of property, or ban of activity (Articles 124a, 124b and 124c of Act No. 141/1961 of Criminal Code as amended).
Denmark	Criminal penalties: Fines or up to 2 years imprisonment (A.O. of 22.7.2003, Para 7). Imprisonment of up to 6 years in aggravated circumstances (Danish Penal Code Para 114e, see Executive Order No 779 of 16.9.2002).

Article 24

Estonia	<p>Imprisonment of up to 5 years (Penal Code).</p> <p>Storage fees and expenses relating to the forwarding and destruction of evidence and expenses relating to the storage, transfer and destruction of confiscated property are procedural expenses. Procedural expenses shall be compensated for by the obligated person pursuant to the extent determined by the body conducting proceedings.</p>
Finland	<p>Fines or imprisonment of up to 5 years (Act on Control of Exports of Dual-Use Goods, Statute No 562/1996 (amendments 891/2000, 884/2001 and 581/2003); Gov. decree on Control of Exports of Dual-Use Goods No 924/2000 (amendment 669/2003).</p>
France	<p>Confiscation of the items and fine between one and twice the value of the items (Code des Douanes).</p> <p>For criminal offences imprisonment from 10 to 30 months and fines from €150,000 to €450,000 (Code pénal, dispositions relatives aux intérêts fondamentaux de la nation).</p>
Germany	<p>For regulatory offences:</p> <p>Fines of up to €500,000 possible (company may be punished with an additional administrative fine amounting to €1 million) (Section 33 of Foreign Trade and Payments Act ("AWG") in conjunction with section 70 of Foreign Trade and Payments Regulation ("AWV")).</p> <p>For criminal offences:</p> <p>Prison sentence of up to 15 years, fines or administrative fines possible (Section 34 AWG and Section 33 AWV).</p> <p>Offender has to bear the court costs.</p> <p>Further export licence will not be granted because of unreliability (Sect. 3 para 2 AWG) due to criminal offence.</p>
Greece	<p>Imprisonment of up to 2 years and fines of up to the value of the goods to be exported (Ministerial Decisions 125695/E3/5695 and 126119/E3/611).</p>
Hungary	<p>Administrative sanctions</p> <p>Regarding "minor acts" (i.e. false data, actions contrary to national obligations, conditions not respected, actions contrary to ICP) are sanctioned with a fine, loss of privileges, licence withdrawal (Government Decree 50/2004 (III.23.) on the licensing of foreign trade in dual-use goods and technologies).</p> <p>Criminal penalties</p> <p>Prison sentences are between 2-8 years and in qualified cases up to 5-10 years (15 years for WMD related) (Criminal Code).</p>
Ireland	<p>Fines not exceeding €1,905 and/or imprisonment not exceeding 12 months (S.I. No 317 of 2000).</p>
Italy	<p>Fines from €10,000 to €250,000 or imprisonment from 2 to 6 years (Legislative Decree No 96 of 9/4/2003, Art. 16 (1-5)).</p> <p>The firm is obliged to pay the lease of the warehouse where the goods have been stored during the seizure.</p>

Article 24

Latvia	<p>Fines of up to 3,000 LVL for legal entities (Administrative Code).</p> <p>Fines of up to 10,000 LVL to legal entities, including confiscation of goods (Regulations on customs procedure).</p> <p>Imprisonment of up to 10 years and confiscation of property (Criminal law, Section 190).</p> <p>Imprisonment of up to five years or fines not exceeding 150 times minimum monthly wage, with or without deprivation of right to engage in entrepreneurial activity for a term of not less than 2 years and not exceeding 5 years (Criminal Law, Section 207).</p>
Lithuania	<p>Up to 20 years or life imprisonment (Penal Code).</p> <p>Fine of up to 10,000 Litass (Code of Administrative Offences, 8.1.1998).</p>
Luxembourg	Imprisonment of up to 1 year, confiscation of the items and fine equivalent to the value of the items (Loi générale sur les douanes et accises).
Malta	<p>Criminal penalties:</p> <p>Imprisonment of up to 5 years or a fine not exceeding 50,000 Maltese liras (approx. €120,000) (Export Control Regulations, 2001).</p>
Netherlands	Imprisonment of up to 6 years and/or fines of up to €450,000 (Import and Export Act - Decree on Import and Export of Strategic Goods).
Poland	<p>Imprisonment of up to 10 years and fines of up to 200,000 PLN (Law of 29.11.2000 on international trade in goods, technologies and services of strategic relevance for state security and maintenance of international peace and security - Journal of Laws No 119, Item 1250).</p> <p>Normally no other charges in addition to administrative or criminal penalties but Article 33(4) of the Law of 29 November 2000 says that <i>"If the person is convicted for the offence referred to in section 1-3 above, the court may issue a forfeiture order in respect of items of strategic importance or other items used or designated for use in order to commit an offence, or resulting either directly or indirectly from such offence, including cash and securities even if these items are not the offender's property"</i>.</p>
Portugal	Imprisonment of up to 2 years and fine of up to €30,000 (Decree-Law 436/91 of 8 November 1991 (Legislation currently being revised with views to harmonisation with community legislation).
Romania	<p>According to Article 302 of the Romanian Criminal Code – Breach of provisions regarding import and export operations (Title VIII – Offences against the regime established for certain economic activities) persons carrying out import, export and transit operations, without an authorisation are punished as follows:</p> <ul style="list-style-type: none"> - Natural persons – imprisonment: minimum 2 years, maximum 7 years; - Legal persons – fine: minimum 5,000 LEI, maximum 600,000 RON (art. 71, par. 2 of the Criminal Code). Complementary punishment might also refer to dissolving the company.
Slovenia	<p>Legal persons, individual sole traders or individuals who perform the activities independently, shall be fined from 1,200 to 125,000€.</p> <p>Responsible person of the legal person who commits an offence shall also be fined from 120 to 4,100€.</p> <p>Private individual shall be fined from EUR 120 to 1,200€.</p> <p>Punishable offences are dual-use export/transfer in the Community without authorisation, brokerage services/technical assistance without authorisation, failure to notify that dual-use items that might contribute to the WMD, prohibited transfer performance, absence of record keeping (Article 13 (Offences) of Slovenian Act regulating the control of exports of dual-use items).</p>

Article 24

Slovakia	Imprisonment of up to 8 years and/or fine of up to €240,000 or three times value of goods if the value exceeds €240,000 (Law No 26/2002 on Control of Imports and Exports and of Brokering Activities with Goods and Technologies Subject to International Control Regimes).
Spain	Imprisonment of up to 6 years and fines of up to four times the value of the goods exported (Organic Law No 3 of 30/4/1995 on contraband and Organic Law No 12 of 10/12/1995 repressing contraband).
Sweden	Criminal penalties: Fines, imprisonment of up to 6 years (Act on the control of dual-use items and technical assistance SFS 2000:1064). Sentenced in accordance with Chapter 23 of Penal Code for serious offences.
United Kingdom	Criminal penalties: Imprisonment of up to 10 years and/or unlimited fine (Penalties laid down in Customs and Excise Management Act, 1979 (CEMA)). Fee for restoring seized goods, based on a points system which takes account the value of the goods and the culpability of the exporter.

Table 13: Circumstances when infringements are regarded as criminal offences

Circumstances when infringements are regarded as criminal offences		
Member State	In any event	In intentional cases only
Austria	X	
Belgium		X
Bulgaria		X
Cyprus	X	
Czech Republic		
Denmark	X	
Estonia		X
Finland	X	
France	X	
Germany	X	
Greece	X	
Hungary		X
Ireland	X	
Italy	X	
Latvia		X
Lithuania		X
Luxembourg		
Malta	X	
Netherlands		X
Poland	X	
Portugal		
Romania	X	
Slovenia		X
Slovakia		X
Spain		X
Sweden		X
United Kingdom	X	

Article 5 of Joint Action

Article 5

Each Member State which has not yet included in its national legislation or practices control provisions which implement this Joint Action or determined the sanctions to be taken shall bring forward appropriate proposals to:

- (a) implement this Joint Action through laying down control provisions;
- (b) determine the sanctions to be taken at national level.

Table 14: Penalties applicable to infringements of the Joint Action imposed by Members States

Member State	Joint Action 2000/401/CFSP (control of technical assistance) - Article 5(b)
Austria	Fines and imprisonment of up to 5 years. Violators could be punished for intent and negligence.
Belgium	Partly covered by Arrêté royal du 8 mars 1993 réglementant l'importation, l'exportation et le transit d'armes, de munitions et de matériel devant servir spécialement [à un usage militaire ou de maintien de l'ordre] et de la technologie y afférente.
Bulgaria	Administrative sanctions: Fines of up to 250,000 BGN and up to 500,000 BGN for second infringement (Articles 77-79 of the Law on export controls of arms and dual-use items and technologies). Criminal penalties: Imprisonment of up to 8 years, fine of up to 500,000 BGN, and forfeiting of property, or ban of activity (Articles 233 of Penal Code as amended).
Denmark	Same maximum penalties as these expected in application of the Dual-Use Regulation. Violators could be punished for intent and negligence.
Finland	Fines or imprisonment of up to 4 years. (Act on Control of Exports of Dual-Use Goods, Statute No 562/1996 (amended by Law 891/2000, 884/2001 and 581/2003); Gov. decree on Control of Exports of Dual-Use Goods No 924/2000 (amendment 669/2003)). Violators could be punished for intent and negligence.
France	Fines of up to €18,000 (Loi No 68-678 modifiée par loi 80-358 et ordonnance 2000-916). Criminal offences : prison sentences from 10 to 30 years and fines from €150,000 to €450,000 (Code pénal, dispositions relatifs aux intérêts fondamentaux de la nation)

Article 5 of Joint Action

Germany	<p>For regulatory offences: Administrative fine of up to €500,000 (Section 33 AWG in conjunction with Section 70 AWV).</p> <p>For criminal offences: Prison sentence of up to 15 years (Art. 34 paras. 2 and 6 AWG). Violators could be punished for intent and negligence (51st Regulation to change the Foreign Trade and Payments Regulation (AWA) of September 30 2000).</p>
Greece	<p>Imprisonment of up to 2 years and fines of up to the value of the goods to be exported (Ministerial Decisions 125695/E3/5695 and 126119/E3/611 titled Control of Transfer of Dual-Use Items dated 25 October 2000). Violators could be punished for intent and negligence.</p>
Hungary	<p>Administrative sanctions Regarding “minor acts” (i.e. false data, actions contrary to national obligations, conditions not respected, actions contrary to ICP) are sanctioned with a fine, loss of privileges, licence withdrawal (Government Decree 50/2004 (III.23.) on the licensing of foreign trade in dual-use goods and technologies).</p> <p>Criminal penalties Prison sentences are between 2-8 years and in qualified cases up to 5-10 years (15 years for WMD related) (Criminal Code).</p>
Ireland	
Italy	Fines of up to €50,000 or imprisonment of up to 4 years (Legislative decree No 96 of 9/4/2003, Art. 16(6 and 7)).
Luxembourg	Imprisonment of up to 1 year, confiscation of the items and fine equivalent to the value of the items (Loi générale sur les douanes et accises).
Netherlands	Violators could be punished for intent.
Portugal	
Romania	Violation of the provisions of the Joint Action, unless the actions are considered crimes under the Penal Code, shall constitute an offence and shall be sanctioned by a fine from 1,000 RON up to 25,000 RON, as well as the suspension, revocation or withdraw of the granted license.
Spain	In case of intent a penalty of minimum 4 years imprisonment and administrative penalties such as fine of triple to quadruple, seizure of production and transport facilities. If done by negligence only administrative penalties will be applied (Real Decreto 1782/2004 of 30 July 2004).
Sweden	Fines, imprisonment of up to 6 years (Act on the control of dual-use items and technical assistance SFS 2000:1064). Sentenced in accordance with Chapter 23 of Penal Code for serious offences.
United Kingdom	Imprisonment of up to 10 years and or unlimited fine (Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (Statutory instrument 2003/2764)). Violators could be punished for intent.
Cyprus	

Article 5 of Joint Action

Czech Republic	<p>Administrative sanctions: Fines of up to 20 million CZK or five times the value of the goods, whichever is the higher, and/or forfeiture of the controlled goods (Articles 24 and 25 of Act No 21/1997 on Control of Exports and Imports of Goods and Technologies Subject to International Control Regimes, as amended by Act No 204/2002)</p> <p>Criminal sanctions: Imprisonment of up to 8 years, or penalty, or forfeiting of property, or ban of activity (Articles 124a, 124b and 124c of Act No. 141/1961 of Criminal Code as amended).</p> <p>Violators could be punished for intend and negligence (Act 594/2004 implementing the EC Regime for the control of exports of dual-use items and technology).</p>
Estonia	<p>Criminal sanctions: Imprisonment of up to 10 years (12 years for WMD related), fines and confiscation of goods. Violators could be punished for intend and negligence (Strategic Goods Act (RT2 I 2004, 2, 7) February 4, 2004).</p>
Hungary	<p>Imprisonment of up to 5 years (Penal Code). Violators could be punished for intend and negligence (Government Decree 50/2004 (III23) on the licensing of foreign trade in dual-use goods and technologies).</p>
Latvia	<p>Imprisonment of up to 5 years or fines not exceeding 150 times minimum monthly wage, with or without deprivation of right to engage in entrepreneurial activity for a term of not less than two years and not exceeding five years (Criminal Law, Section 207).</p>
Lithuania	
Malta	<p>Imprisonment of up to 5 years or a fine not exceeding 50,000 Maltese liras (approx. €120,000) (Dual-Use Items (Export Control) Regulation 2004 (Legal Notice 416 of 2004). Violators could be punished for intend and negligence.</p>
Poland	<p>Imprisonment of up to 10 years and fines up to 200,000 PLN (Law of 29/11/2000 on international trade in goods, technologies and services of strategic relevance for state security and maintenance of international peace and security - Journal of Laws No 119, Item 1250).</p>
Romania	<p>If it is considered contravention: fines from 1,000 LEI to 25,000 LEI, as well as the suspension, revocation or withdraw of the issued licence. If it is considered a criminal offence: - For natural persons – imprisonment: minimum 2 years, maximum 7 years; - For legal persons – fine: minimum 5,000 LEI, maximum 600,000 LEI. Complementary punishment might also refer to dissolving the company.</p>
Slovakia	<p>Imprisonment of up to 8 years and or fine of up to €240,000 or three times value of goods if the value exceeds €240,000 (Law No 26/2002 on Control of Imports and Exports and of Brokering Activities with Goods and Technologies Subject to International Control Regimes). Violators could be punished for intend and negligence.</p>
Slovenia	<p>Act regulating the control of exports dual-use items (ZNIBDR).</p>

Article 25

Article 25

Each Member State shall **inform** the **Commission** of the laws, regulations and administrative provisions adopted in implementation of this Regulation, including the measures referred to in Article 23. The Commission shall forward the information to the other Member States.

Every three years the Commission shall **review the implementation of this Regulation** and present a report to the European Parliament and the Council on its application, **which may include proposals for its amendment**. Member States shall provide to the Commission all appropriate information for the preparation of the report.

Comment: The Commission issued the report in September 2004 which is available on the DG Trade website: http://europa.eu.int/comm/trade/issues/sectoral/industry/dualuse/index_en.htm.

Articles 26, 27, 28 and 6, 7 of the Joint Action

Article 26

This Regulation does not affect:

- the application of Article 296 of the Treaty establishing the European Community,
- the application of the Treaty establishing the European Atomic Energy Community.

Comment: Article 296 of the EC Treaty concerns exceptions to the application of its provisions for the adoption by Member States of measures related to conventional arms trade and production.

Article 296 (ex-Article 223):

“ 1. The provisions of this Treaty shall not preclude the application of the following rules:

(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.”

Article 27

Regulation (EC) No 1334/2000 is hereby repealed with effect from 27 August 2009.

However, for export authorisation applications made before 27 August 2009, the relevant provisions of Regulation (EC) No 1334/2000 shall continue to apply.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex VI.

Article 28

This Regulation shall enter into force 90 days after the date 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 Brussels, 5 May 2009.

For the Council
The President
M. KALOUSEK

Article 6

This Joint Action shall enter into force on the day of its adoption.

Articles 26, 27, 28 and 6, 7 of the Joint Action

Article 7

This Joint Action shall be published in the Official Journal.

Done at Luxembourg, 22 June 2000.

For the Council

The President

J. SÓCRATE

Annex

Annex I List of Dual-Use Items

Annex II Community General Export Authorisation No EU001

Annex IIIa Model for Individual or Global Export Authorisation forms

Annex IIIb Model for brokering services authorisation forms

Annex IIIc Common Elements for Publication of National General Export Authorisations in National Official Journals

Annex IV List referred to in Article 22(1) of this Regulation

Annex V Repealed Regulation with its successive amendments

Annex VI Correlation Table

Comment: The list of items contains in the annexes are amended regularly. To obtain the accurate version please go to http://europa.eu.int/comm/trade/issues/sectoral/industry/dualuse/index_en.htm

Annex IIIa

ANNEX IIIa

(model for individual or global export authorisation forms)
(referred to in Article 14(1) of this Regulation)

When granting the export authorisations, Member States will strive to ensure the visibility of the nature of the authorisation (individual or global) on the form issued.

This is an export authorisation valid in all Member States of the European Union until its expiry date.

EUROPEAN COMMUNITY

EXPORT OF DUAL-USE ITEMS (Reg. (EC) No 428/2009)

1	1. Exporter No	2. Identification number	3. Expiry date (if applicable)
LICENCE		4. Contact point details	
	5. Consignee	6. Issuing authority	
	7. Agent/Representative (if different from exporter) No		
		8. Country of origin	Code ³⁵
		9 Country of consignment	Code ¹
	10. End user (if different from consignee)	11. Member State of current or future location of the items	Code ¹
12. Member State of intended entry into the customs export procedure		Code ¹	
1		13. Country of final destination	Code ¹

³⁵ See Regulation (EC) No 1172/95 (OJ L 118, 25.5.1995, p. 10).

Annex IIIa

14. Description of the items ³⁶	15. Harmonised System or Combined Nomenclature Code (if applicable with 8 digit; CAS number if available)	16. Control list no (for listed items)
	17. Currency and Value	18. Quantity of the items
19. End use	20. Contract date (if applicable)	21. Customs export procedure
22. Additional information required by national legislation (to be specified on the form)		
<div>Available for pre-printed information At discretion of Member States</div>		
<div>For completion by issuing authority</div> <div> <div>Signature</div> <div>Issuing Authority</div> <div>Date</div> </div> <div>Stamp</div>		

³⁶ If needed, this description may be given in one or more attachments to this form (1bis). In this case, indicate the exact number of attachments in this box. The description should be as precise as possible and integrate, where relevant, the CAS or other references for chemical items in particular.

Annex IIIa

EUROPEAN COMMUNITY

EXPORT OF DUAL-USE ITEMS (Reg. (EC) No 428/2009)

LICENCE	1. Exporter	2. Identification number		
	14. Description of the items	15. Commodity code (if applicable with 8 digit; CAS number if available)	16. Control list no (for listed items)	
		17. Currency and Value	18. Quantity of the items	
	14. Description of the items	15. Commodity code (if applicable with 8 digit; CAS number if available)	16. Control list no (for listed items)	
		17. Currency and Value	18. Quantity of the items	
	14. Description of the items	15. Commodity code	16. Control list no	
		17. Currency and value	18. Quantity of the items	
	14. Description of the items	15. Commodity code	16. Control list no	
		17. Currency and value	18. Quantity of the items	
	14. Description of the items	15. Commodity code	16. Control list no	
		17. Currency and value	18. Quantity of the items	

Annex IIIa

14. Description of the items	15. Commodity code	16. Control list no
	17. Currency and value	18. Quantity of the items
14. Description of the items	15. Commodity code	16. Control list no
	17. Currency and value	18. Quantity of the items
14. Description of the items	15. Commodity code	16. Control list no
	17. Currency and value	18. Quantity of the items
14. Description of the items	15. Commodity code	16. Control list no
	17. Currency and value	18. Quantity of the items
14. Description of the items	15. Commodity code	16. Control list no
	17. Currency and value	18. Quantity of the items

Annex IIIa

<i>Note:</i> In part 1 of column 24, write the quantity still available and in part 2 of column 24, write the quantity deducted on this occasion.			
23. Net quantity/value (Net mass/other unit with indication of unit)		26. Customs document (Type and number) or extract (Nr) and date of deduction	27. Member state, name and signature, stamp of deduction
24. In numbers	25. In words for quantity/value deducted		
1.			
2.			
1.			
2.			
1.			
2.			
1.			
2.			

Annex IIIa

1.			
2.			
1.			
2.			
1.			
2.			
1.			
2.			

Annex IIIb

ANNEX IIIb

(model for brokering services authorisation forms)
(referred to in Article 14(1) of this Regulation)

EUROPEAN COMMUNITY

Provision of BROKERING SERVICES (Reg. (EC) No 428/2009)

1	1. Broker/Applicant No	2. Identification number	3. Expiry date (if applicable)
LICENCE		4. Contact point details	
	5. Exporter in originating third country	6. Issuing authority	
	7. Consignee in third country of destination No		
		8. Member State in which the broker is resident or established	Code ³⁷
		9. Originating third country/Third country of location of the items subject of brokering services	Code ¹
	10. End user in third country of destination (if different from consignee)	11. Third country of destination	Code ¹
1		12. Third parties involved, e.g. agents (if applicable)	

³⁷ See Regulation (EC) No 1172/95 (OJ L 118, 25.5.1995, p. 10).

Annex IIIb

14. Description of the items.	15. Harmonised System or Combined Nomenclature Code (if applicable)	16. Control list no
	17. Currency and Value	18. Quantity of the items
19. End use		
20. Additional information required by national legislation (to be specified on the form)		
Available for pre-printed information At discretion of Member States		
For completion by issuing authority Signature Issuing Authority Date		Stamp

Annex IIIc

ANNEX IIIc

COMMON ELEMENTS FOR PUBLICATION OF
NATIONAL GENERAL EXPORT AUTHORISATIONS
IN NATIONAL OFFICIAL JOURNALS
(referred to in Article 9(4)(b) of this Regulation)

1. Title of general export authorisation

2. Authority issuing the authorisation

3. EC validity. The following text shall be used:

"This is a general export authorisation under the terms of Article 9(2) of Regulation (EC) No 428/2009. This authorisation, in accordance with Article 9(2) and (3) of that Regulation, is valid in all Member States of the European Union."

Validity: according to national practices.

4. Items concerned: the following introductory text shall be used:

"This export authorisation covers the following items"

5. Destinations concerned: the following introductory text shall be used:

"This export authorisation is valid for exports to the following destinations"

6. Conditions and requirements

Part II: The European Union Export Control Regime of items which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

Basic principles: The EU export control regime of torture items is organised according to two essential principles:

- An export and import prohibition for a limited number of items listed in Annex II.
- An export and import authorisation principle for the transfer outside and inside of the European Union of torture items listed in Annex III.

Transfers of torture items within the European Union are not submitted to authorisation and can, in principle, be transferred without restrictions between Member States.

Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

Official Journal L 200, 30/07/2005 P. 0001 - 0019

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) Pursuant to Article 6 of the Treaty on European Union, respect for human rights and fundamental freedoms constitutes one of the principles common to the Member States. In view of this, the Community resolved in 1995 to make respect for human rights and fundamental freedoms an essential element of its relations with third countries. It was decided to insert a clause to that end in any new trade, cooperation and association agreement of a general nature that it concludes with third countries.

(2) Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms all lay down an unconditional, comprehensive prohibition on torture and other cruel, inhuman or degrading treatment or punishment. Other provisions, in particular the United Nations Declaration Against Torture and the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, place an obligation on States to prevent torture.

(3) Article 2(2) of the Charter of Fundamental Rights of the European Union states that no one shall be condemned to the death penalty or executed. On 29 June 1998, the Council approved "Guidelines on EU policy towards third countries on the death penalty" and resolved that the European Union would work towards the universal abolition of the death penalty.

Complementary information: Guidelines on EU policy towards third countries on the death penalty.

Taking into account human rights policies of international organisations such as the General Assembly of the United Nations, the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE), EU Member States have decided to elaborate a common framework in order to progress in the universal abolition of capital punishment. It should be noted that all Member States implemented the abolition of death penalty in their national legislations. However, Latvia still allows the capital punishment for murders with aggravating circumstances if committed during wartime. It shall be noted that Latvia has signed Protocol No.

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13 to the Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights] concerning the abolition of the death penalty in all circumstances, adopted by the Council of Europe in 2002; nevertheless this Protocol has not yet been ratified.

29 June 1998 marks the adoption by the Council of EU Guidelines on the Death Penalty³⁸ which principal aims are following:

- to aspire to the abolition of the death penalty, where necessary by establishing a moratorium for the purpose of abolition thereof;
- where capital punishment remains legal, to call for the reduction of use of death penalty as well as to force the realisation thereof according to minimum standards with maximum transparency.

According to these Guidelines Member States can act through following mechanisms:

- **General demarches** consisting in constant dialogue and consultation with third countries on the death penalty issue, taking into account judicial system of the country, its international obligations as well the transparency in its use of death penalty;
- **Individual cases**, consisting in specific demarches where the EU becomes aware of the death penalty cases violating the EU minimum standards established by these Guidelines;
- **Human rights reporting**, consisting in analysis of the application and use of capital punishment as well as the effectiveness of EU action therein³⁹;
- **Other initiatives**, consisting in encouragement of third countries to accede to the international agreements such as the Second Optional Protocol to the International Covenant on Civil and Political Rights⁴⁰ and other comparable regional instruments aiming at abolishing of the death penalty;
- **Action in multilateral fora**, consisting in promotion of multilateral and bilateral conventions with third countries introducing a moratorium of the use of death penalty aiming in the long run at abolition thereof.

In addition these Guidelines elaborate and impose the **set of minimum standards** to the States maintaining the death penalty:

“i) Capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences. The death penalty should not be imposed for non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults nor as a mandatory sentence.

ii) Capital punishment may be imposed only for a crime for which the death penalty was prescribed at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

³⁸ EU Guidelines on the Death Penalty are available on the following website : <http://www.consilium.europa.eu/uedocs/cmsUpload/10015.en08.pdf>

³⁹ EU Annual Human Rights Reports are available on the following website: <http://www.consilium.europa.eu/showPage.aspx?id=970&lang=en>.

⁴⁰ For further information see <http://www2.ohchr.org/english/law/ccpr.htm>.

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iii) *Capital punishment may not be imposed on:*

- *Persons below 18 years of age at the time of the commission of their crime;*
- *Pregnant women or new mothers;*
- *Persons who have become insane.*

iv) *Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for alternative explanation of the facts.*

v) *Capital punishment must only be carried out pursuant to a final judgement rendered by an independent and impartial competent court after legal proceedings, including those before special tribunals or jurisdictions, which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, and where appropriate, the right to contact a consular representative.*

vi) *Anyone sentenced to death shall have an effective right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals become mandatory.*

vii) *Where applicable, anyone sentenced to death shall have the right to submit an Individual complaint under International procedures; the death sentence will not be carried out while the complaint remains under consideration under those procedures; the death penalty will not be carried out as long as any related legal or formal procedure, at the international or at the national level, is pending.*

viii) *Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases of capital punishment.*

ix) *Capital punishment may not be carried out in contravention of a state's international commitments.*

x) *The length of time spent after having been sentenced to death may also be a factor.*

xi) *Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering. It may not be carried out in public or in any other degrading manner.*

xii) *The death penalty should not be imposed as an act of political revenge in contravention of the minimum standards, e.g., against coup plotters."*

(4) Article 4 of the said Charter states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. On 9 April 2001, the Council approved "Guidelines to the EU policy toward third countries, on torture and other cruel, inhuman or degrading treatment or punishment". These guidelines refer to both the adoption of the EU Code of Conduct on Arms Exports in 1998 and the ongoing work to introduce EU-wide controls on the exports of paramilitary equipment as examples of measures to work effectively towards the prevention of

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torture and other cruel, inhuman or degrading treatment or punishment within the Common Foreign and Security Policy. These guidelines also provide for third countries to be urged to prevent the use and production of, and trade in, equipment which is designed to inflict torture or other cruel, inhuman or degrading treatment or punishment and prevent the abuse of any other equipment to these ends. They also make the point that the prohibition of cruel, inhuman or degrading punishment imposes clear limits on the use of the death penalty. Therefore and in line with these texts, capital punishment is not to be considered a lawful penalty under any circumstances.

(5) In its Resolution on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 25 April 2001 and supported by the EU Member States, the United Nations Commission on Human Rights called upon United Nations Members to take appropriate steps, including legislative measures, to prevent and prohibit, inter alia, the export of equipment which is specifically designed to inflict torture or other cruel, inhuman or degrading treatment or punishment. This point was confirmed by Resolutions adopted on 16 April 2002, 23 April 2003, 19 April 2004 and 19 April 2005.

(6) On 3 October 2001, the European Parliament adopted a Resolution on the Council's second Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, urging the Commission to act swiftly to bring forward an appropriate Community instrument banning the promotion, trade and export of police and security equipment the use of which is inherently cruel, inhuman or degrading, and to ensure that that Community instrument would suspend the transfer of police and security equipment the medical effects of which are not fully known, and of such equipment where its use in practice has revealed a substantial risk of abuse or unwarranted injury.

(7) It is therefore appropriate to lay down Community rules on trade with third countries in goods which could be used for the purpose of capital punishment and in goods which could be used for the purpose of torture and other cruel, inhuman or degrading treatment or punishment. These rules are instrumental in promoting respect for human life and for fundamental human rights and thus serve the purpose of protecting public morals. Such rules should ensure that Community economic operators do not derive any benefits from trade which either promotes or otherwise facilitates the implementation of policies on capital punishment or on torture and other cruel, inhuman or degrading treatment or punishment, which are not compatible with the relevant EU Guidelines, the Charter of Fundamental Rights of the European Union and international conventions and treaties.

(8) For the purpose of this Regulation, it is considered appropriate to apply the definitions of torture and other cruel, inhuman or degrading treatment or punishment laid down in the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and in Resolution 3452 of the General Assembly of the United Nations. These definitions should be interpreted taking into account the case law on the interpretation of the corresponding terms in the European Convention on Human Rights and in relevant texts adopted by the EU or its Member States.

Comment: The term “ torture ” was defined by two international instruments.

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On one hand, by the General Assembly Resolution 3452 comprising the Declaration on the Protection of All Persons from Being Subjected of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴¹.

Article 1 of this Declaration gives a following definition of torture:

“For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidation him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners”⁴².

Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment”.

On the other hand, by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴³. Article 1 thereof is worded as follows:

“For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Even though abovementioned formulations are rather similar, the one proposed by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was implemented in Article 2(a) of this Regulation.

(9) It is considered necessary to prohibit exports and imports of equipment which has no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment.

(10) It is also necessary to impose controls on exports of certain goods which could be used not only for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, but also for legitimate purposes. These controls should apply to goods that are primarily used for law enforcement purposes and, unless such controls prove disproportionate, to any other

⁴¹ This Declaration can be consulted at [http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/3452\(XXX\)&Lang=E&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/3452(XXX)&Lang=E&Area=RESOLUTION).

⁴² Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. This integral text can be found at http://www.unhchr.ch/html/menu3/b/h_comp34.htm.

⁴³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1). This integral text can be found at http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

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equipment or product that could be abused for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, taking into account its design and technical features.

(11) As regards law enforcement equipment, it should be noted that Article 3 of the Code of Conduct for Law Enforcement Officials provides that law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, provide that, in carrying out their duty, law enforcement officials should, as far as possible, apply non-violent means before resorting to the use of force and firearms.

(12) In view of this, the Basic Principles advocate the development of non-lethal incapacitating weapons for use in appropriate situations, while admitting that the use of such weapons should be carefully controlled. In this context, certain equipment traditionally used by the police for self-defence and riot-control purposes has been modified in such a way that it can be used to apply electric shocks and chemical substances to incapacitate persons. There are indications that, in several countries, such weapons are abused for the purpose of torture and other cruel, inhuman or degrading treatment or punishment.

(13) The Basic Principles stress that law enforcement officials should be equipped with equipment for self-defence. Therefore, this Regulation should not apply to trade in traditional equipment for self-defence, such as shields.

(14) This Regulation should also apply to trade in some specific chemical substances used to incapacitate persons.

(15) As regards leg-irons, gang-chains and shackles and cuffs, it should be noted that Article 33 of the United Nations Standard Minimum Rules for the Treatment of Prisoners provides that instruments of restraint shall never be applied as a punishment. Furthermore, chains and irons are not to be used as restraints. It should also be noted that the United Nations Standard Minimum Rules for the Treatment of Prisoners provide that other instruments of restraint shall not be used except as a precaution against escape during a transfer, on medical grounds as directed by a medical officer, or, if other methods of control fail, in order to prevent a prisoner from injuring himself or others, or from damaging property.

(16) Taking into account the fact that some Member States have already prohibited exports and imports of such goods, it is appropriate to grant Member States the right to prohibit exports and imports of leg-irons, gang-chains and portable electric shock devices other than electric shock belts. Member States should also be empowered to apply export controls on handcuffs having an overall dimension, including chain, exceeding 240 mm when locked, if they so wish.

(17) This Regulation shall be construed as not affecting the existing rules on export of tear gases and riot control agents, of firearms, of chemical weapons and of toxic chemicals.

Comment: As concerns chemical weapons and toxic chemicals, those items can be considered as dual-use goods, thereby exports thereof are controlled by the Dual-Use Regulation No 428/2009 (see Part I of the present document); or as military items, therefore exports thereof are

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controlled by the Council Common Position 2008/944/CFSP and Council Common Position 2003/468/CFSP (see Part III of this document).

It shall be noted that the Chemical Weapons Convention (CWC) which entered into force on 29 April 1997 gives a following definition of “chemical weapons” and “toxic chemicals”⁴⁴:

“*Chemical Weapons*” means the following, together or separately:

- (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;
- (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;
- (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

“*Toxic Chemical*” means:

Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(For the purpose of implementing this Convention, toxic chemicals which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

Tear gases and riot control agents, which inter alia are not assimilated as chemical weapons nor as toxic chemicals, are considered as dual-use goods, therefore exports thereof are controlled by the Dual-Use Regulation No 428/2009 (see Part I of the present document). Indeed, Annex I of Dual-Use Regulation defines “**riot control agent**” as “*substances which, under the expected conditions of use for riot control purposes, produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure*”. It should be noted that Dual-Use Regulation considers tear gases as a subset of riot control agents.

Dual-Use Regulation rates riot control agents among Category 1 “Special materials and related equipment” of Annex I which contains a list of dual-use items. Therefore according to Article 3 of Dual-Use Regulation an authorisation shall be required for the export of the dual-use items listed in Annex I, in particular of the riot control agents.

As concerns firearms, as those items are being part of SALW goods, exports thereof are controlled by the Council Common Position 2008/944/CFSP and Council Common Position 2003/468/CFSP (see Part III of this document). In addition, the possession and acquisition of aforementioned goods by individuals are governed by the Directive 2008/51/EC (see Part IV of this document).

(18) It is appropriate to provide for specific exemptions from the export controls in order not to impede the functioning of the police forces of the Member States and the execution of peace

⁴⁴ The full text of the CWC is available on the following website: <http://www.opcw.org/chemical-weapons-convention/>.

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keeping or crisis management operations and, subject to review at a later stage, in order to allow transit of foreign goods.

(19) The Guidelines to the EU Policy toward third countries on torture and other cruel, inhuman or degrading treatment or punishment provide, inter alia, that the Heads of Mission in third countries will include in their periodic reports an analysis of the occurrence of torture and other cruel, inhuman or degrading treatment or punishment in the State of their accreditation, and the measures taken to combat it. It is appropriate for the competent authorities to take these and similar reports made by relevant international and civil society organisations into account when deciding on requests for authorisations. Such reports should also describe any equipment used in third countries for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment.

Complementary information: Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The principal purpose of the Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴⁵ is to develop an efficient tool of communication with third countries aiming at strengthening of common efforts towards prevention and eradication of all forms of torture and ill-treatment within the EU and all over the world.

It should be noted that EU human rights policy is guided by following international instruments:

- Universal Declaration of Human Rights;
- UN International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols;
- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- UN Convention on the Rights of the Child (CRC);
- UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocol no.6 as well as the relevant case-law of the European Court on Human Rights;
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT);
- Statute of the International Criminal Court;
- Statute of the International Tribunal for the Former Yugoslavia;
- Statute of the International Tribunal for Rwanda;
- Geneva Conventions on the Protection of Victims of War and its Protocols as well as customary rules of humanitarian law applicable in armed conflict.

In addition, Annex I of these Guidelines contains other relevant norms and standards and principles which may be invoked within the bounds of EU policies.

⁴⁵ The Guidelines are accessible at the following website address:
<http://www.consilium.europa.eu/uedocs/cmsUpload/TortureGuidelines.pdf>

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These Guidelines identify a set of efficient means of work towards the prevention of torture and ill-treatment within the CFSP:

- **Monitoring and reporting** consisting in periodic reports of EU Heads of Mission containing an analysis of occurrence of torture and ill-treatment and the measures taken to combat it as well the evaluation of the EU actions;
- **Assessment** consisting in the identification of the situations where EU actions are necessary by the Council Working Group on Human Rights (COHOM) and the relevant Geographic Working Groups.
- **EU actions in relations with third countries** consisting in promotion among third countries of adoption of the effective measures against torture and ill-treatment. Abovementioned measures include adhesion to and implementation of relevant international norms and standards. In order to achieve those objectives the EU can act through a political dialogue, various demarches and public statements as well as bilateral and multilateral co-operation. EU might induce third countries to take following measures: prohibit and condemn torture and ill-treatment, adhere to international norms and procedures, adopt and implement safeguards and procedures relating to places of detention, establish domestic legal guarantees, combat impunity, concern about groups requiring special protection, allow domestic procedures for complaints and reports of torture and ill-treatment, provide reparation and rehabilitation for victims, allow domestic visiting mechanisms, establish national institutions, provide effective training, support the work of medical professionals, conduct autopsies.
- **Other initiatives** consisting, inter alia, in continuation of rising of the issue of torture and ill-treatment in international multilateral organisations; in support of relevant international and regional mechanisms; in supporting of the UN Voluntary Fund for the Victims of Torture; on offering co-operation on the prevention of torture and ill-treatment; in supporting of public education and awareness-raising campaigns against torture and ill-treatment; in supporting of relevant national and international NGOs; in funding projects aimed at improvement of training of personnel and conditions in places of detention.

(20) In order to contribute to the abolition of the death penalty in third countries and to the prevention of torture and other cruel, inhuman or degrading treatment or punishment, it is considered necessary to prohibit the supply to third countries of technical assistance related to goods which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment.

(21) The measures of this Regulation are intended to prevent both capital punishment and torture and other cruel, inhuman or degrading treatment or punishment in third countries. They comprise restrictions on trade with third countries in goods that could be used for the purpose of capital punishment or for the purpose of torture and other cruel, degrading or inhuman treatment or punishment. It is not considered necessary to establish similar controls on transactions within the Community as, in the Member States, capital punishment does not exist and Member States will have adopted appropriate measures to outlaw and prevent torture and other cruel, inhuman or degrading treatment or punishment.

(22) The aforementioned Guidelines state that, in order to meet the objective of taking effective measures against torture and other cruel, inhuman or degrading treatment or punishment,

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measures should be taken to prevent the use, production and trade of equipment which is designed to inflict torture or other cruel, inhuman or degrading treatment or punishment. It is up to the Member States to impose and enforce the necessary restrictions on the use and production of such equipment.

(23) In order to take into account new data and technological developments, the lists of goods covered by this Regulation should be kept under review and provision should be made for a specific procedure to amend these lists.

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(24) The Commission and the Member States should inform each other of the measures taken under this Regulation and of other relevant information at their disposal in connection with this Regulation.

(25) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

(26) Member States should lay down rules on penalties applicable to infringements of the provisions of this Regulation and ensure that they are implemented. Those penalties should be effective, proportionate and dissuasive.

(27) Nothing in this Regulation constrains any powers under and pursuant to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code and its implementing provisions, as laid down in Commission Regulation (EEC) No 2454/93.

(28) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union,

HAS ADOPTED THIS REGULATION:

CHAPTER I: Subject matter, scope and definitions

Article 1 Subject matter and scope

1. This Regulation lays down Community rules governing trade with third countries in goods that could be used for the purpose of capital punishment or for the purpose of torture and other cruel, degrading or inhuman treatment or punishment, and in related technical assistance.

Comment: The scope of this Regulation covers transfers of goods and technology related to torture outside or into the European Union. Transfers between Member States are not submitted to authorisation.

2. This Regulation does not apply to the supply of related technical assistance if that supply involves cross-border movement of natural persons.

Comment: Contrary to the Regulation setting up a Community regime for the control of the export of dual-use items (see Part I of this document), this Regulation has not been completed by a Council Joint Action dedicated specifically to the export control of technical assistance. Nevertheless, the supplies of technical assistance through tangible (i.e. instruction manual) or intangible means (i.e. instructions send by email or fax) are covered by this Regulation. Only transmission by oral forms through the cross-border movement of natural persons is not covered by this Regulation (i.e. a technician send outside of the EU without carrying any controlled information in a tangible forms).

Article 2 Definitions

For the purposes of this Regulation:

(a) "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from that person or from a third person information or a confession, punishing that person for an act that either that person or a third person has committed or is suspected of having committed, or intimidating or coercing that person or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted either by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. It does not, however, include pain or suffering arising only from, inherent in or incidental to, lawful penalties;

(b) "other cruel, inhuman or degrading treatment or punishment" means any act by which significant pain or suffering, whether physical or mental, is inflicted on a person, when such pain or suffering is inflicted either by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. It does not, however, include pain or suffering arising only from, inherent in or incidental to, lawful penalties;

(c) "law enforcement authority" means any authority in a third country responsible for preventing, detecting, investigating, combating and punishing criminal offences, including, but not limited to, the police, any prosecutor, any judicial authority, any public or private prison authority and, where appropriate, any of the state security forces and military authorities;

(d) "export" means any departure of goods from the customs territory of the Community, including the departure of goods that requires a customs declaration and the departure of goods after their storage in a free zone of control type I or free warehouse within the meaning of Regulation (EEC) No 2913/92;

(e) "import" means any entry of goods into the customs territory of the Community, including temporary storage, the placing in a free zone or free warehouse, the placing under a suspensive procedure and the release for free circulation within the meaning of Regulation (EEC) No 2913/92;

(f) "technical assistance" means any technical support related to repairs, development, manufacture, testing, maintenance, assembly or any other technical service, and may take forms such as instruction, advice, training, transmission of working knowledge or skills or consulting services. Technical assistance includes verbal forms of assistance and assistance provided by electronic means;

(g) "museum" means a non-profit making, permanent institution in the service of society and of its development, and open to the public, which acquires, conserves, researches, communicates and exhibits, for purposes of study, education and enjoyment, material evidence of people and their environment;

Article 2

(h) "competent authority" means an authority of one of the Member States, as listed in Annex I, which in accordance with Article 8(1) is entitled to make a decision on an application for an authorisation;

(i) "applicant" means

1. in the case of exports referred to in Article 3 or 5, any natural or legal person that holds a contract with a consignee in a country to which the goods will be exported and that has the power for determining the sending of goods controlled by this Regulation out of the customs territory of the Community at the time when the customs declaration is accepted. If no export contract has been concluded or if the holder of the contract does not act on its own behalf, the power for determining the sending of the item out of the customs territory of the Community shall be decisive;
2. where, in the case of such exports, the benefit of a right to dispose of the goods belongs to a person established outside the Community pursuant to the contract on which the exports are based, the contracting party established in the Community;

Comment: It should be noted that paragraphs 1 and 2 of Article 2 (i) of this Regulation are cumulative. In addition, the definition of term “**applicant**” of this Regulation is rather similar to the one of “**exporter**” used by Dual-Use Regulation (see Part I of this document).

3. in the case of supplies of technical assistance referred to in Article 3, the natural or legal person that will supply the service; and
4. in the case of imports and supplies of technical assistance referred to in Article 4, the museum that will display the goods.

CHAPTER II Goods which have no practical use other than for the purposes of capital punishment, torture and other cruel, inhuman or degrading treatment or punishment

Type of Control	Content	Reference
Export Prohibition	<p>Goods listed in Annex II which have no practical use other than for the purpose of capital punishment, torture and other cruel, inhuman or degrading treatment or punishment;</p> <p>Supply of technical assistance related to goods listed in Annex II;</p> <p>Derogation if demonstrated that goods will be used for the exclusive purpose of public display in a museum in view of their historic significance.</p>	Regulation Article 3
Import Prohibition	<p>Goods listed in Annex II which have no practical use other than for the purpose of capital punishment, torture and other cruel, inhuman or degrading treatment or punishment;</p> <p>Supply of technical assistance related to goods listed in Annex II;</p> <p>Derogation if demonstrated that the goods will be used for the exclusive purpose of public display in a museum in view of their historic significance.</p>	Regulation Article 4
Export Authorisation Requirement	<p>Goods listed in Annex III that could be used for the purpose of torture and other cruel, inhuman or degrading treatment or punishment;</p> <p>No authorisation required for goods exclusively passing Community customs territory;</p> <p>Derogation for territories listed in Annex IV, provided that the goods are used by an authority in charge of law enforcement;</p> <p>Derogation for third countries, provided that the goods are used by military/civil personnel of a Member State involved in:</p> <ul style="list-style-type: none"> - EU or UN peace keeping operation in the third country concerned, - EU or UN crisis management operation in the third country concerned, - Operation based on agreements between Member States and third countries in the field of defence. 	Regulation Article 5

Article 3 Export prohibition

1. Any export of goods which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, listed in Annex II, shall be prohibited, irrespective of the origin of such equipment.

The supply of technical assistance related to goods listed in Annex II, whether for consideration or not, from the customs territory of the Community, to any person, entity or body in a third country shall be prohibited.

2. By way of derogation from paragraph 1, the competent authority may authorise an export of goods listed in Annex II, and the supply of related technical assistance, if it is demonstrated that, in the country to which the goods will be exported, such goods will be used for the exclusive purpose of public display in a museum in view of their historic significance.

Article 4 Import prohibition

1. Any import of goods listed in Annex II shall be prohibited, irrespective of the origin of such goods.

The acceptance by a person, entity or body in the customs territory of the Community of technical assistance related to goods listed in Annex II, supplied from a third country, whether for consideration or not, by any person, entity or body shall be prohibited.

2. By way of derogation from paragraph 1, the competent authority may authorise an import of goods listed in Annex II, and the supply of related technical assistance, if it is demonstrated that, in the Member State of destination, such goods will be used for the exclusive purpose of public display in a museum in view of its historic significance.

Comment: As defined by Article 2 (d) and (e) the export and import prohibition concerns only transfers outside and into the European Union. Transfers between Member States are not submitted to such prohibition.

CHAPTER III Goods that could be used for the purpose of torture or other cruel, inhuman or degrading treatment or punishment

Article 5 Export authorisation requirement

1. For any export of goods that could be used for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, listed in Annex III, an authorisation shall be required, irrespective of the origin of such goods. However no authorisation shall be required for goods which only pass through the customs territory of the Community, namely those which are not assigned a customs-approved treatment or use other than the external transit procedure within Article 91 of Regulation (EEC) No 2913/92, including storage of non-Community goods in a free zone of control type I or a free warehouse.

2. Paragraph 1 shall not apply to exports to those territories of Member States which are both listed in Annex IV and are not part of the customs territory of the Community, provided that the goods are used by an authority in charge of law enforcement in both the country or territory of destination and the metropolitan part of the Member State to which that territory belongs. Customs or other relevant authorities shall have the right to verify whether this condition is met and may decide that, pending such verification, the export shall not take place.

Comment: Territories listed in Annex IV are following:

- Denmark: Greenland;
- France: New Caledonia and dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands, Mayotte, St Pierre and Miquelon;
- Germany: Büsingen.

3. Paragraph 1 shall not apply to exports to third countries, provided that the goods are used by military or civil personnel of a Member State, if such personnel is taking part in an EU or UN peace keeping or crisis management operation in the third country concerned or in an operation based on agreements between Member States and third countries in the field of defence. Customs and other relevant authorities shall have the right to verify whether this condition is met. Pending such verification, the export shall not take place.

Article 6 Criteria for granting export authorisations

1. Decisions on applications for authorisation for the export of goods listed in Annex III shall be taken by the competent authority on a case by case basis, taking into account all relevant considerations, including in particular, whether an application for authorisation of an essentially identical export has been dismissed by another Member State in the preceding three years.

Comment: the term “essentially identical” was defined by Article 13(5) of the Dual-Use Council Regulation (EC) No 1334/2000 as amended by the Council Regulation (EC) No 428/2009 (see p. 73 of Part I of this document).

Therefore essentially identical transaction shall mean a bargain of an item with essentially identical parameters or technical characteristics to the same end user or consignee.

Article 5 and 6

2. The competent authority shall not grant any authorisation when there are reasonable grounds to believe that goods listed in Annex III might be used for torture or other cruel, inhuman or degrading treatment or punishment, including judicial corporal punishment, by a law enforcement authority or any natural or legal person in a third country.

The competent authority shall take into account:

- available international court judgements,
- findings of the competent bodies of the UN, the Council of Europe and the EU, and reports of the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment and of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment.

Other relevant information, including available national court judgements, reports or other information prepared by civil society organisations and information on restrictions on exports of goods listed in Annexes II and III applied by the country of destination, may be taken into account.

Complementary information:

Competent UN Bodies involved in elaboration of human rights policies can be classified according to the document constituting a legal base of creation thereof. These bodies benefit from secretariat support of the Human Rights Council and Treaties Division of the Office of the High Commissioner for Human Rights.

Charter-based bodies created under the provisions of UN Charter include:

- [Human Rights Council](#);
- [Universal Periodic Review](#);
- [Commission on Human Rights](#) (replaced by the Human Rights Council);
- [Special Procedures of the Human Rights Council](#).

Treaty-based bodies created under the international human rights treaties are represented by:

- [Human Rights Committee](#) (CCPR);
- [Committee on Economic, Social and Cultural Rights](#) (CESCR);
- [Committee on the Elimination of Racial Discrimination](#) (CERD);
- [Committee on the Elimination of Discrimination Against Women](#) (CEDAW);
- [Committee Against Torture](#) (CAT) & [Optional Protocol to the Convention against Torture](#) (OPCAT) - Subcommittee on Prevention of Torture ;
- [Committee on the Rights of the Child](#) (CRC);
- [Committee on Migrant Workers](#) (CMW);
- [Committee on the Rights of Persons with Disabilities](#) (CRPD).

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (CPT) established by Article 1 of European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁴⁶ and constitutes one of the main

⁴⁶ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is available at following website: <http://www.cpt.coe.int/en/documents/ecpt.htm>.

Article 5 and 6

instruments of the Council of Europe aiming at guarantee of human rights and at prevention of violations.

The members of CPT are represented by the experts in various fields, they proceed through visits of places of detention to which they have in principle an unlimited access. One of the main achievements of CPT activity is the elaboration of set of standards relating to the treatment of persons deprived of their liberty. In addition, every year CPT publishes an Annual General Report on its activities, those reports are available at:

<http://www.cpt.coe.int/en/docsannual.htm>.

UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment is an expert with 3 years mandate appointed by the United Nations Commission on Human Rights. The mandate includes following activities:

- transmitting appeals to States concerning persons suspected of being at risk of torture and communications on past cases of torture;
- undertaking country visits; and
- submitting annual reports on activities to the Human Rights Council and the General Assembly. These reports are available at: http://ap.ohchr.org/documents/dpage_e.aspx?m=103.

Comment: Some Member States have extended the application of the criteria established by Council Common Position 2008/944/CFSP of 8 December 2008⁴⁷ defining common rules governing control of exports of military technology and equipment to the trade of goods listed in Annex III.

⁴⁷ OJ L 335, 13.12.2008, p. 99.

Article 7, 8 and 9

Article 7 National measures

1. Notwithstanding the provisions in Articles 5 and 6, a Member State may adopt or maintain a prohibition on the export and import of leg irons, gang chains and portable electric shock devices.

Comment: several Member States have decided to implement this disposition their national legislations and prohibit fully or partly export and import of leg-irons, gang-chains and portable electric shock devices other than electric shock belts.

Indeed since 1996 Latvian Control Committee of Strategic Goods has forbidden for humanitarian reasons the export of handcuffs and leg-irons to all destinations.

In addition, Estonian government statement considers thumb-screws and serrated thumb-cuffs as goods suited for accomplishment of human rights violations; therefore import, export and transit thereof should be banned.

Spanish government has confined itself to a political statement emphasising the pressing necessity of introduction of prohibition of trade of leg-irons and shackles, however no legally binding provisions have been implemented so far.

As concerns United Kingdom, leg-irons, stun guns, and stun batons are banned for export under British law. Since 1997 the prohibition of export of equipment which could be used for torture, including portable devices designed to administer an electric shock, including electric-shock batons.

It should be noted that Swedish legislation has also outlawed the high voltage electro-shock stun batons.

2. A Member State may impose an authorisation requirement on the export of handcuffs which have an overall dimension including chains, measured from the outer edge of one cuff to the outer edge of the other cuff, exceeding 240 mm when locked. The Member State concerned shall apply Chapter III and IV to such handcuffs.

3. Member States shall notify the Commission of any measures adopted pursuant to paragraphs 1 and 2. Existing measures shall be notified by 30 July 2006. Subsequent measures shall be notified before they enter into force.

CHAPTER IV Authorisation procedures

Article 8 Applications for authorisations

1. An authorisation for export and import and for the supply of technical assistance shall be granted only by the competent authority of the Member State listed in Annex I where the applicant is established.

2. Applicants shall supply the competent authority with all relevant information on the activities for which an authorisation is required.

Article 9 Authorisations

1. Authorisations for export and import shall be issued on a form consistent with the model set out in Annex V and shall be valid throughout the Community. The period of validity of an authorisation shall be from three to twelve months with a possible extension of up to 12 months.

Comment: It should be noted that according to this Article the maximum period of validity of authorisation for export and import could not exceed 24 months.

2. The authorisation may be issued by electronic means. The specific procedures shall be established on a national basis. Member States availing themselves of this option shall inform the Commission.

Comment: Several Member States have established electronic application form for export licenses.

Thus, Germany provides for the possibility to apply for export and transfer licences electronically via BAFA (Federal Office of Economics and Export Control) online service ELAN available at following website: http://www.ausfuhrkontrolle.info/bafa/en/export_control/index.html. However, prior registration at BAFA website is required in order to use ELAN licence application.

Moreover, United Kingdom provides electronic license application via the SPIRE licensing system which requires a preliminary registration on the following website: <https://www.spire.berr.gov.uk/>. All supporting documents and information should be submitted via SPIRE, the licence will be also issued via SPIRE export licensing system.

3. Authorisations for export and import shall be subject to any requirements and conditions the competent authority deems appropriate.

4. The competent authorities, acting in accordance with this Regulation, may refuse to grant an export authorisation and may annul, suspend, modify or revoke an export authorisation which they have already granted.

Article 10 Customs formalities

1. When completing customs formalities, the exporter or importer shall submit the duly completed form set out in Annex V as proof that the necessary authorisation for the export or import concerned has been obtained. If the document is not filled out in an official language of the Member State where the customs formalities are being completed, the exporter or importer may be required to provide a translation into such official language.
2. If a customs declaration is made concerning goods listed in Annexes II or III, and it is confirmed that no authorisation has been granted pursuant to this Regulation for the intended export or import, the customs authorities shall detain the goods declared and draw attention to the possibility to apply for an authorisation pursuant to this Regulation. If no application for an authorisation is made within six months of time after the detention, or if the competent authority dismisses such an application, the customs authorities shall dispose of the detained goods in accordance with applicable national legislation.

Article 11 Notification and consultation requirement

1. The authorities of the Member States, as listed in Annex I, shall notify all other authorities of the Member States and the Commission, as listed in that Annex, if they take a decision dismissing an application for an authorisation under this Regulation and if they annul an authorisation they have granted. The notification shall be made not later than 30 days of the date of the decision.

Comment: It should be noted that the term “**authorisation**” refers not only to the authorisation for export but also to the one for import of goods covered by this Regulation. As concerns denial notifications, it shall be emphasised that two denial notifications circulated in 2008.

2. The competent authority shall consult the authority or authorities which, in the preceding three years, dismissed an application for authorisation of an import or export or the supply of technical assistance under this Regulation, if it receives an application concerning an import or export or the supply of technical assistance involving an essentially identical transaction referred to in such earlier application and considers that an authorisation should, nevertheless, be granted.
3. If, after such consultations, the competent authority decides to grant an authorisation, it shall immediately inform all the authorities listed in Annex I of its decision and explain the reasons for its decision, submitting supporting information as appropriate.
4. The refusal to grant an authorisation, if it is based on a national prohibition in accordance with Article 7(1), shall not constitute a decision dismissing an application within the meaning of paragraph 1.

Comment: Even if this Article establishes a procedure of consultation between Member States as regards granting of import and export authorisations, it should be emphasised that sole consultation and notification of the decision of Member State authorities is compulsory.

Article 10 and 11

Therefore, after having undertaken all required consultations Member State remains unrestricted as concerns the final decision on issue of authorisation. Thereby, this Article shall not be considered as a catch-all clause similar to the one introduced by Article 4 of Dual-Use Regulation (see Part I of this document).

In addition, the prohibition imposed by Member States on the ground of Article 7(1) concerning the export and import of leg irons, gang chains and portable electric shock devices is not covered by this Article. In other words, denials issued and based on prohibition prescribed under Article 7(1) shall not be notified to the Commission and all authorities of other Member States, as listed in Annex I of this Regulation.

CHAPTER V General and final provisions

Article 12 Amendment of Annexes

1. The Commission shall be empowered to amend Annex I. The data regarding competent authorities of the Member States shall be amended on the basis of information supplied by the Member States.
2. In accordance with the procedure referred to in Article 15(2), the Commission shall be empowered to amend Annexes II, III, IV and V.

Article 13 Exchange of information between Member States' authorities and the Commission

1. Without prejudice to Article 11, the Commission and the Member States shall, upon request, inform each other of the measures taken under this Regulation and supply each other with any relevant information at their disposal in connection with this Regulation, in particular information on authorisations granted and refused.
2. Relevant information on authorisations granted and refused shall comprise at least the type of decision, the grounds for the decision or a summary thereof, the names of the consignees and, if they are not the same, of the end-users as well as the goods concerned.
3. Member States, if possible in cooperation with the Commission, shall make a public, annual activity report, providing information on the number of applications received, on the goods and countries concerned by these applications, and on the decisions they have taken on these applications. This report shall not include information the disclosure of which a Member State considers to be contrary to the essential interests of its security.

Comment: It shall be noted that no such report has been published so far. Therefore the Committee on common rules for exports of products (see comment relative to Article 15) during its meeting of 14 January 2009 urged Member States to publish their activity reports (since July 2006 and on an annual basis) and asked to send them also to the Commission. In addition, national activity reports were required, even if no requests for authorisation had been received.

Nevertheless, several Member States publish their statistics as concerns transactions under Torture Regulation. Such information concerning issued, refused or revoked export licences is available for the United Kingdom on the following website:
<http://www.berr.gov.uk/whatwedo/europeandtrade/strategic-export-control/statistics/index.html>.

4. Except for the supply of information mentioned in paragraph 2 to the authorities of the other Member State and to the Commission, this Article shall be without prejudice to applicable national rules concerning confidentiality and professional secrecy.

Article 12,13 and 14

5. The refusal to grant an authorisation, if it is based on a national prohibition adopted in accordance with Article 7(1), shall not constitute an authorisation refused within the meaning of paragraphs 1, 2 and 3 of this Article.

Comment: The main purpose of this Article is to encourage the exchange of information between the authorities of Member States and the Commission. This information exchange shall not be confused with the notification mechanism established by Article 11 of this Regulation. Notification procedure consists in Member States obligation to notify the authorities of other Member States, as listed in Annex I of this Regulation, and the Commission, if they dismiss an application for an authorisation under this Regulation and if they annul an authorisation they have granted.

In addition, the prohibition imposed by Member States on the ground of Article 7(1) concerning the export and import of leg irons, gang chains and portable electric shock devices is not covered by this Article. In other words, authorisation demission issued applying a prohibition prescribed under Article 7(1) may not be communicated to the Commission and all authorities of other Member States, as listed in Annex I of this Regulation.

Article 14 Use of information

Without prejudice to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [10] and national legislation on public access to documents, information received pursuant to this Regulation shall be used only for the purpose for which it was requested.

Article 15,16, 17, 18 and 19

Article 15 Committee procedure

1. The Commission shall be assisted by the committee on common rules for exports of products, set up by Article 4(1) of Regulation (EEC) No 2603/69 [11].

Comment: This Committee was established within the Trade Service, reference thereof is (C22400) Committee on common rules for exports of products.

Last meeting of this Committee took place in Brussels on 14 January 2009, furthermore a draft agenda thereof determines a set of points to be considered by the Committee, inter alia⁴⁸:

- Use of sources of information from international bodies and civil society (Article 6(2) of Regulation (EC) No 1236/2005);
- Annual activity reports and exchange of experience with export licensing (Article 13(3) of Regulation (EC) No 1236/2005);
- Denial notifications (Article 11(1) of Regulation (EC) No 1236/2005);
- Rules on penalties for infringement of Regulation (EC) No 1236/2005 and implementation (Article 17 of Regulation (EC) No 1236/2005).

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at two months.

3. The Committee shall adopt its rules of procedure.

Article 16 Implementation

The Committee referred to in Article 15 shall examine any question concerning the implementation of this Regulation raised by its chairman either on his or her own initiative or at the request of a representative of a Member State.

Article 17 Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

2. Member States shall notify the Commission of those rules by 29 August 2006 and shall notify it without delay of any subsequent amendment affecting them.

⁴⁸ Agenda for meeting of 14 January 2009 of the Committee on Common Rules for Exports of Products can be found at following website:

<http://ec.europa.eu/transparency/regcomitology/searchform/DocumentDetail.cfm?Rd7XvmSP1OO/UFRM3k3y0XGlW9BBIf/sJbrpOrLVBA0Z5dFFy1jqZPIMzrDHRuuS>.

Article 15,16, 17, 18 and 19

Article 18 Territorial scope

1. This Regulation shall apply to:

- the customs territory of the Community, as defined in Regulation (EEC) No 2913/92,
- the Spanish territories Ceuta and Melilla,
- the German territory of Helgoland.

2. For the purpose of this Regulation Ceuta, Helgoland and Melilla shall be treated as part of the customs territory of the Community.

Article 19 Entry into force

This Regulation shall enter into force on 30 July 2006.

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

Done at Luxembourg, 27 June 2005.

For the Council

The President

L. LUX

ANNEX I LIST OF AUTHORITIES REFERRED TO IN ARTICLES 8 AND 11

Comment: It should be noted that Annex I has been amended by the Commission Regulation (EC) No 1377/2006 of 18 September 2006⁴⁹. Modifying dispositions define competent authorities responsible for implementation of this Regulation. Considered Member States are the United Kingdom of Great Britain and Northern Ireland, Netherlands, in addition the address Commission's Directorate to be notified was also amended.

A. Authorities of the Member States

BELGIUM

Ministerie van Economie, Energie, Handel en
Wetenschapsbeleid
Directoraat E4: Economisch Potentieel, Markttoegangs-
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la politique scientifique
Directorat, E4: potentiel économique, politique d'accès
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⁴⁹ OJ L 255, 19.9.2006, p. 3.

ANNEX I

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Erhvers- og Byggestyrelsen
Eksportkontroladministrationen
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GERMANY

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ΕΛΛΑΔΑ

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ANNEX I

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ANNEX I

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ΚΥΠΡΟΣ

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Directoraat-generaal voor Buitenlandse Economische Betrekkingen
Directie Handelspolitiek
Bezuidenhoutseweg 153
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Tel. (31-70) 379 64 85, 379 62 50

AUSTRIA

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Abteilung für Aus- und Einfuhrkontrolle
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PORTUGAL

Ministério das Finanças
Direcção-Geral das Alfândegas e dos Impostos Especiais

ANNEX I

de Consumo
Direcção de Serviços de Licenciamento
Rua Terreiro do Trigo, edifício da Alfândega
P-1149-060 Lisboa
Tel.: (351-21) 881 42 63
Fax: (351-21) 881 42 61

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Odbor riadenia obchodovania s citlivými tovarmi
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SUOMI

Sisäasiainministeriö
Arpajais- ja asehallintoyksikkö
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Puhelin (358-9) 160 01
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SWEDEN

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PO Box 6803
S-113 86 Stockholm
Tfn (46-8) 690 48 00
Fax (46-8) 30 67 59
E-post: registrator@kommers.se

UNITED KINGDOM

Import of goods listed in Annex II:
Department of Trade and Industry
Import Licensing Branch
Queensway House

ANNEX I

West Precinct
Billingham TS23 2NF
United Kingdom
Tel. (44-1642) 36 43 33
Fax (44-1642) 36 42 69
E-mail: enquiries.ilb@dti.gsi.gov.uk

Export of goods listed in Annex II or III, and supply of technical assistance related to goods listed in Annex II as referred Articles 3(1) and 4(1):

Department of Trade and Industry
Export Control Organisation
Kingsgate House
66-74 Victoria Street
London SW1E 6SW
United Kingdom
Tel. (44-20) 72 15 80 70
Fax (44-20) 72 15 05 31
E-mail: lu3.eca@dti.gsi.gov.uk

B. Address for notifications to the Commission

COMMISSION OF THE EUROPEAN COMMUNITIES

Directorate-General for External Relations
Directorate A. Crisis Platform and Policy Coordination in CFSP
Unit A.2. Crisis Management and Conflict Prevention
CHAR 12/45
B-1049 Brussels
Tel. (32-2) 295 55 85, 299 11 76
Fax (32-2) 299 08 73
E-mail: relex-sanctions@ec.europa.eu

Part III: The European Union Export Control Regime of Arms

Introductory Remark: to facilitate the understandings of the EU export control regime of arms, we have in the present Part mixed together the **two** documents, which constitute the EU regime:

- Council Common Position 2008/944/CFSP (in black in the present text),
- Council Common Position 2003/468/CFSP (in red in the present text).

It should be kept in mind that both documents are inter-governmental cooperation instruments set up by the Treaty on European Union (EU Treaty). To be implemented, they have to be integrated by Member States into their national legislation.

**Council Common Position 2008/944/CFSP of December 2008
defining common rules governing control of export of military
technology and equipment**

Official Journal L 335/99, 13/12/2008 P. 0099 - 00103

Comment: In 1998 the Council reached political agreement on an EU Code of Conduct on Arms Exports. The Code builds on the Common Criteria for arms exports adopted in 1991 and 1992 and also includes a denial notification and consultation mechanism.

In December 2008, the Council has adopted the Council Common Position 2008/944/CFSP defining common rules governing control of export of military technology and equipment which replaces the Code of Conduct, however without changing fundamentally its content.

Complementary, a User's Guide⁵⁰ was adopted by the Council to help Member States Authorities to apply the Code of Conduct. User's Guide makes subject of periodical monitoring, therefore essential interpretation elements of amendments 2009 have been summarised and integrated in comments and remarks sections of the concerned provisions.

**Council Common Position 2003/468/CFSP of 23 June 2003 on the
control of arms brokering**

Official Journal L 156, 25/06/2003 P. 0079 - 0080

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty of the European Union, and in particular Article 15 thereof,

Whereas:

- (1) Member States intend to build on the Common Criteria agreed at the Luxembourg and Lisbon European Councils in 1991 and 1992, and on the European Union Code of Conduct on Arms Exports adopted by the Council in 1998.
- (2) Member States recognise the special responsibility of military technology and equipment exporting States.
- (3) Member States are determined to set high common standards which shall be regarded as the minimum for the management of, and restraint in, transfers of military technology and equipment by all Member States, and to strengthen the exchange of relevant information with a view to achieving greater transparency.
- (4) Member States are determined to prevent the export of military technology and equipment which might be used for internal repression or international aggression or contribute to regional instability.
- (5) Member States intend to reinforce cooperation and to promote convergence in the field of exports of military technology and equipment within the framework of the Common Foreign and Security Policy (CFSP).
- (6) Complementary measures have been taken against illicit transfers, in the form of the EU Programme for Preventing and Combating Illicit Trafficking in Conventional Arms.

⁵⁰ User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment is available at following website:
<http://register.consilium.europa.eu/pdf/en/09/st09/st09241.en09.pdf>.

Preamble

(7) The Council adopted on 12 July 2002 Joint Action 2002/589/CFSP on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons.

(8) The Council adopted on 23 June 2003 Common Position 2003/468/CFSP on the control of arms brokering.

(9) The European Council adopted in December 2003 a strategy against the proliferation of weapons of mass destruction, and in December 2005 a strategy to combat illicit accumulation and trafficking of SALW and their ammunition, which imply an increased common interest of Member States of the European Union in a coordinated approach to the control of exports of military technology and equipment.

Complementary information: These Strategies fall into line with the requirements prescribed, on one hand, by the United Nations Programme of Action to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects⁵¹, and, on the other hand, by the European Security Strategy (ESS)⁵².

European Security Strategy "A Secure Europe in a better world" was adopted by the European Council on 12 December 2003. The ESS enunciates five key threats to be faced by the EU Member States, inter alia, Terrorism, Proliferation of Weapons of Mass Destruction (WMD), Regional Conflicts, State Failure and Organised Crime. It should be emphasised that the WMD proliferation is considered as a main challenge for the EU security and wellbeing. ESS accentuates that remaining threats are highly influenced by the outcomes of illicit circulation, transfer and manufacture of small arms and light weapons (SALW) and their excessive accumulation and uncontrolled spread.

It shall be noted that the definition of SALW followed in both Strategies is that set out in Annex of Council Joint Action 2002/589/CFSP⁵³ which is following:

"The Joint Action shall apply to the following categories of weapons, while not prejudging any future internationally agreed definition of small arms and light weapons. These categories may be subject to further clarification, and may be reviewed in the light of any such future internationally agreed definition.

(a) Small arms and accessories specially designed for military use:

- machine-guns (including heavy machine-guns),*
- sub-machine guns, including machine pistols,*
- fully automatic rifles,*
- semi-automatic rifles, if developed and/or introduced as a model for an armed force,*
- moderators (silencers).*

(b) Man or crew-portable light weapons:

- cannon (including automatic cannon), howitzers and mortars of less than 100 mm calibre,*
- grenade launchers,*
- anti-tank weapons, recoilless guns (shoulder-fired rockets),*
- anti-tank missiles and launchers,*
- anti-aircraft missiles/man-portable air defence systems (MANPADS)."*

⁵¹ This Program was adopted on 20 July 2000 during the United Nations Conference on the Illicit Traffic in Small Arms and Light Weapons in All Its Aspects which was held from 9-20 July 2001 at UN Headquarters in New York. The Program is available at the following website: <http://disarmament.un.org/cab/poa.html>.

⁵² ESS is available on the following website:
<http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>.

⁵³ Joint Action 2002/589/CFSP (OJ L 191, 19.7.2002, p. 1) is available on the following website:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:191:0001:0004:EN:PDF>.

EU Strategy Against Proliferation of Weapons of Mass Destruction⁵⁴ (EU WMD Strategy) was adopted by the European Council on 10 December 2003. The main purpose of this Strategy is to develop an exhaustive and comprehensive EU plan to combat the proliferation of WMD and missiles. In order to do so three factors are emphasised:

- Growing threat to international peace and security caused by proliferation of WMD and its means of delivery;
- EU must elaborate an effective multilateralist response;
- Instruments to prevent, deter, halt and eliminate proliferation programmes.

EU WMD Strategy implemented in “living action plan” which must be constantly monitored and subjected to regular revision and updating every six months. This plan reposes on four pillars:

- Resolute action against proliferation;
- Promotion of stable international and regional environment;
- Close cooperation with the United States and other key partners;
- Development of the necessary structures within the Union which consists in organising a six monthly debate on the implementation of the EU Strategy at the External Relations Council⁵⁵; setting up of a WMD monitoring centre which will supervise the consistent implementation of the EU⁵⁶.

New lines for action by the European Union in combating the proliferation of weapons of mass destruction and their delivery systems⁵⁷ were adopted by the European Council on 17 December 2008. This document constitutes an instrument intended to improve the efficiency of implementation of the EU WMD Strategy.

New lines emphasise following objectives for the EU:

- Rising of non-proliferation measures into a transversal priority of EU and Member States’ policies;
- Encouraging of existing best practices at the level of Member States' national policies;
- Encouraging better coordination between national policies of Member States and of existing EU tools and policies;
- Identification of areas where EU action shall be straightened.

The essential grounds of the action plan can be summed up as follows:

- An updated risk and threat evaluation document;
- Models for awareness raising for undertakings, scientific and academic circles, and financial institutions;
- Intensifying cooperation with third countries to help them to improve their non-proliferation policies and export controls;
- Measures to combat intangible transfers of knowledge and know-how, including mechanisms of cooperation in terms of consular vigilance;
- Intensifying efforts to impede proliferation flows and sanction acts of proliferation;

⁵⁴ The full text of EU WMD Strategy is available at following website:

<http://register.consilium.europa.eu/pdf/en/03/st15/st15708.en03.pdf>.

⁵⁵ Six-monthly Progress Reports are available at the following website:

<http://www.consilium.europa.eu/showPage.aspx?id=718&lang=en>.

⁵⁶ A concept paper on monitoring and enhancing consistent implementation of the EU strategy against the proliferation of WMD adopted by European Council on 12 December 2006 frames principal task of WMD Monitoring Centre. This concept paper is available at the following website:

<http://register.consilium.europa.eu/pdf/en/06/st16/st16694.en06.pdf>.

⁵⁷ The full text is available on the following website:

<http://register.consilium.europa.eu/pdf/en/08/st17/st17172.en08.pdf>.

- Intensifying efforts to combat proliferation financing;
- Intensifying coordination/collaboration with, and contribution to, relevant regional and international organisations.

Strategy to Combat Illicit Accumulation and Trafficking of SALW and Their

Ammunition⁵⁸ (EU SALW Strategy) was adopted by the European Council on 15-16 December 2005. This Strategy represents EU attempt to combat the dangers arose by the illicit accumulation and trafficking of SALW and their ammunition.

EU SALW Strategy underlines that the destabilising accumulation and spread of SALW constitutes a growing threat to peace, security and development. It also reminds EU armoury of measures which is essentially represented by the Joint Action 2002/589/CFSP as well as various CFSP and ESDP instruments.

Action Plan

Action Plan constitutes the main achievement of EU SALW Strategy; it must be constantly monitored and revised in terms of an interim report by the Presidency on its implementation. This plan contains following means of action:

- International action (support of ratification of international instruments aimed at combat illicit trafficking or at tracing and marking of SALW);
- Regional action (support of regional initiatives, notably ECOWAS Moratorium, Nairobi Convention and SADC Protocol);
- Action in the framework of agreements/structured dialogues (inclusion of SALW subject in the neighbourhood policy, in EU structured dialogues with main exporters);
- Action within the Union (Joint Action 2002/589/CFSP, EU's 2003 Common Position on brokerage, and harmonised application of the Code of Conduct on Arms Exports).

(10) The UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects was adopted in 2001.

(11) The United Nations Register of Conventional Arms was established in 1992.

(12) States have a right to transfer the means of self-defence, consistent with the right of self-defence recognised by the UN Charter.

(13) The wish of Member States to maintain a defence industry as part of their industrial base as well as their defence effort is acknowledged.

(14) The strengthening of a European defence technological and industrial base, which contributes to the implementation of the Common Foreign and Security Policy, in particular the Common European Security and Defence Policy, should be accompanied by cooperation and convergence in the field of military technology and equipment.

(15) Member States intend to strengthen the European Union's export control policy for military technology and equipment through the adoption of this Common Position, which updates and replaces the European Union Code of Conduct on Arms Exports adopted by the Council on 8 June 1998.

(16) On 13 June 2000, the Council adopted the Common Military List of the European Union, which is regularly reviewed, taking into account, where appropriate, similar national and international lists.

(17) The Union must ensure the consistency of its external activities as a whole in the context of its external relations, in accordance with Article 3, second paragraph of the Treaty; in this respect the Council takes note of the Commission proposal to amend Council Regulation (EC)

⁵⁸ EU SALW Strategy is available at the following website:
<http://register.consilium.europa.eu/pdf/en/06/st05/st05319.en06.pdf>.

Preamble

No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual use items and technology,
HAS ADOPTED THIS COMMON POSITION:

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the European Union, and in particular Article 15 thereof,

Whereas:

- (1) In implementing the European Union Code of Conduct on Arms Exports Member States have agreed to address the problem of control of arms brokering.
- (2) Member States have continued and deepened their discussions on arms trafficking and brokering activities and have reached agreement on a set of provisions for controlling these activities through national legislation, as set out below.
- (3) Most Member States already have in place or are in the process of adopting national legislation on the subject.
- (4) In the Fourth Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports Member States have agreed to continue deliberations in the area of arms brokering on the basis of the guidelines already approved, with a view to adopting a Common Position on the subject.
- (5) In the Wassenaar Arrangement Participating States agreed on a Statement of Understanding to consider the adoption of national measures regulating arms brokering activities.

Comment: Statement of Understanding on Arms Brokerage was adopted by 11-12 December 2002 Plenary Meeting of the Wassenaar Arrangement. This Statement is available at the following website: http://www.wassenaar.org/docs/sou_arms_brokerage.htm

- (6) The United Nations Programme of Action on Small Arms and Light Weapons (SALW) commits States to develop adequate national legislation or administrative procedures to regulate small arms and light weapons brokering activities, and undertake further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering of small arms and light weapons.
- (7) The United Nations Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against transnational organised crime requires States Parties to establish a system for regulating the activities of those who engage in brokering,

HAS ADOPTED THIS COMMON POSITION:

Article 1

Article 1

1. Each Member State shall assess the export licence applications made to it for items on the EU Common Military List mentioned in Article 12 on a case-by-case basis against the criteria of Article 2.

Comment: the information on the exports and license refusals per destination, per region and world wide is available in the Eleventh Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, published in OJ C 265, 6.11.2009, p. 1. (See comment relative to Article 8(2)).

In order to see the dynamic of EU military export, the summary of the data provided is following:

- Central America and the Caribbean 202 licences and 3 refusals;
- Central Asia 135 licences and 3 refusals;
- European Union 16776 licences and 1 refusal;
- Middle East 4189 licences and 50 refusals;
- North Africa 565 licences and 16 refusals;
- North America 5193 licences, no information on refusals;
- North East Asia 1696 licences and 44 refusals;
- Oceania 1515 licences, no information on refusals;
- Other European Countries 6985 licences and 54 refusals;
- South America 1245 licences and 16 refusals;
- South Asia 2960 licences and 76 refusals;
- South East Asia 1896 licences and 15 refusals;
- Sub-Saharan Africa 1255 licences and 40 refusals;
- World Wide 44634 licences and 319 refusals.

2. The export licence applications as mentioned in paragraph 1 shall include:

- applications for licences for physical exports, including those for the purpose of licensed production of military equipment in third countries,
- applications for brokering licences,

Comment: The control of brokering is ruled by the Common Position on arms brokering. Reference to export licence application for brokering activities, included in this paragraph, extends the necessity for Member States Authorities to consider the criteria of this Common Position when they analyse an application thereof for a brokering licence.

- applications for "transit" or "transshipment" licences,

Comment: Unfortunately “transit” and “transshipment” are not defined directly by this Common Position. The distinction between these two terms is not very clear and they are even sometimes used indifferently to qualify the same operation. Nevertheless, the User’s Guide to the EU Code of Conduct on Arms Export has defined the terms “transit” and “transshipment”:
- “Transit is the movements in which the goods (military equipment) merely pass through the territory of the Member State”;

Article 1

- *“Transshipment is a transit involving the physical operation of unloading goods from the importing means of transport followed by a reloading (generally) onto another exporting means of transport”*. In this regard transshipment should be understood as part of an export or transit operation.

- applications for licences for any intangible transfers of software and technology by means such as electronic media, fax or telephone.

Comment: The export authorisation for an item listed covers the minimum technology necessary for the installation, operation, maintenance and repair of the items supplied. It also provides operating instructions and some basic specifications. An everyday parallel would be the type of technical manual supplied with a television or washing machine. If such technology is exported apart it will require an authorisation.

Moreover, an authorisation might also be necessary if:

- the technology will support a complete system, but the items exported are components of that system;
- the technology related to a previous authorisation, but not essentially different from the technology that was originally supplied (handbooks or publications relating to equipment that has been upgraded since its original supply).

Member States' legislation shall indicate in which case an export licence is required with respect to these applications.

Article 1, 2, 3 and 4 of the Common Position

Article 1

1. The objective of this Common Position is to control arms brokering in order to avoid circumvention of UN, EU or OSCE embargoes on arms exports, as well as of the Criteria set out in the European Union Code of Conduct on Arms Exports.
2. In order to achieve this objective, Member States will ensure that their existing or future national legislation on arms brokering is in conformity with the provisions set out below.

Article 2

1. Member States will take all the necessary measures to control brokering activities taking place within their territory. Member States are also encouraged to consider controlling brokering activities outside of their territory carried out by brokers of their nationality resident or established in their territory.
2. Member States will also establish a clear legal framework for lawful brokering activities.
3. For the purposes of paragraph 1, brokering activities are activities of persons and entities:
 - negotiating or arranging transactions that may involve the transfer of items on the EU Common List of military equipment from a third country to any other third country;
 - or
 - who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country.

Comment: It should be noted that Dual-Use Regulation (see part I of this document) also gives a definition of brokering activities, however it uses the term **“brokering services”**. Even though both definitions are rather similar, Article 2 (3), paragraph 2 of this Regulation considers as brokering activities an arrangement of transfer of items on the EU Common List of military equipment from a third country to any other third country. This Regulation does define precisely the term **“arrange the transfer”** which might leave space for Member States appreciation or interpretation. Nevertheless, Article 2 (5) of Dual-Use Regulation specifies that **“ancillary services”**, notably transportation, financial services, insurance or re-insurance, or general advertising or promotion, are excluded from the definition of brokering services. Thereby, a parallel can be drawn between notions of “arrange the transfer” and “ancillary services”, which can eventually guide Member States in elaboration of their national legislations implementing this Regulation. Generally speaking, the exclusion of auxiliary services from the scope of brokering activities can be considered as a loophole of the Common Position. Therefore other international instruments made several attempts to control auxiliary services in other domains of strategic control. Indeed, the UN General Assembly adopted on 8 December 2005 the Resolution 60/81 which requested Secretary-General to appoint a group of governmental experts in order to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons (SALW) and to submit the report on the outcome of its study. After numerous consultations with UN Member States, the Group of Experts submitted a required report emphasising a necessity to regulate activities closely associated with brokering in SALW⁵⁹.

⁵⁹ The report of group of Group of Governmental experts can be found at following website:
www.grip.org/bdg/pdf/g0974.pdf

Article 1, 2, 3 and 4 of the Common Position

This paragraph shall not preclude a Member State from defining brokering activities in its national legislation to include cases where such items are exported from its own territory or from the territory of another Member State.

Article 3

1. For brokering activities, a licence or written authorisation should be obtained from the competent authorities of the Member State where these activities take place, and, where required by national legislation, where the broker is resident or established. Member States will assess applications for a licence or written authorisation for specific brokering transactions against the provisions of the European Union Code of Conduct on Arms Exports.
2. Member States should keep records for a minimum of 10 years of all persons and entities which have obtained a licence under the terms of paragraph 1.

Comment: the information on brokering licenses granted and denied per Member State is available in the Eleventh Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, published in OJ C 265, 6.11.2009, p. 1. (See comment relative to Article 8(2)).

Separate tables are available for Each Member State containing data on destination, number of licences issued, the value of licences issued in Euros, ML category, quantity of brokered items and country of origin.

In 2008 only one brokering licence was refused for Israel on the basis of Criterion 2 and 3, it concerned ML 6 category.

Article 4

1. Member States may also require brokers to obtain a written authorisation to act as brokers, as well as establish a register of arms brokers. Registration or authorisation to act as a broker would in any case not replace the requirement to obtain the necessary licence or written authorisation for each transaction.
2. When assessing any applications for written authorisations to act as brokers, or for registration, Member States could take account, inter alia, of any records of past involvement in illicit activities by the applicant.

Article 2 Criterion One

Article 2

1. **Criterion One:** Respect for the international obligations and commitments of Member States, in particular the sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations. An export licence shall be denied if approval would be inconsistent with, *inter alia*:

- (a) the international obligations of Member States and their commitments to enforce United Nations, European Union and Organisation for Security and Cooperation in Europe arms embargoes;
- (b) the international obligations of Member States under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;
- (c) the commitment of Member States not to export any form of anti-personnel landmine;
- (d) the commitments of Member States in the framework of the Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement and The Hague Code of Conduct against Ballistic Missile Proliferation.

Comment: The User's Guide, analyses the way in which Member States should apply Criterion 1. As it states, the purpose of such criterion is to ensure that sanctions decided by international regimes are respected. To evaluate if an export might be inconsistent or not with international obligations and commitments Member States should firstly consult the different information sources at their disposal (common EU database, EU denial database, EU watch list, international regimes database and others documentation available through United Nations, IAEA...).

The User's Guide detailed the elements (point (a) to (d) of the Criterion) to take into consideration by Member States Authorities when forming a judgment on consistency of the application with their international obligations. They should carefully check if the final destination and end-user are subject to embargos enforced by the UN, OSCE and EU. As concerns legally binding UN sanctions, in order to assure unified EU interpretation of the scope of aforesaid embargos Member States should refer to the Council Common Position or to the Council Regulation, which incorporated into EU law such sanctions. Interpretation is left under Member States appreciation for non-legally binding UN and OSCE sanctions. Member States parties to the Ottawa Convention on Anti-Personnel Mines or who have taken a political commitment not to export such mines should deny an export authorisation for such mines unless for purpose of their destruction (Poland has not ratified the Convention).

In addition, User's Guide was revised in 2009 thereby introducing following amendments to the Criterion One:

- Integration of the commitments under the Zangger Committee and the Hague Code of Conduct against the Proliferation of Ballistic Missiles in Criterion One (see point 3.1.3 (d) of User's Guide as revised in 2009). Heretofore, those international instruments were only considered as those of "considerable importance when forming a judgement with regard to Criterion One".
- Change in Denial Notification (DN) Database access until remote access thereto is possible (see point 1.4.9 of User's Guide as revised in 2009). Previous procedure provided that the Council Secretariat will each month send to Member States, via nominated persons in their Permanent Representations in Brussels, a disc containing the latest version of the database. Procedure established in 2009 stipulates that the Council Secretariat will hand a disc

Article 2 Criterion One

containing the latest version of the database to a representative of each Member State at meetings of the Working Party on Conventional Arms Exports (COARM).

- Single DN Database (see point 1.4.20 of User's Guide as revised in 2009). Thereby, separated databases for brokering DNs and export licence DNs which thus far circulated together shall be unified. However, brokering DNs should be clearly identified on the database by the Council Secretariat.

Article 2 Criterion Two

2. **Criterion Two:** Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law.

- Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States shall:

- (a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;
- (b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe;

For these purposes, technology or equipment which might be used for internal repression will include, *inter alia*, technology or equipment where there is evidence of the use of this or similar technology or equipment for internal repression by the proposed end-user, or where there is reason to believe that the technology or equipment will be diverted from its stated end-use or end-user and used for internal repression. In line with Article 1 of this Common Position, the nature of the technology or equipment will be considered carefully, particularly if it is intended for internal security purposes. Internal repression includes, *inter alia*, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

- Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, Member States shall:

- (c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.

Comment: The User's Guide largely analyses and comments this criterion focusing on the respect of human rights. The following terms are defined more precisely:

Recipient country's attitude towards relevant human rights principles (as redrafted by the present Common Position): it includes the policy line of recipient country's government, past record of the proposed end-user, recent significant developments, including *inter alia* impact of "fight against terrorism"; effective constitutional protection of human rights; human rights training among key actors (e.g. law enforcement agencies); impunity for human rights violations; independent monitoring bodies and national institutions for promotion or protection of human rights.

The User's Guide has adopted a list of indicators to assess the recipient country's attitude toward human rights and fundamental freedoms:

- The commitment of the recipient country's government to respect and improve human rights and to bring human rights violators to justice;
- The implementation record of relevant international and regional human rights instruments through national policy and practice;
- The ratification record of the country in question with regard to relevant international and regional human rights instruments;
- The degree of cooperation with international and regional human rights mechanisms (e.g.

Article 2 Criterion Two

UN treaty bodies and special procedures);

- The political will to discuss domestic human rights issues in a transparent manner, for instance in the form of bilateral or multilateral dialogues, with the EU or with other partners including civil society.

International human rights instruments (this provision was supplemented by User's Guide as revised in 2009): a non-exhaustive list of the main international and regional instruments is contained in the Annex II of the User's Guide.

Serious violations of human rights (this provision was supplemented by User's Guide as revised in 2009): the qualification of a human rights violation as "serious" has to be assessed for each situation on its own merits and on a case-by-case basis, taking into account all relevant aspects. Relevant factor in the assessment is the character/nature and consequences of the actual violation in question. Systematic and/or widespread violations of human rights underline the seriousness of the human rights situation. However, violations do not have to be systematic or widespread in order to be considered as "serious" for the Criterion 2 analysis. According to Criterion 2, a major factor in the analysis is whether the competent bodies of the UN, the EU or the Council of Europe (as listed in Annex III) have established that serious violations of human rights have taken place in the recipient country. In this respect it is not a prerequisite that these competent bodies explicitly use the term "serious" themselves; it is sufficient that they establish that violations have occurred. Member States must do the final assessment whether these violations are considered as serious in the present context. Likewise, the absence of a decision by these bodies should not preclude Member States from the possibility of making an independent assessment as to whether such serious violations have occurred.

Clear risk that the proposed export might be used for internal repression (this provision was supplemented by User's Guide as revised in 2009): the text of the Criterion gives an ample set of examples of what constitutes internal repression. However, assessing whether or not there is a clear risk that the proposed export might be used to commit or facilitate such acts requires detailed analysis. The combination of "clear risk" and "might" in the text should be noted. Such formulation requires a lower burden of evidence than a "clear risk" that equipment will be used for internal repression.

The risk analysis has to be based upon a case-by-case consideration of available evidence of the history and current prevailing circumstances in the recipient State/regarding the proposed end-user, as well as any identifiable trends and/or future events that might reasonably be expected to precipitate conditions that might lead to repressive actions (e.g. forthcoming elections). Some initial questions that might be asked are:

- Has the behaviour of the recipient State/ the proposed end-user been highlighted negatively in EU Council statements/conclusions?
- Have concerns been raised in recent reports from EU Heads of Mission in the recipient State/regarding the proposed end-user?
- Have other international or regional bodies (e.g. UN, Council of Europe or OSCE) raised concerns?
- Are there any consistent reports of concern from local or international NGOs and the media?

It will be important to give particular weight to the current situation in the recipient State before confirming any analysis. It may be the case that abuses have occurred in the past but that the recipient State has taken steps to change practices in response to domestic or

Article 2 Criterion Two

international pressure, or an internal change in government took place. Following interrogations might be raised:

- Has the recipient State agreed to external or other independent monitoring and/or investigations of alleged repressive acts?
- If so, how has it reacted to/implemented any findings?
- Has the government of the recipient State changed in manner that gives confidence of a change in policy/practice?
- Are there any EU or other multilateral or bilateral programmes in place aimed at bringing about change/reform?

Mitigating factors such as improved openness and an on-going process of dialogue to address human rights concerns in the recipient State may lead to the possibility of a more positive assessment. However, it is important to recognise that a lengthy passage of time since any highly publicised instance of repression in a recipient State is not on its own a reliable measure of the absence of clear risk. There is no substitute for up-to-date information from reliable data sources if a proper case-by-case assessment is to be made.

The nature of the equipment: any assessment of equipment under Criterion 2 has to be realistic (i.e. are the items in question really useable as a tool of repression?). But it is also important to recognise that a wide variety of equipment has a track record of use which can eventually favour the fulfilment or facilitate repressive. Items such as Armoured Personnel Carriers (APCs), body armour and communications/surveillance equipment can have a strong role in facilitating repression.

The end-user has to be carefully considered. If intended for the police or security forces, it is important to establish the exact branch of these forces in a recipient State thereto the items are to be delivered. It should also be noted that there is no strict rule as to which branches of the security apparatus may have a role in repression. For example, the army may have a role in many states, while in others it may have no record of such a role.

Some initial questions might include:

- Is there a record of this equipment being used for repression in the recipient state or elsewhere?
- If not, what is the possibility of it being used in the future?
- Who is the end-user?
- What is the end-user's role in the recipient state?
- Has the end-user been involved in repression?
- Are there any relevant reports on such involvement?

Diversion; The question of internal diversion also needs consideration. There may be clues to this in the nature of the equipment and the end-user. It might be asked:

- Does the stated end-user have a legitimate need for this equipment? Or are the items in question more appropriate to another branch of the security apparatus?
- Would we issue a licence if the end-user were another part of the security apparatus of the recipient state?
- Do the different branches of the security forces have separate procurement channels? Is there a possibility that equipment might be redirected to a different branch?

Article 2 Criterion Three

3. **Criterion Three:** The **internal situation** in the country of final destination, as a function of the existence of **tensions** or armed conflicts.

Member States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

Comment: Criterion 3 applies to all recipient countries without distinction. However, these best practices follow the principle that if there is an armed conflict or if there are internal tensions in the country of destination, a careful analysis should be carried out concerning the eventual risk that this proposed export might provoke or prolong the conflict or aggravate the existing tensions and escalating them into a wider conflict. If the analysis shows a risk of aforementioned phenomenon this happening, a restrictive approach should be adopted towards the export licence under consideration. Particular attention should be given to the role of the end-user in this conflict. All export licences should be assessed on a case-by-case basis and consideration should be given to Criterion 3 where there are concerns over the existence of tensions or armed conflicts.

The User's Guide establishes a list of information sources for Member States Authorities.

The User's Guide has also defined some key concepts:

Internal situation refers to the economic, social and political developments and stability within the borders of the country of final destination. The EU Code of Conduct also refers to the "country of final destination" as the "recipient country".

Tensions refers to unfriendly or hateful relations between different groups, or groups of individuals, of the society based either on race, colour, sex, language, religion, political or other opinion, national or social origin, interpretation of historic events, differences in economic wellbeing or ownership of property, sexual orientation, or other factors. Tensions could be at the origin of tumult or violent actions, or a cause for the creation of private militia not controlled by the State.

Armed conflicts refers to the escalation of the tensions between groups to the level in which any of the groups uses arms against others. In considering an export licence application the competent authority must assess the internal situation of the country of destination; possible participation and role of the end-user in the internal conflict or tensions and the probable use of the proposed export in the conflict. In assessing the potential risks in the recipient country the competent authority might ask the following questions:

- What is the end-use of the proposed export (military technology or equipment)? Would the export be used to enforce internal security or to continue with the hostilities?
- Is the military equipment or technology intended to support internationally-sanctioned peace-keeping/peace enforcing operations or humanitarian interventions?
- Is the end-user participating or closely related to a party involved in the armed conflict within the country? What is the role of the end-user in the conflict?
- If components or spares are being requested, is the recipient state known to operate the relevant system in armed conflict in the country?
- Have there been recent reports that the existing tensions might be aggravating? Is there a risk that the existing tensions might turn into an armed conflict when one or more of the participants gain access to the military equipment and technology to be exported?
- Is the recipient country subject to regional or UN embargoes because of the internal situation thereof (see also Criterion 1)?

The nature of equipment will impact the judgement of whether to approve or refuse a licence. Consideration should be given as to whether the equipment or technology to be

Article 2 Criterion Three

exported actually is related, directly or indirectly, to the tensions or conflicts in the country of final destination. This will be all the more important when there is already an existing armed conflict. Some questions to consider might be:

- Is the nature of export in such, that it is or could be used in an armed conflict within the country of final destination?
- Is there a risk that the existing internal tensions might turn into an armed conflict when the proposed end-user obtains access to this military equipment and technology?

The end-user also plays an important role in the analysis. If there are concerns related to Criterion 3, it is important to establish exactly for which branch of the armed forces, police or security forces the export is intended. For example, in a recipient country the army and police might be involved in an armed conflict in which the navy has no role. In this respect, the risk of internal diversion should also be considered. More complex cases arise when equipment may be going to a research institute or private company. Here a judgment should be made on the likelihood of diversion, and the views on Criterion 3 should be based on the other criteria, specifically concerns related to Criterion 7, the risk of diversion.

The following questions might be considered:

- What is the end-user's role in the recipient state? Is the end-user part of the problem, or rather attempting to be part of the solution?
- Is the end-user involved in the internal armed conflict or tensions? Are there any relevant reports of such involvement?

Article 2 Criterion Four

4. **Criterion Four:** Preservation of regional peace, security and stability.

Member States **shall deny** an export licence if there is a clear risk that the intended recipient would use the military technology or equipment to be exported aggressively against another country or to assert by force a territorial claim.

When considering these risks, EU Member States will take into account inter alia:

- a) **the existence or likelihood of armed conflict between the recipient and another country;**
- b) **a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;**
- c) **the likelihood of the military technology or equipment being used other than for the legitimate national security and defence of the recipient;**
- d) **the need not to affect adversely regional stability in any significant way.**

Comment: The User's Guide recalls that if Criterion 4 applies to all recipient countries without distinction, these best practices follow the principle that where there is a greater risk of regional conflict, greater scrutiny of Criterion 4 is required than in cases where there is a lesser risk. All export licences should be assessed on a case-by-case basis and consideration given to Criterion 4 where there are concerns over the preservation of peace, security and stability in the region.

The purpose of Criterion 4 is to ensure that export of military items does not encourage, aggravate, provoke or prolong conflicts or tensions in the region of the intended recipient country. The Criterion makes a distinction between the intention to use the proposed export for aggressive as opposed to defensive purposes. The Criterion is not intended to preclude exports to countries that are (potential) victims of aggression or a threat of aggression. A careful assessment would need to be carried out as to whether there are sound indications of an intention by the intended recipient country to use the proposed export to attack, potentially attack or threaten to attack another country.

The User's Guide establishes a list of information sources for Member States Authorities.

The User's Guide has also defined some key concepts:

Preservation of regional peace, security and stability: Member States will not issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim. All nations have the right to defend themselves according to the UN Charter. This criterion addresses the issue of whether the recipient state has intentions to use or threaten to use the proposed export aggressively against another country. An assessment should therefore be made of the recipient's intentions, as well as whether the import is an appropriate and proportionate response to the recipient country's need to defend itself, to ensure internal security, and assist in international peace-keeping and humanitarian operations.

Licence applications to sensitive and potentially sensitive destinations are carefully assessed on a case-by-case basis, especially when the export destination regards a country that is or has been involved in armed conflict. When analysing whether there is a clear risk, the history of armed conflict and the current prevailing circumstances in the recipient state and the region should be taken into consideration, as well as any identifiable trends and/or future events that might reasonably be expected to heighten tensions or lead to aggressive actions.

The wording **will not issue** (changed into **shall deny** by the present Common Position) in this Criterion means that if in the assessment of a licence application it has been established that there is a clear risk that the proposed export would be used aggressively against another

Article 2 Criterion Four

country or to assert by force a territorial claim, the export licence must be denied regardless of the outcome of the analysis with respect to the other criteria of the Code of Conduct, or any other considerations.

When considering these risks, Member States will take into account inter alia:

(a) the existence or likelihood of armed conflict between the recipient and another country

For the purposes of this element, a judgement will have to be made as to whether there is a clear risk that this equipment will be used in an existing armed conflict between the recipient country and its neighbours or another conflict in the region. Where there is no armed conflict, the regional situation should be considered. Growing tensions in the region, increased threats of conflict or weakly held peace arrangements are examples of whether there is a likelihood of a conflict, putting at risk the preservation of the regional peace, security and stability. In these cases, a judgement would need to be made as to whether there is a clear risk that supplying this piece of equipment would hasten the advent of conflict, for instance by giving the recipient country an advantage over its neighbours or others in the region. Where the equipment to be exported might add to the military capability of the recipient country, a judgement will have to be made as to whether there is a clear risk that this equipment will prolong an existing conflict or bring simmering tensions into armed conflict. The following questions are indicators that may be taken into consideration as appropriate:

- Is there an existing conflict in the region?
- Is the current situation in the region likely to lead to an armed conflict?
- Is the threat of conflict theoretical/unlikely or is it a clear and present risk?

(b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force

An assessment should be made on whether there is a clear risk that the recipient country will by armed conflict or threat of force assert a territorial claim on a neighbouring country. Such territorial claim might be stated as an official position or be voiced by official representatives or relevant political forces of the recipient country and could relate to land, sea or aerial space. The neighbouring country does not have to be the direct neighbour of the recipient country. The fact that there have been recent claims by the recipient country on another's territory should be factored in, when making a judgement. Where the recipient country has tried in the past to pursue by force a territorial claim or has threatened to pursue a territorial claim, a judgement should be made as to whether the nature of this equipment will let it seem probable, that it would be used in such a case and as to whether it would give the recipient country an additional capability to try to pursue again this claim by force, thus destabilising the region.

The following questions are indicators that may be taken into consideration as appropriate:

- Is the recipient country pursuing a claim against the territory of a neighbouring country?
- Has a territorial claim led to conflict in the region, or underlying tensions between the recipient country and its neighbours?
- Has the recipient country tried to resolve the issue through peaceful means, has it tried in the past to assert by force its territorial claim, or has it threatened to pursue its territorial claim by force?

(c) the likelihood of the military technology or equipment would be likely to being used other than for the legitimate national security and defence of the recipient

When assessing this element of Criterion 4, the exporting state should estimate whether the recipient state has expressed an aggressive military doctrine, and the likelihood of the

Article 2 Criterion Four

requested equipment being used in accordance with this doctrine. The exporting state should also estimate whether the requested equipment is compatible with, or constitutes a necessary addition to or replacement of, existing armament systems in the defence forces of the recipient state. It may also be relevant to take into account the quantity and quality of the equipment to be exported.

(d) the need not to affect adversely regional stability in any significant way

A judgement on this Criterion will have to be made on whether supplying the recipient country with the equipment will significantly improve military capability thereof, and if it does, would a neighbouring country as a result be put under threat of conflict. Where there are existing tensions in the region, would supplying of this equipment enhance the recipient country's military capability by introducing a new piece of equipment into the region, which could threaten a neighbouring country. The following questions are indicators that may if appropriate be taken into consideration:

- Why does the recipient wish to acquire the equipment or technology?
- Is this equipment simply a replacement or it is destined for maintenance for existing items that might be old or in disrepair, or is the recipient developing new capabilities, such as a significantly improved air strike capability?

The nature of the equipment to be exported will impact the judgement of whether to approve or refuse a licence. Consideration should be given as to whether there is a clear risk that the equipment can be used in a conflict between the recipient country and its neighbours. This will be used to a greater extent where there are existing regional tensions or an existing armed conflict. Where there are existing tensions, the type of equipment is all the more important as the equipment could significantly increase the recipient country's capability to move to armed conflict or threaten armed conflict. Could a neighbouring country be moved to increase its arms imports due the export of this equipment? Given tensions in certain regions, an export could be seen as an increase in threat to a neighbouring country; therefore consideration of this question becomes vital.

Some questions to consider might be:

- Would the recipient's capability be enhanced by the export, and if so, would it be enhanced to the point where existing powers balance would be upset? Given the circumstances in the recipient country and its intentions, would an enhanced capability present a clear risk of hastening the advent of conflict?
- Would a neighbouring country feel threatened by the military technology or equipment to be exported?
- Is there a risk that the existing regional tensions might turn into an armed conflict when one or more of the participants obtain access to this military equipment and technology?
- Is the export in nature such, that it is or could be used in an armed conflict within the region? What is the likelihood of this equipment being used in a conflict?

A judgement on **the end-user** would have to be made on whether he would allow this equipment to be used in a manner inconsistent to Criterion 4. If it is going directly to the military/government, a decision has to be made on whether the equipment will be used in any military action against another country. More complex cases arise when equipment may be going to a research institute or private company. Here a judgement should be made on the likelihood of diversion, and views on Criterion 4 should be based on the other criteria, specifically concerns related to Criterion 7, and the risk of diversion.

The following questions might be considered:

Article 2 Criterion Four

- Is the export likely to be deployed in conflict with a neighbouring state? Or would it most likely go to the Police/a UN contribution, or some other branch of the security forces not directly connected to the Criterion 4 concerns?

Article 2 Criterion Five

5. **Criterion Five:** The national security of the member states and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries

Member States will take into account:

- a) **the potential effect of the military technology and equipment to be exported on their defence and security interests as well as those of Member States and those of friendly allied countries, while recognising that this factor cannot affect consideration of the criteria on respect of human rights and on regional peace, security and stability;**
- b) **the risk of use of the military technology and equipment concerned against their forces or of Member States and those of friendly allied countries.**

Comment: The User's Guide, analyses "key concepts" of Criterion 5. It could be summed as follow:

National Security refers to the capability of the Member States to ensure territorial integrity, protect the population and preserve national security interests as well as the resources and supplies deemed essential for its subsistence and its independence vis-à-vis all kind of threats and attacks. Threats include terrorism, proliferation of weapons of mass destruction, regional conflict, State failure, organised crime (as defined by the European Security Strategy).

National security must also be assessed by taking account of international or collective security, which is among the aims pursued by the Charter of the United Nations.

Territories whose external relations are the responsibility of a Member State:

- Territories covered by Article 5 of the NATO Treaty;
- The outermost regions (Guadeloupe, French Guiana, Martinique, Réunion, Azores, Madeira, Canary Islands);
- Overseas countries and territories covered by Article 198 to 204 of the Treaty of Lisbon (former Article 182 to 188 of the TEC), and listed in Annex II of the Treaty of Lisbon (former Annex II of TEC);
- European territories to which the provisions of the TEC apply under certain conditions.

Allied countries refers to countries associated by treaty or an international agreement providing for a solidarity clause or mutual defence clause.

Friendly countries covers countries with which a Member State maintains a close or long standing bilateral relationship, particularly in the field of defence and security, or with which it shares values and interests and pursues common objectives.

The User's Guide describes also factors to consider when examining requests in terms of Criterion 5.

In addition, it shall be emphasised that point (c) of Criterion 5 is henceforth included as point (f) in Criterion 7.

Article 2 Criterion Six

6. **Criterion Six:** behaviour of the buyer country with regard to the international community, as regards in particular to its attitude to terrorism, the nature of its alliances and respect for international law.

Member States will take into account, *inter alia*, the record of the buyer country with regard to:

- a) its support or encouragement of terrorism and international organised crime;
- b) its compliance with its international commitments, in particular on the non-use of force, and with international humanitarian law;
- c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to point (b) of Criterion One.

Comment: The User's Guide, Criterion 6 analysis focus essentially on current and past record of the recipient country with regard to its attitude to terrorism and international organised crime, the nature of its alliances, its respect for international commitment and law, concerning in particular the non-use of force, International Humanitarian Law and WMD non-proliferation, arms control disarmament. This criterion has to be considered for buyer countries whose Government exhibit negative behaviour with respect to the above provisions. Therefore the specific identity and the nature of the end-user or the equipment to be exported are not the main focus. The main focus is the behaviour of the buyer country more than any consideration of the risk that a particular transfer might have particular negative consequences.

The User's Guide describes also some key concepts to consider when examining requests in terms of Criterion 6 such as:

- **Terrorism**, which should be understood as terrorism acts, prohibited under international law;
- **Nature of buyer alliance**, which should be understood in a large sense as to include all those economic, military and defence agreements, which, by their nature are aimed at establishing a significant connection between two or more states.

Article 2 Criterion Seven

Criterion Seven: Existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions.

In assessing the impact of the military technology or equipment to be exported on the recipient country and the risk that such technology or equipment might be diverted to an undesirable end-user, the following shall be considered:

- a) **the legitimate defence and domestic security interests of the recipient country, including any participation in United Nations or other peace-keeping activity;**
- b) **the technical capability of the recipient country to use such technology equipment;**
- c) **the capability of the recipient country to exert effective export controls;**
- d) **the risk of such technology or equipment being re-exported to undesirable destinations, and the record of the recipient country in respecting any re-export provision or consent prior to re-export which the exporting Member State considers appropriate to impose;**
- e) **the risk of such technology or equipment being diverted to terrorist organisations or to individual terrorists;**
- f) **the risk of reverse engineering or unintended technology transfer.**

Comment: The User's Guide analyses a few key concepts, which should be taken into account in any assessment. It should be kept in mind that diversion can be initiated at various levels, it can take place within a country or can involve detour or retransfer to a third "unauthorised" country. It can be of possession (end-user) and/or function (end-use).

(a) The legitimate defence and domestic security interests of the recipient country, including any participation in United Nations or other peace keeping activity

All nations have the right to defend themselves according to the UN Charter. Nonetheless, an assessment should be made of whether the import is an appropriate and proportionate response to the recipient country's need to defend itself, to ensure internal security, or to assist in United Nations or other peace-keeping activity. The following questions might be asked:

- Is there a plausible threat to security that the planned arms import could meet?
- Are the armed forces equipped to meet such a threat?
- What will the destination be of the imported goods after the participation in UN or other peace-keeping activity has been terminated?

(b) The technical capability of the recipient country to use the equipment

It can be a key indicator of the "existence of a risk" of diversion. A proposed export that appears technically beyond what one might normally expect to be deployed by the recipient state may be an indication that a third-country end-user is in fact the intended final destination. This concept applies equally to complete goods and systems, as well as components and spares. The export of components and spares where there is no evidence that the recipient country operates the completed system in question may be a clear indicator of other intent. Some questions that might be asked are:

- Is the proposed export high-tech in nature?
- If so, does the recipient have access to, or is it investing in, the appropriate technical backup to support the sale?
- Does the proposed export fit with the defence profile of the recipient state?
- If components or spares are being requested, is the recipient state known to operate the relevant system that incorporates these items?

Article 2 Criterion Seven

(c) The capability of the recipient country to exert effective export controls

Recipient states' adherence to international export control norms can be a positive indicator against either deliberate or unintentional diversion. Some questions that might be asked are:

- Is the recipient state a signatory or member of key international export control treaties, arrangements or regimes (e.g. Wassenaar)?
- Does the recipient country report to the UN Register of Conventional Arms; if not, why?
- Has the recipient country aligned itself with the principles of the Council Common Position 2008/944/CFSP or similar regional arrangements?
- Does the recipient country apply effective export and transfer controls encompassing dedicated control legislation and licensing arrangements that conform to international norms?
- Is stockpile management and security of sufficient standard?
- Are there effective legal instruments and administrative measures in place to prevent and combat corruption?
- Is the recipient state in the proximity of conflict zones or are there on-going tensions or other factors within the recipient state that might mitigate against the reliable enforcement of their export control provisions?
- Does the country of stated end-use have any history of diversion of arms, including the re-export of surplus equipment to countries of concern?

(d) The risk of such technology or equipment being re-exported to undesirable destinations, and the record of the recipient country in respecting any re-export provision or consent prior to re-export which the exporting Member State considers appropriate to impose (as redrafted by the present Common position)

The competent authority should assess the reliability of the specific consignee:

- Is the equipment intended for the government or an individual company?

If the importer is the government:

- Is the government/the specific government branch reliable in this respect?
- Has the government/the specific government branch honoured previous end-user certificates?
- Is there any reason to suspect that the government/the specific government branch is not reliable?

If the importer is a company:

- Is the company known?
- Is the company authorised by the government in the recipient state?
- Has the company previously been involved in undesirable transactions?
- Does the recipient country have the technical capacity to use the equipment?

Technical capacity refers to the ability of the recipient country to make effective use of the equipment in question, both in material and human terms. It also refers to the technological level of the recipient country and its operational capacity, and generally to the standard of performance of its equipment. Consequently, examination of the compatibility of an export of military technology or equipment with respect to this technical capacity should include consideration of whether it is opportune to deliver to the recipient equipment which is more sensitive or sophisticated than the technological means and operational needs of the recipient country.

Article 2 Criterion Seven

(e) The risk of such technology or equipment being re-exported or diverted to terrorist organisations or to individual terrorists (as redrafted by the present Common Position)

In assessing the potential risk in the recipient state, the competent authority might ask the following questions:

- Does the recipient state have a record of past or present terrorist activities?
- Are there any known or suspected links to terrorist organisations (or even individual terrorists) or any reason to suspect that entities within the recipient state participate in the financing of terrorism?
- Is there any other reason to suspect that the arms might be re-exported or diverted to terrorist organisations?

If the answer is “yes” to one or more of the above-mentioned questions, a higher degree of scrutiny is necessary. The competent authority should consult with open and other sources when continuing that risk assessment.

In addition to the considerations pursuant to point (a) – (d) the competent authority should also assess the reliability of the specific consignee:

- Is the equipment intended for the government or an individual company?

If the importer is the government:

- Is the government/the specific government branch reliable in this respect?
- Has the government/the specific government branch honoured previous end-user certificates?
- Is there any reason to suspect that the government/the specific government branch is not reliable?

If the importer is a company:

- Is the company known?
- Is the company authorised by the government in the recipient state?
- Has the company previously been involved in undesirable transactions?

(f) The risk of reverse engineering or unintended technology transfer (as redrafted by the present Common Position, moreover previously this key concept was part of Criterion 5)

When the Member States are deciding on an export licence application, account must be taken of the capabilities of the recipient, whether State or private, to analyse and to divert the technology contained in the military equipment being acquired. The Member States will be able to exchange the relevant information with a view to establishing the capabilities of a potential purchaser of European military equipment.

In this context, and particularly for equipment which uses sensitive technology, the following factors must be considered:

- The sensitivity and the level of protection of the technologies contained in the system, as regards the estimated level of expert knowledge of the recipient, and the evident desire of that recipient to acquire some of those technologies;
- The ease with which those technologies could be analysed and diverted, either to develop similar equipment, or to improve other systems using the technology acquired;
- The quantities to be exported: the purchase of a number of sub-systems or items of equipment which appears to be under (or over) estimated is an indicator of a move to acquire technologies;

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- The past behaviour of the recipient, when that recipient has previously acquired systems which it has been able to examine to obtain information about the technologies used in those systems. In this context, the Member States may inform one another about the cases of technology theft which they have experienced.

In order to determine this compatibility, Member States could consider the following questions:

- Does the recipient country have the military infrastructure to be able to make effective use of the equipment?
- Is the technological level of the equipment requested proportionate to the needs expressed by the recipient country and to its operational capacity?
- Is similar equipment already in service well maintained?
- Are enough skilled personnel available to be able to use and maintain the equipment?

Comment: the information on the exports to United Nations-mandated or other national missions in 2008 is available in the Eleventh Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, published in OJ C 265, 6.11.2009, p. 1. (See comment relative to Article 8(2)).

The table contains general information on destination country, EU exporter, UN mission and the description of goods without the number specification.

Article 2 Criterion Eight

Criterion Eight: Compatibility of the exports of military technology or equipment with the **technical and economic capacity** of the recipient country, taking into account the desirability that states should meet their **legitimate security and defence needs** with the **least diversion of human and economic resources for armaments**.

Member States will take into account, in the light of information from relevant sources such as United Nations Development Programme, World Bank, International Monetary Fund and Organisation for Economic Cooperation and Development reports, whether the proposed export would seriously **hamper the sustainable development** of the recipient country. They shall consider in this context the recipient country's **relative levels of military and social expenditure**, taking into account also any EU or bilateral **aid**.

Comment: The User's Guide largely analyses and comments this criterion. The following terms are defined by the Guide:

Economic capacity refers to the impact of the arms import on the availability of the financial and economic resources of the recipient state for others purposes, in the immediate, medium and long term. In this regard Member States might take into account following questions:

- Both the capital cost of the arms purchase and the likely follow-on 'life-cycle' costs of related operation (e.g. ancillary systems and equipment), training and maintenance;
- Whether the arms in question are additional to existing capabilities or are replacing them, and, where appropriate, the likely savings in operating costs of older systems;
- How the import will be financed by the recipient country and how this might impact on its external debt and balance of payments situation.

Technical capacity refers to the ability of the recipient country to make effective use of the equipment in question, both in material and human terms. In this regard, Member States should consider the following questions:

- Does the recipient country have the military infrastructure to be able to make an effective use of the equipment?
- Is similar equipment already in service well maintained?
- Is enough skilled personnel available to be able to use and maintain the equipment?

Legitimate needs of security and defence require that Member State conduct an assessment of whether the import is an appropriate and proportionate response to the recipient country's need to defend itself, to ensure internal security, and assist in international peace-keeping and humanitarian operations. The following questions should be considered by Member States:

- Is there a plausible threat to security that the planned arms import could meet?
- Are the armed forces equipped to meet such a threat?
- Is the planned arms import a plausible priority considering the overall threat?

Least diversion for armaments of human and economic resources should be evaluate by considering factors such as the adequacy with recipient poverty reduction strategy, amount and transparency of military expenditures, etc.

Member States should consider inter alia the following questions:

- Is the expenditure in line with the recipient country's Poverty Reduction Strategy or programmes supported by the International Financial Institutions (IFIs)?
- What are the levels of military expenditure in the recipient country? Has it been increasing in the last five years?
- How transparent are state military expenditures and procurement? What are the possibilities or democratic or public involvement in the state budget process?
- Is there a clear and consistent approach to military budgeting? Is there a well-defined

Article 2 Criterion Eight

- defence policy and a clear articulation of a country's legitimate security needs?
- Are more cost-effective military systems available?

Relative levels of military and social expenditure. Member States should consider the following questions in assessing whether the purchase would significantly distort the level of military expenditure relative to social expenditure:

- What is the recipient country's level of military expenditure relative to its expenditure on health and education?
- What is the recipient country's military expenditure as a percentage of Gross Domestic Product (GDP)?
- Is there an upward trend in the ratio of military expenditure to health and education and to GDP over the last five years?
- If the country has high levels of military expenditure, does some of this "hide" social expenditure? (e.g. in highly militarised societies, the military may provide hospitals, welfare, etc).
- Does the country have significant levels of "off-budget" military expenditure (i.e. is there significant military expenditure outside the normal processes of budgetary accountability and control)?

Member States should take into account the level of **Aid Flows** to the importing country and their potential fungibility (fungibility refers to the potential diversion of aid flows into inappropriate military expenditure).

- Is the country highly dependent on multilateral as well as EU and bilateral aid?
- What is the country's aid dependency as a proportion of Gross National Income?

An assessment of the **cumulative impact** of arms imports on a recipient country's economy can only be made with reference to exports from all sources, but accurate figures are not usually available. Each Member State may wish to consider the cumulative impact of its own arms exports to a recipient country, including recent and projected licence requests. It may also wish to take into account available information on current and planned exports from other EU Member States, as well as from other supplier States. Potential sources of information are, inter alia, the EU Annual Report, Member States' annual national reports, the Wassenaar Arrangement, the UN Arms Register and the annual reports of the Stockholm International Peace Research Institute.

Data on cumulative arms exports may be used to inform a more accurate assessment of:

- Historical, current and projected trends in a recipient country's military expenditure, and how this would be affected by the proposed export;
- Trends in military spending as a percentage of the recipient country's income, and as a percentage of its social expenditure.

Article 3

Article 3

This Common Position shall not affect the right of Member States to operate more restrictive national policies.

Article 4

1. Member States shall circulate details of applications for export licences which have been denied in accordance with the criteria of this Common Position together with an explanation of why the licence has been denied. Before any Member State grants a licence which has been denied by another Member State or States for an essentially identical transaction within the last three years, it shall first consult the Member State or States which issued the denial(s). If following consultations, the Member State nevertheless decides to grant a licence, it shall notify the Member State or States issuing the denial(s), giving a detailed explanation of its reasoning.

Comment: the information on a total number of consultations initiated and total number of consultations received by each Member State in 2008 as well as the table showing a total number of consultations for each destination concerned in 2008 are available in the Eleventh Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, published in OJ C 265, 6.11.2009, p. 1. (See comment relative to Article 8(2)).

Summing up, 101 consultations were undertaken by Member States in 2008. States which induced the highest amount of the consultations are, inter alia, Ukraine 9, Pakistan 8, and Bangladesh 6.

2. The decision to transfer or deny the transfer of any military technology or equipment shall remain at the national discretion of each Member State. A denial of a licence is understood to take place when the Member State has refused to authorise the actual sale or export of the military technology or equipment concerned, where a sale would otherwise have come about, or the conclusion of the relevant contract. For these purposes, a notifiable denial may, in accordance with national procedures, include denial of permission to start negotiations or a negative response to a formal initial enquiry about a specific order.

3. Member States shall keep such denials and consultations confidential and not use them for commercial advantage.

Comment: The implementation of the no-undercut principle lays on the information received by Member States Authorities. If a denial has been notified by one Member State to the others and if another Member State receives an export application for an essentially identical transaction, he has, prior his decision, to consult the Member State who has issued the denial. If it has doubts whether or not the considered export application is an “essentially identical transaction”, it should initiate a consultation in order to clarify the situation.

The User’s Guide specifies that the consultation deadline is 3 weeks from the date of transmission of the consultation request, unless otherwise agreed between the parties concerned. If the consulted Member State has not responded within this time, it is presumed to have no objection to the licence application.

The consulting Member State should inform all Member States, of its decision on the licence application, including a brief statement of its reasoning. The consulting Member State should send this notification within 3 weeks of reaching a decision.

It should be emphasised that strictly speaking, the result of the consultation is not legally binding.

Practices currently differ between Member States on the time that exporters approach their Authorities to obtain the export authorisation. In some Member States exporters are used to have early informal contacts with their Authorities to get indications whether a potential transaction will be authorised. In other Member States exporters have to introduce the formal export authorisation application to know if the authorisation will be granted or not.

In spite of those different approaches, the no-undercut mechanism will be applied only if a denial has been delivered and notified by National Authorities. So to avoid the risk to be undercut by competitor from another Member State, it is essential that exporters introduce an export authorisation application even if they know by informal contacts that the authorisation will be denied.

The User's Guide specifies that a denial should be notified when the government authority has denied an application for export approval made in writing with a certain degree of precision giving the competent authority enough information to make the decision. The minimum of information that the request has to contain are:

- Country of destination;
- Full description of the items concerned including quantity and technical specifications;
- Buyer (government agency, branch of the armed forces, paramilitary force or private natural or legal person);
- Proposed end-user.

Normally a denial should be issued by Member States Authorities when:

- They revoke a extant export licence;
- They deny an export licence that is relevant to the scopes of the Code and has already circulated a denial notification in other international export control regimes;
- They have refused an export transaction deemed essentially identical to a transaction previously refused by another Member State and notified as denial.

The denial notification document should contain:

- Identification number;
- Country of final destination;
- Date of notification;
- Contact details for more information;
- Short description of the goods;
- Control List reference;
- Stated end-use;
- Consignee and end-user;
- Reason for notification of denial/amendment/revocation;
- Additional remarks;
- Origin country of the goods
- Broker's name and details;
- In case amendment specification of the elements changed to the original notification;
- Effective date of amendment or revocation.

In case of a licence being refused on the basis of national policy that is stricter than that required under the Code, Member State Authorities could issue an notification "for information only" which will not require the potential application of the no-undercut principle.

Article 5

Export licences shall be granted only on the basis of reliable prior knowledge of end use in the country of final destination. This will generally require a thoroughly checked end-user certificate or appropriate documentation and/or some form of official authorisation issued by the country of final destination. When assessing applications for licences to export military technology or equipment for the purposes of production in third countries, Member States shall in particular take account of the potential use of the finished product in the country of production and of the risk that the finished product might be diverted or exported to an undesirable end user.

Comment: The User's Guide defined a common core of elements that should appear in an **end-user certificate** when it is required by Member State Authorities:

Minimum elements of **content**:

- Exporter's details;
- End-user's details;
- Country of final destination;
- Description of the goods being exported or reference to the contract concluded with the authorities of the country of final destination;
- Quantity and/or value of the exported goods;
- Signature, name and position of the end-user;
- Date of the end-user certificate;
- End-use and/or re-export clause if appropriate;
- Indication of the end-use of the goods;
- An undertaking, where appropriate, that the goods being exported will not be used for purposes other than declared use;
- An undertaking, where appropriate, that the goods will not be used in the development, production or use of a weapon of mass destruction or for missiles capable of delivering such weapons.

Others **elements** that might be required by Member State Authorities, **at their discretion**, are inter alia:

- A **clause prohibiting re-export** of the goods covered in the end-user certificate. Such clause could, among other requirements, contain :

- * a pure and simple ban on re-export;
- * a provision that re-export will be subject to agreement in writing of the authorities of the original exporting country;
- * a permission for re-export without the prior authorisation of the authorities of the exporting country to certain countries identified in the end-user certificate.

- Full details, where appropriate, on the intermediary;

- If the end-user certificate comes from the government of the country of destination of the goods, the certificate will be attested by the authorities of the exporting country in order to check the authenticity of the signature and the capacity of the signatory to make commitments on behalf of its government;

- A commitment by the final consignee to provide the exporting State with a Delivery Verification certificate upon request.

Article 6

Article 6

Without prejudice to Regulation (EC) No 1334/2000, the criteria in Article 2 of this Common Position and the consultation procedure provided for in Article 4 are also to apply to Member States in respect of dual-use goods and technology as specified in Annex I to Regulation (EC) No 1334/2000 where there are serious grounds for believing that the end-user of such goods and technology will be the armed forces or internal security forces or similar entities in the recipient country. References in this Common Position to military technology or equipment shall be understood to include such goods and technology.

Comment: This Article has to be read in connection with Article 12 of the Dual-Use Regulation. Nevertheless, it is not clear how both provisions (the one of the Regulation and the one of the Joint Action) might interfere. Shall Member States take into consideration when assessing an export application for dual-use the eight criterions of the Common Position if the end-user will be the armed force of the recipient States? If politically such mechanism might be required, the Common Position cannot legally extend the Member States obligation to consider such criteria in the consultation mechanism for an essentially identical transaction previously denied established by Article 9 neither extend the criteria list of Article 8 of the Dual-Use Regulation.

Article 7

Article 7

In order to maximise the effectiveness of this Common Position, Member States shall work within the framework of the CFSP to reinforce their cooperation and to promote their convergence in the field of exports of military technology and equipment.

Article 8

1. Each Member State shall circulate to other Member States in confidence an annual report on its exports of military technology and equipment and on its implementation of this Common Position.
2. An EU Annual Report, based on contributions from all Member States, shall be submitted to the Council and published in the 'C' series of the *Official Journal of the European Union*.
3. In addition, each Member State which exports technology or equipment on the EU Common Military List shall publish a national report on its exports of military technology and equipment, the contents of which will be in accordance with national legislation, as applicable, and will provide information for the EU Annual Report on the implementation of this Common Position as stipulated in the User's Guide.

Comment: Annual Reports, which review the Code implementation by Member States, are being adopted by the Council since 1999. They are available at the following website: <http://www.consilium.europa.eu/showPage.aspx?id=1484&lang=en>

Eleventh Annual Report defining common rules governing control of exports of military technology and equipment was published in OJ C 265, 6.11.2009, p. 1. This Report broaches the implementation of the Council Common Position 2008/944/CFSP by the Member States and contains several tables on the practical application thereof.

European Union asserts the promotion of principles and criteria of Common Position 2008/944/CFSP among third countries. Indeed, a number of outreach seminars were organised on the basis of Joint Action 2008/230/CFS involving the countries of South East Europe and North Africa as well as Ukraine. In addition, troika meetings with Canada, Norway, and Russian Federation were held under the several presidencies.

The Report also touches upon the subject of an Arms Trade Treaty which is being currently negotiated on the UN level. Member States emphasized their strong support for the process and continue to encourage all UN members to endorse the concept of an Arms Trade Treaty.

As concerns the priority guidelines for the near future following areas were identified as requiring to be consolidated:

- Promoting of earlier adoption and harmonization of national reports;
- Continuation of activities for the promotion of an Arms Trade Treaty;
- Implementation of Common Position 2003/468/CFSP;
- Promoting the principles and criteria of Common Position 2008/944/CFSP among third countries and assisting its practical implementation through, inter alia, the provision of practical and technical assistance to ensure the harmonization of policies on arms export control;
- Expert contribution to discussions on the implementation of Directive 2009/43/EC⁶⁰;
- Further development of dialogue with the European Parliament;
- Continued close cooperation and consultation with the interested third parties, including international NGO's and the defence industry.

⁶⁰ OJ L 146, 10.06.09, p. 1.

Annexes of the Report contain information on conventional arms exports and implementation of the Code of Conduct by the Member States over the period 1 January to 31 December 2008. Therefore, following tables are available:

- Tables setting out exports and license refusals per destination, per region and world wide (See Article 1(1));
- Table showing exports to United Nations-mandated or other national missions in 2008 (See Article 2(7) (a));
- Table providing information on brokering licenses granted and denied per Member State (See Article 3 of Common Position 2003/468/CFSP);
- Table showing a total number of consultations initiated and total number of consultations received by each Member State in 2008 (See Article 4(1));
- Table showing a total number of consultations for each destination concerned in 2008 (See Article 4(1));
- Information on national legislation implementing Common Position 2003/468/CFSP on the control of arms brokering and Common Position 2008/944/CFSP defining common rules for the control of the exports of military technology and equipment or, for those Member States which have not yet fully implemented these Common Positions, providing information on the state of play (see Article 12);
- Table of outreach activities carried out by the EU and Member States (1 January 2008 to 30 June 2009) (see Article 11);
- Table showing internet addresses for national reports on Arms Exports.

Article 9

Article 9

Member States shall, as appropriate, assess jointly through the CFSP framework the situation of potential or actual recipients of exports of military technology and equipment from Member States, in the light of the principles and criteria of this Common Position.

Article 10

While Member States, where appropriate, may also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, these factors shall not affect the application of the above criteria.

Article 11

Member States shall use their best endeavours to encourage other States which export military technology or equipment to apply the criteria of this Common Position. They shall regularly exchange experiences with those third states applying the criteria on their military technology and equipment export control policies and on the application of the criteria.

Comment: the information on the outreach activities carried out by the EU and Member States from 1 January 2008 to 30 June 2009 is available in the Eleventh Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, published in OJ C 265, 6.11.2009, p. 1. (See comment relative to Article 8(2)).

The information is provided on target/host country and date, on Member State providing assistance/outreach and on description of assistance/outreach.

Article 12

Member States shall ensure that their national legislation enables them to control the export of the technology and equipment on the EU Common Military List. The EU Common Military List shall act as a reference point for Member States' national military technology and equipment lists, but shall not directly replace them.

Comment: The list has been adopted by the Council in June 2000. The last revised version has been adopted in February 2009 and has been published in the Official Journal of the European Union (OJ C 65, 19.3.2009, p. 1)⁶¹.

⁶¹ This list is available at following website: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:065:0001:0034:EN:PDF>.

Table 1: Information on national legislation implementing Common Position 2003/468/CFSP and Common Position 2008/944/CFSP or, for those Member States which have not yet fully implemented these Common Positions, providing information on the state of play

Member State	Council Common Position 2003/468/CFSP on the control of arms brokering (OJ L 156 of 25 May 2003, pages 79-80).		Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (OJ L 335 of 13 December 2008, pages 99-103)	
	National legislation reference no.	Information concerning state of play	National legislation reference no.	Information concerning state of play
Austria	Foreign Trade Act (AussHG, Federal Gazette I No. 50/2005) and War Material Act (KMG Federal Gazette I no. 540/1977 as amended by Federal Gazette I No. 50/2005)	Implementation completed	Foreign Trade Act (AussHG, Federal Gazette I No. 50/2005) and War Material Act (KMG Federal Gazette I no. 540/1977 as amended by Federal Gazette I No. 50/2005)	Implementation completed
Belgium	Law of 25 March 2003, article 12, (published in Moniteur belge of 7.7.2003, modifying law of 5.8.1991	Implementation completed		
Bulgaria	Latest amendments: Law on export control of arms and dual use items and technologies into force 5.02.2007 Regulation for the implementation of the Export Control Law (adopted by Decree 72/3.04.2007)	Implementation completed Fully implements the Common Position on Brokering		
Cyprus		In preparation		
Czech Republic	Amendment to Act No. 38/1994 on foreign trade in military material, amended by Act No. 357/2004 to make clear reference to brokering activities and by Act No. 220/2009	Implementation completed	Amendment to Act No. 38/1994 on foreign trade in military material amended by Act No. 220/2009 reflects certain provisions of the Common Position	
Denmark	Act No. 555 of 24 June 2005 on brokering, incorporated in Consolidated Weapons and Explosives Act No. 1316/2007			

Article 12

Member State	Council Common Position 2003/468/CFSP on the control of arms brokering (OJ L 156 of 25 May 2003, pages 79-80).		Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (OJ L 335 of 13 December 2008, pages 99-103)	
	National legislation reference no.	Information concerning state of play	National legislation reference no.	Information concerning state of play
Estonia	Strategic Goods Act RT I 2004, 2,7 amended by RT I 2004 53, 366	Implementation completed	Strategic Goods Act RT I 2004, 2,7 amended by RT I 2004 53, 366	References to criteria 6 and 8 of CCP 2008/944 need to be updated in the present legislation. This work is currently in process. By the completion of amending the law, controls based on criteria 6 and 8 can still be executed and denial issued under the reference of § 16.2.10 of Strategic Goods Act: 'other significant reasons exist'
Finland	Decision of Council of State on General Guidelines for Export, Transit and Brokering of Defence Material (1000/2002)	Fully implements the Common Position on Brokering	The former EU CoC is already incorporated into the Finnish legislation as an annex to the National Guidelines (1000/2002)	Changes will be made as one part of the ongoing work on revising the legislation on export of defence equipment
France	Decree 2002-23	Amendment to fully implement Common Position in preparation		
Germany	Legislation on brokering of war weapons adopted in 1978. Amendment to fully implement the Common Position on brokering (2003/468/GASP) is in force since the end of July 2006. This means that not only the brokering of war weapons, but of all items of the EU Common Military list is controlled	Implementation completed	In Germany national law will not have to be changed after the adoption of the Common Position. The existing legal requirements in connection with the 'Political Principles Adopted by the Government of the Federal Republic of Germany for the Export of War Weapons and Other Military Equipment' make it possible to immediately apply the regulations laid down in the Common Position	Implementation completed

Article 12

Member State	Council Common Position 2003/468/CFSP on the control of arms brokering (OJ L 156 of 25 May 2003, pages 79-80).		Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (OJ L 335 of 13 December 2008, pages 99-103)	
	National legislation reference no.	Information concerning state of play	National legislation reference no.	Information concerning state of play
Greece		Amendment of Law 2168/1993 to implement Common Position in preparation		
Hungary	Gov. decree. 16/2004 on the licensing of the export, import, transfer and transit of Military equipment and technical assistance	Implementation completed		<p>The Code of Conduct on arms export has been a legally binding document in national legislation since accession to the EU: it has been incorporated into Government decree 16/2004 on arms exports since May 1, 2004.</p> <p>Need to change the wording and the references in the various legislations, amendment procedure is underway</p>
Ireland	Control of Exports Act 2008 (No. 1 of 2008)			Consultations being initiated with Attorney General on eventual need for implementing legislation
Italy		New draft law for all the sector is in preparation and will include also the Common Position		New draft law for all the sector is in preparation and will include also the Common Position
Latvia	Law on the Circulation of Strategic Goods (in force since 19 July 2007)	<p>Implementation completed</p> <p>Fully implements the Common Position</p>	Law on the Circulation of Strategic Goods (in force since 19 July 2007)	<p>Partly implemented.</p> <p>Draft Regulations of the Government to fully implement the Common Position in preparation</p>
Lithuania	Law on the Control of Strategic Goods which came into effect on 1 August 2004, amended 6 April 2006 (effective from 1 July 2006)	Implementation completed	Law on the Control of Strategic Goods which came into effect on 1 August 2004, amended 6 April 2006 (effective as of 1 July 2006)	Pending amendment of the Law on the Control of Strategic Goods: references to EU Code of Conduct have to be replaced with references to Common Position.

Article 12

Member State	Council Common Position 2003/468/CFSP on the control of arms brokering (OJ L 156 of 25 May 2003, pages 79-80).		Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (OJ L 335 of 13 December 2008, pages 99-103)	
	National legislation reference no.	Information concerning state of play	National legislation reference no.	Information concerning state of play
Luxembourg		Amendment to implement Common Position in preparation		
Malta	Subsidiary legislation 365.13 Military equipment export control regulations	Implementation completed		
Netherlands	Decree on Financial Involvement concerning Strategic Goods Order of 1996, as amended in 1999 and 2001; 1997 Arms and Ammunitions Act	Implementation completed		
Poland	Law of 29/11/2000 on foreign trade in goods, technologies and services of strategic importance to the security of the state and to maintaining international peace and security (uniform text - Journal of Laws of 2004, No 229, item 2315) ⁶²	Implementation completed		Amendment of Law of 29/11/2000 to implement Common Position in preparation (planned in the second half of 2009)
Portugal	Law no. 49/2009 of 5 August 2009	Implementation completed		New Law under preparation. It will be in line with the Council Common Position 2008/944/CFSP and include provisions on intra-community transfers, in compliance with the Directive on intra-community transfers.
Romania	Law no. 595/2004 and Order no. 59/2005	Implementation completed		

⁶² Poland first adopted legislation covering brokering activities in the Act of 11 December 1997 on administrating of foreign trade in goods and services and transfers of special goods (Journal of Laws 1997, No. 157, item 1026).

Article 12

Member State	Council Common Position 2003/468/CFSP on the control of arms brokering (OJ L 156 of 25 May 2003, pages 79-80).		Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (OJ L 335 of 13 December 2008, pages 99-103)	
	National legislation reference no.	Information concerning state of play	National legislation reference no.	Information concerning state of play
Slovakia	Law no. 179/1998 on trading in Military material, as amended	Implementation completed		
Slovenia	Decree on permits and consents for trade and production of military weapons and equipment (Official Gazette 18/03, 31/05). Brokers are bound to obtain trading permit	Implementation completed	Article 77 of the Defence Act (Official Gazette 103/04) specifies that an export license may be refused on the basis of Slovenia's international commitments and obligations	A new Governmental Decree on Permits and Consents for Trade and Production of Military Weapons and Equipment is in preparation.
Spain	Royal Decree 2061/08 of 12/12/2008 Law 53/2007 of 28/12/2007	Implementation completed		A new Royal Decree will be in force in 2010, incorporating Common Position 2008/944/CFSP
Sweden	Military equipment act 1992:1300 as last amended by 2008:885.	Implementation completed		Possible measures will be reviewed in connection with an analysis of the implementation requirements of the Directive on Intra-Community Transfers
United Kingdom	Trade in controlled goods order effective 1 May 2004	Implementation completed		

Article 13, 14, 15, 16

Article 13

The User's Guide to the European Code of Conduct on Exports of Military Equipment, which is regularly reviewed, shall serve as guidance for the implementation of this Common Position.

Article 14

This Common Position shall take effect on the date of its adoption.

Article 15

This Common Position shall be reviewed three years after its adoption.

Article 16

This Common Position shall be published in the *Official Journal of the European Union*.

Done at Brussels, 8 December 2008.

For the Council

The President

B. KOUCHNER

Article 5, 6, 7 and 8 of the Common Position

Article 5

1. Member States will establish a system for exchange of information on brokering activities among themselves as well as with third States, as appropriate. A specific arrangement for such exchange of information will be established. This arrangement will take particular account of the case where several Member States are involved in the control of the same brokering transaction(s).

2. Information will be exchanged, inter alia, in the following areas:

- legislation,
- registered brokers (if applicable),
- records of brokers,
- denials of registering applications (if applicable) and licensing applications.

Comment: A denial notification form has been adopted by the User's Guide⁶³. It contains:

- Identification;
- Broker(s);
- Goods (if known);
- Reason for Denial;
- Additional Remarks.

All Member States, which have laws on brokering activities and operate a licensing system for brokering transactions should notify denials in the same way as for export licence denials in accordance with and to the extent permitted by their national legislation and practice (see comment under operative provision number 3).

Article 6

Each Member State will establish adequate sanctions, including criminal sanctions, in order to ensure that controls on arms brokering are effectively enforced.

Article 7

This Common Position shall take effect on the date of its adoption.

Article 8

This Common Position shall be published in the *Official Journal of the European Union*.
Done at Brussels, 23 June 2003.

For the Council

The President

G. PAPANDEOU

⁶³ The form is available at the following website:
<http://register.consilium.europa.eu/pdf/en/09/st09/st09241.en09.pdf>.

Part IV: The European Union regime of acquisition and possession of weapons

**Maryna TSUKANOVA under the direction of
Pr. Dr. Quentin MICHEL**

Introductory Remark: EU regime of acquisition and possession of weapons is regulated by the Directive 91/477/EEC amended by the Directive 2008/51/EC.

In order to facilitate understanding we have in the present Part represented a consolidated version of aforesaid Directives as follows:

- Directive 91/477/EEC (in black in the present text),
- Directive 2008/51/EC (in grey in the present text).

Introductory remarks

Introductory Remark:

Main objectives and principles of Directive 91/477/EEC:

Main objective of this Directive is to abolish controls on the possession of firearms at internal Community borders and partially to harmonise national laws on such firearms.

The abolition of controls at internal Community borders on 1 January 1993 has de facto constrained the EU to adopt rules in order to accomplish controls on arms circulation within the Member States. Indeed, this Directive balances the necessity to control the movement of weapons and the principle of single market. In other words it was essential to confine the absence of borders, hence avoiding an incentive to buy arms in countries with less strict legislation. This Directive introduces rules on the acquisition and possession of firearms and organises the transfer of firearms to another Member States.

Procedure established by this Directive focuses on following subjects:

- The requirement of a licence for transfers of firearms between Member States;
- The requirement of an authorisation for the cross-border movement of person travelling in possession of a firearm. Nevertheless, more flexible rules were introduced as regards hunting and sport target shooting.

Directive 91/477/EEC constitutes a standard of harmonisation; consequently Member States are free to adopt more restricted provisions, on the assumption of their respect of the rules of the Treaty, particularly the principles of proportionality and subsidiarity.

The following series of domains are excluded of scope of application of this Directive (Article 2):

- Commercial transfers of weapons of war and ammunition;
- Acquisition and possession of weapons and ammunition by the armed forces, the police, the public authorities, as well as collectors and cultural and historical organisations;
- Carrying of weapons, hunting or sport target shooting activities;
- Acquisition or possession of weapons and ammunition by collectors and bodies concerned with the cultural and historical aspects of weapons and recognised as such by the Member State in which they are established;
- Operations which do not take place within European Community borders.

Main objectives and principles of Directive 2008/51/EC:

Amendments introduced by Directive 2008/51/EC were substantially due to the accession of the Community to the United Nations Protocol on the illicit manufacturing of and trafficking in firearms, their parts, components and ammunition (see comment relative to Recital 2 of this Directive).

However, it should be kept in mind that this Directive concerns transfers and commerce of firearms *exclusively within the European Community borders*, whereas the Protocol affects much larger scope of countries.

Those amendments shall fulfil following objectives:

- Harmonisation of European legislation;
- Fighting the illegal market in weapons initially intended for civilian use;
- Averting penetration of legal weapons in illegal market.

Introductory remarks

- Definition, within the scope of application of the Directive, of the notions of 'illicit manufacturing and trafficking of firearms';
- Provisions stipulating the marking of weapons;
- Extension of the period for keeping registers prescribed by Directive 91/477/EEC;
- Clarification of the applicable penalties;
- Inclusion of the general principles on the deactivation of weapons defined by the Protocol.

Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons

Official Journal L 256, 13/09/1991 P.0051–0058

Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons

Official Journal L 179, 8/07/2008, P. 0005–0011

Comment: In order to understand the grounds of Directive 2008/51/EC to amend the Directive 91/477/EEC as well as to deepen the comprehension thereof following documents can be consulted:

- European Parliament debate on control of the acquisition and possession of weapons of 28 November 2007⁶⁴.
- Proposal for a Directive amending Council Directive 91/477/EEC⁶⁵.

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Complementary information: Due to the fact that the Directive is dated 18 June 1991, it should be emphasised that the term “Treaty” refers to the Single European Act (Luxembourg, 17 February 1986, and The Hague, 28 February 1986).

“Article 100a

*1. By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8a. The Council shall, acting by a **qualified majority** on a **proposal from the Commission in co-operation with the European Parliament** and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*

(...)

*4. If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a **Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36**, or relating to protection of the environment or the working environment, **it shall notify the Commission** of these provisions. The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States. By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.*

⁶⁴ This debate is available at the following website: <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20071128&secondRef=ITEM-021&language=EN&ring=A6-2007-0276>.

⁶⁵ This proposal is available at the following website: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=EN&type_doc=COMfinal&an_doc=2006&nu_doc=0093.

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5. The harmonization measures referred to above shall, in appropriate cases, include a safeguard clause authorizing the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Community control procedure.”

Including several modifications, present Article integrated as Article 95 EC which became Article 114 TFEU with the Treaty of Lisbon.

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas Article 8a of the Treaty provides that the internal market must be established by not later than 31 December 1992; whereas the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured, in accordance with the provisions of the Treaty;

Complementary information:

“Article 8a

The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 8b, 8c, 28, 57 (2), 59, 70 (1), 84, 99, 100a and 100b and without prejudice to the other provisions of this Treaty.

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.”

Including several modifications, present Article is mentioned as Article 14 EC which became Article 26 TFEU with the Treaty of Lisbon.

Whereas, at its meeting in Fontainebleau on 25 and 26 June 1984, the European Council expressly set the objective of abolishing all police and customs formalities at intra-Community frontiers;

Whereas the total abolition of controls and formalities at intra-Community frontiers entails the fulfilment of certain fundamental conditions; whereas in its white paper 'Completing the internal market' the Commission stated that the abolition of controls on the safety of objects transported and on persons entails, among other things, the approximation of weapons legislation;

Complementary information: White Paper from the Commission to the European Council regarding the completion of the internal market⁶⁶

Taking into account a lack of progress in the cooperation within Community, a more effective approach appeared to be necessary. Therefore, in its White Paper, approved on 28-29 June 1985 by the European Council in Milan, the Commission shaped a program for implementation of the internal market.

⁶⁶ White paper “Completing the internal market” is available at the following website:
http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf.

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In order to implement objectives of completing of the internal market, the White Paper suggested several legislative measures to be taken, grouping them under three main purposes:

- the elimination of physical frontiers, by abolishing checks on goods and persons at internal frontiers,
- the elimination of technical frontiers: breaking down the barriers of national regulations on products and services, by harmonisation or mutual recognition,
- the elimination of tax frontiers: overcoming the obstacles created by differences in indirect taxes, by harmonisation or approximation of VAT rates and excise duty⁶⁷.

The Part One of the White Paper devoted to the removal of physical barriers concerns the weapon legislation. Section III thereof titled "Control of Individuals" includes **point 55** which expresses the wish of the Commission to "*arrive at the stage whereby checks on the entry are also abolished for Community citizens arriving from another Community country*".

For this purpose the Commission tables a proposal to balance the necessity to control the movement of weapons and the principle of single market. In other words it was essential to confine the absence of borders, hence avoiding an incentive to buy arms in countries with less strict legislation. According to White Paper such proposal had to be drafted in 1985 with target approval in 1988 at the latest.

Whereas abolition of controls on the possession of weapons at intra-Community frontiers necessitates the adoption of effective rules enabling controls to be carried out within Member States on the acquisition and possession of firearms and on their transfer to another Member State; whereas systematic controls must therefore be abolished at intra-Community frontiers;

Whereas the mutual confidence in the field of the protection of the safety of persons which these rules will generate between Member States will be the greater if they are underpinned by partially harmonized legislation; whereas it would therefore be useful to determine category of firearms whose acquisition and possession by private persons are to be prohibited, or subject to authorization, or subject to declaration;

Whereas passing from one Member State to another while in possession of a weapon should, in principle, be prohibited; whereas a derogation therefrom is acceptable only if a procedure is adopted that enables Member States to be notified that a firearm is to be brought into their territory;

Whereas, however, more flexible rules should be adopted in respect of hunting and target shooting in order to avoid impeding the free movement of persons more than is necessary; Whereas the Directive does not affect the right of Member States to take measures to prevent illegal trade in weapons,

Whereas:

(1) Directive 91/477/EEC established an accompanying measure for the internal market. It creates a balance between on the one hand the undertaking to ensure a certain freedom of movement for some firearms within the Community, and on the other the need to control this freedom using security guarantees suited to this type of product.

⁶⁷ For further information consult the site of the European Parliament, notably the section devoted to the principles and general completion of the internal market (http://www.europarl.europa.eu/factsheets/3_1_0_en.htm)

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(2) In accordance with Council Decision 2001/748/EC of 16 October 2001 concerning the signing on behalf of the European Community of the United Nations Protocol on the illicit manufacturing of and trafficking in firearms, their parts, components and ammunition, annexed to the Convention against transnational organised crime, the Commission signed that Protocol (hereinafter referred to as the Protocol) on behalf of the Community on 16 January 2002.

Complementary Information: United Nations Protocol on the illicit manufacturing of and trafficking in firearms, their parts, components and ammunition, annexed to the Convention against transnational organized crime⁶⁸.

The Protocol was signed by the Commission on behalf of the Community on 16 January 2002, according to Council Decision 2001/748/EC⁶⁹.

The Protocol was adopted by the UN Resolution 55/255 and it entered into force on 3 June 2005. It reflects the necessity for all States to take appropriate measures in order to prevent, combat and eradicate the illicit manufacturing and trafficking of firearms, their parts and components and ammunition, owing to the harmful effects of those activities on the security of the world as a whole.

It applies to the prevention of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and to the investigation and prosecution of offences established. It shall not apply to State-to-State transactions or to State transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations.

(3) The accession of the Community to the Protocol requires amendments to certain provisions of Directive 91/477/EEC. Indeed, it is important to ensure the coherent, effective and rapid application of the international commitments affecting that Directive. Furthermore, it is necessary to take the opportunity of this revision in order to improve that Directive by addressing certain issues, in particular those that were identified in the report of the Commission to the European Parliament and the Council of 15 December 2000 on the implementation of Directive 91/477/EEC.

(4) Police intelligence evidence shows an increase in the use of converted weapons within the Community. It is therefore essential to ensure that such convertible weapons are brought within the definition of a firearm for the purposes of Directive 91/477/EEC.

Comment: The relevance of control of **converted weapons** shall be emphasised. Taking into account their particularly dangerous nature, Article 1(1) this Directive did introduced converted weapons in notion of “firearms”. In addition, in order to avoid legal uncertainty, paragraph 2 of Article 1(1) specifies that *object capable of being converted to expel a shot, bullet or projectile* shall satisfy following conditions:

- it has the appearance of a firearm, and
- as a result of its construction or the material from which it is made, it can be so converted.

It should be also noted that Annex I of this Directive touches upon ‘firearms disguised as other objects’ and classifies them in Category A-Prohibited firearms.

⁶⁸ The full text of the Protocol is available at the following website:
http://www.unodc.org/pdf/crime/a_res_55/255e.pdf.

⁶⁹ OJ L 280, 24.10.2001, p. 5. The full text is available at the following website: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=32001D0748.

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(5) Firearms, their parts and ammunition, when imported from third countries, are subject to Community legislation and, accordingly, to the requirements of Directive 91/477/EEC.

Comment: It must be emphasised that soles **importations** of firearms, their parts and ammunition. In other words the exportations of those goods are not covered by this Directive; indeed they are subject to Council Common Position 2008/944/CFSP as well as to Council Common Position 2003/468/CFSP (see Part III of this Document).

(6) The notions of illicit manufacturing and trafficking of firearms, their parts and ammunition, as well as the notion of tracing, should therefore be defined for the purposes of Directive 91/477/EEC.

(7) Furthermore, the Protocol establishes an obligation to mark weapons at the time of manufacture and at the time of transfer from government stocks to permanent civilian use, whereas Directive 91/477/EEC refers only indirectly to the marking obligation. In order to facilitate the tracing of weapons, it is necessary to use alphanumeric codes and to include in the marking the year of manufacture of the weapon (if not part of the serial number). The Convention of 1 July 1969 on Reciprocal Recognition of Proofmarks on Small Arms should, to the greatest extent possible, be used as a reference for the marking system in the Community as a whole.

(8) Moreover, while the Protocol provides that the period during which registers containing information on weapons are to be kept must be increased to at least 10 years, it is necessary, in view of the dangerous nature and durability of weapons, to extend this period up to a minimum of 20 years in order to allow the proper tracing of firearms. It is also necessary that Member States keep a computerised data-filing system, either a centralised system or a decentralised system which guarantees access to authorised authorities to the data-filing systems in which the necessary information regarding each firearm is recorded. Access by police, judicial and other authorised authorities to the information contained in the computerised data-filing system must be subject to compliance with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(9) In addition, the brokering activities referred to in Article 15 of the Protocol should be defined for the purposes of Directive 91/477/EEC.

(10) In some serious cases, compliance with Articles 5 and 6 of the Protocol requires the application of criminal sanctions and the confiscation of the weapons.

(11) With regard to the deactivation of firearms, point (a) of Part III of Annex I to Directive 91/477/EEC simply refers to national legislation. The Protocol sets out more explicit general principles for the deactivation of weapons. Annex I to Directive 91/477/EEC should therefore be amended.

(12) Due to the special nature of the activity of dealers, it is necessary that Member States exercise a strict control over this activity, in particular by verifying the professional integrity and abilities of dealers.

(13) The acquisition of firearms by private individuals by means of distance communications, for example via the Internet should, where authorised, be subject to the rules laid down in

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Directive 91/477/EEC and, as a general rule, the acquisition of firearms by persons convicted by a final court judgment of certain serious criminal offences should be prohibited.

Comment: Initial proposition of Recital 13 was added by the European Parliament and stipulated that **except with respect to dealers and brokers**, suggested measures consisted in **prohibition of acquisition** of firearms through the means of distance communication, which do not allow appropriate control. Another suggested measure required introduction of a **cooling-off period** between the moment when the client orders the firearm and the moment when the firearm is delivered, initially set up to 15 days. Such period, already put in practice in State of California, could promote the decreasing of crimes under temporary state of mental disorder.

Present Recital 13 as well as amended Article 6 did not keep either a cooling-off period, or complete prohibition of the acquisition of firearms through the means of distance communication, albeit admitting that, where authorised, it should be strictly controlled. Therefore, this Directive does not provide any explicit rule on acquisition by means of distance communication (see also comment relative to Article 6).

(14) The European firearms pass functions in a satisfactory way on the whole and should be regarded as the main document needed by hunters and marksmen for the possession of a firearm during a journey to another Member State. Member States should not make the acceptance of the European firearms pass conditional upon the payment of any fee or charge.

Comment: This provision was added by the European Parliament which constrained considered European firearms pass (hereinafter referred to as EFP) to be the sole document required from hunters and marksmen. Such position was also backed up by the majority of Member States. However, this statement was not implemented in this Directive (see also comment relative to Article 12(2)).

(15) In order to facilitate the tracing of firearms and efficiently to combat the illicit trafficking and manufacturing of firearms, their parts and ammunition, it is necessary to improve the exchange of information between Member States.

(16) The processing of information is subject to compliance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [5] and does not prejudice the level of protection of individuals with regard to the processing of personal data under Community and national law, and in particular does not alter the obligations and rights set out in Directive 95/46/EC.

(17) The measures necessary for the implementation of Directive 91/477/EEC should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [6].

(18) Several Member States have simplified the way they classify firearms by switching from four categories to the following two: prohibited firearms and firearms subject to authorisation. Member States should fall into line with this simplified classification, although Member States which divide firearms into a further set of categories may, in accordance with the principle of subsidiarity, maintain their existing classification systems.

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(19) Authorisations for the acquisition and possession of firearms should, as far as possible, involve a single administrative procedure.

(20) Article 2(2) of Directive 91/477/EEC among other things excludes from the scope of application of that Directive the acquisition or possession of weapons and ammunition in accordance with national law by collectors and bodies concerned with the cultural and historical aspects of weapons and recognised as such by the Member State in whose territory they are established.

(21) In accordance with point 34 of the Interinstitutional Agreement on better law-making [7], Member States should draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and make them public.

(22) Directive 91/477/EEC should therefore be amended accordingly.

HAS ADOPTED THIS DIRECTIVE:

CHAPTER 1 Scope

Article 1

1. For the purposes of this Directive, "firearm" shall mean any portable barrelled weapon that expels, is designed to expel or may be converted to expel a shot, bullet or projectile by the action of a combustible propellant, unless it is excluded for one of the reasons listed in Part III of Annex I. Firearms are classified in Part II of Annex I.

Comment:

The Protocol has also consolidated a definition of firearms, according to **Article 3(a)** thereof *“firearm shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas. Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899”*.

Thereby definition, as amended by Directive 2008/51/EC, aligns Community legislation with provisions of the Protocol. Nevertheless, this definition excludes deactivated firearms; firearms designed for alarm, signalling, life-saving, animal slaughter or harpoon fishing or for industrial or technical purposes; and antique weapons, as it is mentioned Part III of Annex I of this Directive.

Generally speaking, Part II of Annex I of this Directive distinguishes among four categories of firearms:

- *Category A* – prohibited firearms,
- *Category B* – firearms subject to authorisation,
- *Category C* – firearms subject to declaration,
- *Category D* – other firearms.

Besides, some European deputies manifested their wish to abolish the four-category differentiation of firearms, by accentuating that several Member States (i.e. Ireland) introduced merely two categories into their national legislations, such as forbidden firearms and firearms subject to authorisation.

Nevertheless, according to Recital 18 of this Directive which is worded as follows:

“Several Member States have simplified the way they classify firearms by switching from four categories to the following two: prohibited firearms and firearms subject to authorisation. Member States should fall into line with this simplified classification, although Member States which divide firearms into a further set of categories may, in accordance with the principle of subsidiarity, maintain their existing classification systems”.

Member States are free to decide which classification to adopt. This disposition is due to respect of special features and traditions of Member States which ensues from the principle of subsidiarity inherent in European Union policies.

It shall be noted that categories defined in Part II of Annex I of this Directive, notably the categories B, C and D could be included in the concept of ‘*small arms and light weapons*’ as defined by the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons⁷⁰, adopted by the UN General Assembly on 8 December 2005.

⁷⁰ The full text of International Instrument is available on the following website:
<http://disarmament.un.org/cab/docs/International%20instrument%20English.pdf>

According to this document, '**small arms and light weapons**' mean "any man-portable lethal weapon that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch a shot, bullet or projectile by the action of an explosive, excluding antique small arms and light weapons or their replicas. []

'**Small arms**' are, broadly speaking, weapons designed for individual use. They include, inter alia, revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns.

'**Light weapons**' are, broadly speaking, weapons designed for use by two or three persons serving as a crew, although some may be carried and used by a single person. They include, inter alia, heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of a caliber of less than 100 millimetres."

For the purposes of this Directive, an object shall be considered as capable of being converted to expel a shot, bullet or projectile by the action of a combustible propellant if:

- it has the appearance of a firearm, and
- as a result of its construction or the material from which it is made, it can be so converted.

1a. For the purposes of this Directive, "part" shall mean any element or replacement element specifically designed for a firearm and essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any device designed or adapted to diminish the sound caused by firing a firearm.

1b. For the purposes of this Directive, "essential component" shall mean the breach-closing mechanism, the chamber and the barrel of a firearm which, being separate objects, are included in the category of the firearms on which they are or are intended to be mounted.

Comment: Article 3(b) of the Protocol provides common definition for "**parts and components**". In order to preserve legal certainty aforesaid definition was exactly the one used by point 1a of Article 1 of this Directive, defining sole term of "**part**".

1c. For the purposes of this Directive, "ammunition" shall mean the complete round or the components thereof, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorisation in the relevant Member State.

Comment: In order to preserve legal certainty the definition of term "ammunition" reproduces the one used by Article 3(c) of the Protocol.

1d. For the purposes of this Directive, "tracing" shall mean the systematic tracking of firearms and, where possible, their parts and ammunition from manufacturer to purchaser for the purpose of assisting the competent authorities of Member States in detecting, investigating and analysing illicit manufacturing and illicit trafficking.

Comment: In order to preserve legal certainty this provision uses the definition of "tracing" provided by Article 3(f) of the Protocol. Besides, the relevance of notion of tracing of firearms, their parts and components is essential in a combat against illicit trafficking and manufacturing.

1e. For the purposes of this Directive, "broker" shall mean any natural or legal person, other than a dealer, whose trade or business consists wholly or partly in the buying, selling or arranging the transfer of weapons.

Comment: The term "**weapons**" used in this provision deserves to be pointed out. The scope thereof is far to general; therefore it is difficult to understand which items shall be taken into account (i.e. firearms, ammunitions, parts). Nevertheless, this notion is specified in Annex I of this Directive:

"1. For the purposes of this Directive, 'weapon' means:
- any firearm as defined in Article 1 of the Directive,
- weapons other than firearms as defined in national legislation".

It shall be noted that the transactions involving ammunitions and parts of firearms are excluded from the definition of brokering activities.

As concerns the definition of "**dealer**", the items concerned, namely firearms, parts and ammunition, are clearly mentioned in the definition of Article 1(2).

The difference between "dealer" and "broker" stands essentially in fact that broker does not usually enter in contact with nor owns the goods he deals in. However, abovementioned difference is rather an empirical one and therefore it has no legal force as concerns the application of this Directive.

2. For the purposes of this Directive, "dealer" shall mean any natural or legal person whose trade or business consists wholly or partly in the manufacture, trade, exchange, hiring out, repair or conversion of firearms, parts and ammunition.

Comment: Inclusion of reference to the notions of "**parts and ammunition**" results from accession of the Community to the Protocol, which required such amendment for the purpose of enlargement of the scope of application of Directive to the notions of parts of firearms and ammunition, which are defined respectively in the Articles 1b and 1c of this Directive.

2a. For the purposes of this Directive, "illicit manufacturing" shall mean the manufacturing or assembly of firearms, their parts and ammunition:

- (i) from any essential component of such firearms illicitly trafficked;
- (ii) without an authorisation issued in accordance with Article 4 by a competent authority of the Member State where the manufacture or assembly takes place; or
- (iii) without marking the assembled firearms at the time of manufacture in accordance with Article 4(1).

2b. For the purposes of this Directive, "illicit trafficking" shall mean the acquisition, sale, delivery, movement or transfer of firearms, their parts or ammunition from or across the territory of one Member State to that of another Member State if any one of the Member States concerned does not authorise it in accordance with the terms of this Directive or if the assembled firearms are not marked in accordance with Article 4(1).

Comment: Article 3(d) of the Protocol provides identical definition of "**illicit trafficking**"; nevertheless it also embraces transactions concerning import and export. It should be kept in mind, that the scope of this Directive covers sole activities in the frame of the internal market, thus the notions of import, export and transfer used by abovementioned Article of the Protocol are restricted to transaction within the Community while leaving aside the transactions involving third countries.

3. For the purposes of this Directive, a person shall be deemed to be a resident of the country indicated by the address appearing on a document establishing his place of residence, such as a passport or an identity card, which, on a check on possession or on acquisition, is submitted to the authorities of a Member State or to a dealer.

4. A "European firearms pass" shall be issued on request by the authorities of a Member State to a person lawfully entering into possession of and using a firearm. It shall be valid for a maximum period of five years, which may be extended, and shall contain the information set out in Annex II. It shall be non-transferable and shall record the firearm or firearms possessed and used by the holder of the pass. It must always be in the possession of the person using the firearm and any change in the possession or characteristics of the firearm, as well as the loss or theft thereof, shall be indicated on the pass.

Comment: Former provision established variable validity of European firearm pass according to category of arms it made reference to. Whereas the common period of validity of pass was set up to a maximum of five years, the derogation stipulated "*where only firearms classified in category D appear on the pass, the maximum period of validity thereof shall be ten years*". The standard of the EFP was established by the Commission in Recommendation 93/216/EEC of 25 February 1993, modified by Recommendation 96/129/EEC⁷¹ of 12 January 1996. All Member States decided to adopt the model of the pass elaborated by the Commission.

⁷¹ The Recommendation is available at the following website:
http://ec.europa.eu/enterprise/regulation/goods/docs/dir91477/recomcart_en.pdf

Article 2

1. This Directive is without prejudice to the application of national provisions concerning the carrying of weapons, hunting or target shooting.

Comment: In other words this Directive completes national legislation; it is no way intended to substitute national provision.

It should be noted that the main aim of this Directive is to harmonise the rules on acquisition and possession of firearms in the Community. In order to have a complete overview of the issue of concern, national legislations of Member States shall be examined.

2. This Directive shall not apply to the acquisition or possession of weapons and ammunition, in accordance with national law, by the armed forces, the police, the public authorities or by collectors and bodies concerned with the cultural and historical aspects of weapons and recognized as such by the Member State in whose territory they are established. Nor shall it apply to commercial transfers of weapons and ammunition of war.

Comment: As regards collectors and cultural and historical organisations, there is a necessity to underline an ambiguity relative to the meaning of “**antique weapons**”.

Indeed, the Commission proposed to use the provisions of the Schengen acquis, namely Article 82 which remains in force and which gives criteria to recognise an antique weapon based on the date of its fabrication. Therefore, all weapons fabricated prior to 1 January 1870 shall be considered as antiques weapons.

Nevertheless, this Article reserves the possibility for Member States to introduce exceptions at national level. Several Member States did exercise this right, thereby creating uncertainty in this area. The need of legal certainty constrained the European Parliament to propose several amendments in order to close this loophole by opting for adoption of the definition based on Article 82 of Schengen acquis. However this definition was revised defining “**antique weapon**” as “*either any weapon manufactured before 1900, including replicas, or any newer weapon defined as an antique weapon by a Member State according to technical criteria*”. None of those provisions have been included in the draft of Directive 2008/51/EC.

Member State	Antique weapon specification
Belgium	Model of firearm shall be anterior to 1890 and it shall be manufactured before 1945
Denmark	Firearms manufactured before 1870
Ireland	Weapons manufactured before 1845 which have an ignition system that does not utilise cased ammunition.
Italy	Firearms manufactured before 1890
Lithuania	An arm made before the year 1870
Poland	An arm made before the year 1870
Slovakia	A model developed before December 31, 1890
United Kingdom	Firearms manufactured before 1st January 1 st , 1919

Article 3

Member States may adopt in their legislation provisions which are more stringent than those provided for in this Directive, subject to the rights conferred on residents of the Member States by Article 12 (2).

Comment: This Directive essentially establishes common elements to be implemented by Member States. Its objective remains to harmonise national legislations governing the field of firearms acquisition and possession within the European Community borders even if Member States are free to adopt more restrictive provisions.

CHAPTER 2 Harmonization of legislation concerning firearms

Article 4

1. Member States shall ensure either that any firearm or part placed on the market has been marked and registered in compliance with this Directive, or that it has been deactivated.
2. For the purpose of identifying and tracing each assembled firearm, Member States shall, at the time of manufacture of each firearm, either:
 - (a) require a unique marking, including the name of the manufacturer, the country or place of manufacture, the serial number and the year of manufacture (if not part of the serial number). This shall be without prejudice to the affixing of the manufacturer's trademark. For these purposes, the Member States may choose to apply the provisions of the Convention of 1 July 1969 on Reciprocal Recognition of Proofmarks on Small Arms; or

Complementary information: Convention for the reciprocal recognition of proof marks on small arms, signed at Brussels on 1 July 1969⁷²:

Convention establishes the Permanent International Commission for the Proving of Small Arms⁷³, which shall be composed of representatives of all the Contracting Parties, as well as each Contracting Party shall have one vote, whatever the number of its representatives. Following Member States have signed the Convention: Austria, Belgium, Czech Republic, Finland, France, Germany, Hungary, Italy, Slovak Republic, Spain and United Kingdom.

Article I sets up following functions for of Permanent International Commission:

“(1) To select apparatus to serve as a standard for shooting pressure measurements, and measuring procedures to be employed by the official services for accurate and practical determination of pressures developed by standard and proof cartridges, in respect of:
(a) sporting, target and defensive arms, with the exception of arms for land, sea and air warfare; however, the Contracting Parties shall be entitled to use, for any or all of the latter arms, the measuring instruments and procedures adopted hereunder;
(b) all other portable devices, arms or apparatus for industrial or occupational use not covered above which utilize an explosive charge to propel a projectile or mechanical parts of any kind, and the testing of which is deemed necessary by the Permanent International Commission.

Such apparatus shall be termed "standard apparatus".

(2) To determine the nature and manner of execution of the official tests to which the arms or apparatus specified in paragraph (1) (a) and (b) will be subjected, with a view to providing every guarantee of safety.

Such tests shall be termed "standard tests".

(3) To incorporate into the standard measurement apparatus and the operating procedures, as also into the standard tests, such improvements, modifications or additions as may be called for by advances in metrology or in the production of small arms and apparatus for industrial and occupational use and of ammunition therefor.

(4) To promote the standardization of chamber dimensions of commercial fire-arms and the methods of inspection and testing of ammunition there for.

(5) To examine the laws and regulations concerning the official testing of small arms enacted by the Contracting Governments with a view to ascertaining whether they are in conformity with the determinations made under paragraph (2) above.

⁷² This Convention is available at the following website:
http://untreaty.un.org/unts/1_60000/23/3/00044110.pdf

⁷³ Commission internationale permanente pour l'épreuve des armes feu portatives: <http://www.cip-bp.org/>.

(6) To declare in which Contracting States the tests performed correspond to the standard tests under paragraph (2) and to issue a table of facsimiles of the proof marks employed by those States' official proof houses both currently and in the time since the signing of the Convention of 15 July 1914.

(7) To withdraw the declaration provided for in paragraph (6) above and amend the said table should the conditions referred to in paragraph (6) cease to be fulfilled.”

Article II stipulates that the proof marks of the official proof houses of each of the Contracting Parties shall be recognised in the territory of the other Contracting Parties provided prior declaration of the CIP.

Decisions of the Permanent International Commission are taken by vote, provided that the number of votes shall constitute at least two thirds of the total number of Governments members of the Permanent International Commission. However, when the question of recognising of proof marks of a Contracting Party is being considered, the Party concerned shall not be entitled to vote. The decisions shall enter into force if within the six months following the notification accomplished by the Permanent Bureau.

- (b) maintain any alternative unique user-friendly marking with a number or alphanumeric code, permitting ready identification by all States of the country of manufacture.

Comment: It shall be noted that the year of manufacture constitutes relevant information for tracing firearm. Besides, this Directive does not opt for marking with geometric symbols which is generally used in China and in several States of former USSR; therefore such marking might only be understood by the country of manufacture. Hence, marking with alphabetic symbols was privileged for transfers including EU Member States.

The marking shall be affixed to an essential component of the firearm, the destruction of which would render the firearm unusable.

Member States shall ensure that each elementary package of complete ammunition is marked so as to provide the name of the manufacturer, the identification batch (lot) number, the calibre and the type of ammunition. For these purposes Member States may choose to apply the provisions of the Convention of 1 July 1969 on Reciprocal Recognition of Proofmarks on Small Arms.

Furthermore, Member States shall ensure, at the time of transfer of a firearm from government stocks to permanent civilian use, the appropriate unique marking permitting identification by States of the transferring country.

3. Member States shall make the pursuit of the activity of dealer within their territory conditional upon authorisation on the basis of at least a check of the private and professional integrity and of the abilities of the dealer. In the case of a legal person, the check shall be on the person who directs the undertaking.

Comment: This provision was amended several times. Initially a difference was made between the categories A and B, and the categories C and D. As concerns the categories A and B, the pursuit of activity of dealer was submitted to authorisation. As concerns categories C and D, declaration was required in order to proceed with activity of dealer. Nevertheless, this consideration was not endorsed by the European Parliament. Therefore, notwithstanding the category in question, the pursuit of the activity of dealer has to be submitted to authorisation.

It is interesting to point that the European Parliament opted, in addition to verification of professional abilities of dealers and brokers, for an obligation to verify “*the origin of their financial means*”, grounding this requirement by specific nature of their activity as well as by need of proper regulation thereof.

However, the ambiguity of this provision shall be emphasised. The term “check of the private and professional integrity and of the abilities of the dealer” might engender various and not always compatible interpretations given by Member States in their transposition process. Therefore the implementation of this provision in national legislations deserves to be carefully analysed in order to grasp the meaning given to it by Member States.

It should be noted, that initially this provision concerned also the activity of brokers, since the Commission wanted to enclose brokering activities, as mentioned in Article 15 “Brokers and brokering” of the Protocol, within the definition of dealer given by this Directive⁷⁴.

Consequently brokering activities had to be regulated similarly as those of dealers. Nevertheless, this proposal was not endorsed; therefore brokering activities are regulated separately by Article 4b of this Directive, as amended.

4. Member States shall, by 31 December 2014, ensure the establishment and maintenance of a computerised data-filing system, either a centralised system or a decentralised system which guarantees to authorised authorities access to the data-filing systems in which each firearm subject to this Directive shall be recorded. This filing system shall record and maintain for not less than 20 years each firearm’s type, make, model, calibre and serial number, as well as the names and addresses of the supplier and the person acquiring or possessing the firearm.

Comment: Article 7 of the Protocol also constrains State Parties with guarantee of maintenance, for not less than 10 years, of information in relation to:

- firearms,
- their parts and components where appropriate and feasible,
- ammunition that is necessary to their tracing and identification.

The provision of this Directive appears to be stricter than the one of the Protocol as regards the duration of maintain of information. Justification of extension of the period of maintenance of information up to 20 years is partially due to the dangerous nature and longevity of weapons. By integrating this provision the Commission believed to decrease a likelihood of abuse of weapons for criminal intentions and to provide the proper tracing of firearms.

Mentioned data-filing system could be accessible solely to police and judicial authorities responsible for the prevention, investigation, detection and prosecution of criminal offences. The processing of the information cannot prejudice either rights relative to the protection of individuals granted by Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁷⁵, or the level of protection provided by Community and national law.

Article 12 of the Protocol requires States Parties to exchange among themselves a relevant case-specific information on matters such as authorised producers, dealers, importers,

⁷⁴ See 27th Amendment of draft European Parliament legislative resolution on the proposal for a directive amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2007-0276+0+DOC+XML+V0//EN>.

⁷⁵ OJ L 281, 23.11.1995, p. 31 as amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>.

exporters and, whenever possible, carriers of firearms, their parts and components and ammunition.

Throughout their period of activity, dealers shall be required to maintain a register in which all firearms subject to this Directive and which are received or disposed of by them shall be recorded, together with such particulars as enable the firearm to be identified and traced, in particular the type, make, model, calibre and serial number thereof and the names and addresses of the persons supplying and acquiring it. Upon the cessation of his activities, the dealer shall deliver the register to the national authority responsible for the filing system provided for in subparagraph 1.

5. Member States shall ensure that all firearms may be linked to their owner at any moment. However, as regards firearms classified in category D, Member States shall, as from 28 July 2010, put into place appropriate tracing measures, including, as from 31 December 2014, measures enabling linking at any moment to the owner of firearms placed on the market after 28 July 2010.

Comment: It shall be noted that previously Member States were bounded to make the pursuit of the activity of dealer conditional upon:

- an authorisation, at least with respect to categories A and B;
- a declaration with respect of categories C and D.

Presently, Member States are urged to require an authorisation for pursuit of the activity of dealer for all categories of firearms subject to this Directive.

In addition, former disposition impelled each dealer to keep a register with inventory of all firearms classified in categories A, B or C. Period of conservation of such register was set up to 5 years.

Presently, the register is required for all categories of firearms thereby category D is also included. Moreover, the information recorded shall be maintained for not less than 20 years which increases considerably the period of preservation of information.

Moreover, it should be noted, that initially this provision concerned also the activity of brokers, since the Commission wanted to enclose brokering activities, as mentioned in Article 15 “Brokers and brokering” of the Protocol, within the definition of dealer given by the Directive⁷⁶. Consequently brokering activities had to be regulated similarly as those of dealers. Nevertheless, this proposal was not endorsed; therefore brokering activities are regulated separately by Article 4b of this Directive, as amended.

Article 4a

Without prejudice to Article 3, Member States shall allow the acquisition and possession of firearms only by persons who have been granted a licence or, with respect to categories C or D, who are specifically permitted to acquire and possess such firearms in accordance with national law.

Comment: it shall be noted that several Member States have decided to introduce a more than two categories as concerns the licence for acquisition and possession of firearms. Indeed, Slovakia and Czech Republic established a distinction for firearms permits according to the purpose for which the firearm or ammunition is to be used.

⁷⁶ See 28th Amendment of draft European Parliament legislative resolution, *op.cit.*

As concerns **Slovakia** following groups were set up:

- A – carrying a firearm and the ammunition in order to protect a person and property,
- B – keeping a firearm and ammunition in order to protect a person and property,
- C – keeping a firearm and ammunition in order to carry out one’s employment or authorisation according to a special regulation,
- D – keeping a firearm and ammunition for hunting purposes,
- E – keeping a firearm and ammunition for sporting purposes,
- F – keeping a firearm and ammunition for museum or collector’s purposes.

As concerns **Czech Republic** provided groups are:

- A – collectors’ purposes,
- B – sport purposes,
- C – hunting purposes,
- D – pursuing a profession or occupation,
- E – protecting life, health or property, or
- F – activities in the field of unexploded ordnance.

It shall be noted that the groups provided by both States are rather similar, however the corresponding categories differ which can eventually result in legal uncertainty.

Article 4b

Member States shall consider establishing a system for the regulation of the activities of brokers. Such a system might include one or more measures such as:

- (a) requiring the registration of brokers operating within their territory;
- (b) requiring the licensing or authorisation of the activity of brokering.;

Comment: It shall be noted that measures stated in points (a) and (b) are those proposed by **Article 15 of the Protocol**, which in addition includes a point (c) worded as follows:

“Requiring disclosure on import and export licenses or authorizations, or accompanying documents, of the names and locations of brokers involved in the transaction”.

Article 5

Without prejudice to Article 3, Member States shall permit the acquisition and possession of firearms only by persons who have good cause and who:

- (a) are at least 18 years of age, except in relation to the acquisition, other than through purchase, and possession of firearms for hunting and target shooting, provided that in that case persons of less than 18 years of age have parental permission, or are under parental guidance or the guidance of an adult with a valid firearms or hunting licence, or are within a licenced or otherwise approved training centre;
- (b) are not likely to be a danger to themselves, to public order or to public safety. Having been convicted of a violent intentional crime shall be considered as indicative of such danger.

Comment: This Article strongly bands minor acquisition and possession of firearms for hunting and target shooting:

- The exception for minors as concerns firearms for hunting and target shooting was banded by the requirement of parental permission or specific guidance (Article 5(a)),
- The notion “*be a danger to themselves, to public order or to public safety*” was specified (Article 5(a)).

It should be noted that former wording of this Article concerned only firearms classified in Category B (firearms subject to authorisation). Consequently the rules on acquisitions and possession of firearms classified in Categories C and D has been reinforced.

Member States may withdraw authorisation for possession of a firearm if any of the conditions on the basis of which it was granted are no longer satisfied.

Member States may not prohibit persons resident within their territory from possessing a weapon acquired in another Member State unless they prohibit the acquisition of the same weapon within their own territory.

Article 6

Member States shall take all appropriate steps to prohibit the acquisition and the possession of the firearms and ammunition classified in category A. In special cases, the competent authorities may grant authorizations for such firearms and ammunition where this is not contrary to public security or public order.

Comment: Firearms and ammunitions listed in category A constitute a minimum requirement as concerns the firearms that shall be prohibited. According to Article 8(3) of this Directive, Member States can extend this list by adding other items which they consider as enough dangerous to be prohibited for the acquisition and the possession by the individuals. Therefore, there is no common list of firearms taking into account that the one proposed by this Directive can be amended by 27 Member States.

Member States shall ensure that, except with respect to dealers, the acquisition of firearms and their parts and ammunition by means of distance communication, as defined in Article 2 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts[], shall, where authorised, be strictly controlled.

Complementary information: Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts⁷⁷

Taking into account that the introduction of new technologies is increasing the number of ways for consumers to obtain information about offers anywhere in the Community and to place orders, this Directive offers the minimum scope of measures to be taken by Member States in order to protect the consumers with regard to distance contracts.

Article 2 provides the definition of “**means of distance communication**” which are characterised as follows “*any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties*”. Annex I contains an indicative list of the means covered by this Directive which includes:

- Unaddressed printed matter,
- Addressed printed matter,
- Standard letter,
- Press advertising with order form,
- Catalogue,
- Telephone with human intervention,
- Telephone without human intervention (automatic calling machine, audiotext),
- Radio,
- Videophone (telephone with screen),
- Videotex (microcomputer and television screen) with keyboard or touch screen,
- Electronic mail,
- Facsimile machine (fax),
- Television (teleshopping).

Article 3 establishes the list of exemptions, notably the cases where this Directive shall not be applied, *inter alia*, cases:

- relating to financial services, a non-exhaustive list of which is given in Annex II,
- concluded by means of automatic vending machines or automated commercial premises,
- concluded with telecommunications operators through the use of public payphones,
- concluded for the construction and sale of immovable property or relating to other immovable property rights, except for rental,
- concluded at an auction.

Article 10 introduces the restrictions on the use of certain means of distance communication. Thereby, only providing prior consent of the consumer, a supplier can use automated calling system without human intervention as well as of facsimile machine. Member States shall ensure that means of distance communication which allow individual communications may be used only where there is no clear objection from the consumer.

Article 7

1. No one may acquire a firearm classified in category B within the territory of a Member State unless that Member State has so authorized him.

No such authorization may be given to a resident of another Member State without the latter's prior agreement.

⁷⁷ This Directive is available on the following website: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31997L0007&modeI=guichett.

Article 5, 6, 7

2. No one may be in possession of a firearm classified in category B within the territory of a Member State unless that Member State has so authorized him. If he is a resident of another Member State, that other Member State shall be informed accordingly.

3. An authorization to acquire and an authorization to possess a firearm classified in category B may take the form of a single administrative decision.

4. Member States may consider granting persons who satisfy the conditions for the granting of an authorisation for a firearm a multiannual licence for the acquisition and possession of all firearms subject to authorisation, without prejudice to:

- (a) the obligation to notify the competent authorities of transfers;
- (b) the periodic verification that those persons continue to satisfy the conditions; and
- (c) the maximum limits for possession laid down in national law.

5. Member States shall adopt rules to ensure that persons holding authorisations for firearms of category B in force under national law as at 28 July 2008 do not need to apply for a licence or permit regarding firearms they hold in categories C or D due to the entry into force of Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008 []. However, any subsequent transfer of firearms of categories C or D shall be subject to the transferee obtaining or having a licence or being specifically permitted to possess those firearms in accordance with national law.

Article 8

1. No one may be in possession of a firearm classified in category C unless he has declared it to the authorities of the Member State in which that firearm is held.

The Member States shall provide for the compulsory declaration of all firearms classified in category C at present held within their territories but not previously declared within one year of the entry into force of the national provisions transposing this Directive.

2. Every seller, dealer or private person shall inform the authorities of the Member State in which it takes place of every transfer or handing over of a firearm classified in category C, giving the particulars by which the firearm and the person acquiring it may be identified. If the person acquiring such a firearm is a resident of another Member State, that other Member State shall be informed of the acquisition by the Member State in which it took place and by the person acquiring the firearm.

3. If a Member State prohibits or makes subject to authorization the acquisition and possession within its territory of a firearm classified in category B, C or D, it shall so inform the other Member States, which shall expressly include a statement to that effect on any European firearms pass they issue for such a firearm, pursuant to Article 12 (2).

Article 9

1. The handing over of a firearm classified in category A, B or C to a person who is not resident in the Member State in question shall be permitted, subject to compliance with the obligations laid down in Articles 6, 7 and 8:

- where the person acquiring it has been authorized in accordance with Article 11 himself to effect a transfer to his country of residence,

- where the person acquiring it submits a written declaration testifying to and justifying his intention to be in possession of the firearm in the Member State of acquisition, provided that he fulfils the legal conditions for possession in that Member State.

2. Member States may authorize the temporary handing over of firearms in accordance with procedures which they shall lay down.

Article 10

The arrangements for the acquisition and possession of ammunition shall be the same as those for the possession of the firearms for which the ammunition is intended.

CHAPTER 3 Formalities for the movement of weapons within the Community**Article 11**

Authorisation	Content	Reference
Individual transfer authorisation	Granted to persons undertaking firearms transfer between Member States. Possible for all categories of firearms listed in Annex I of this Directive. If authorisation is granted, a licence shall accompany the firearm during transportation thereof and shall be produced on request.	Article 11(1)
Plural Transfer Authorisation	Granted to dealer undertaking firearms transfer to a dealer established in another Member State. Possible for all categories of firearms listed in Annex I of this Directive. An authorisation is granted for maximum period of three years. It shall accompany the firearm during transportation thereof and shall be produced on request.	Article 11(3)
Individual Travel Authorisation	Granted to persons travelling through two or more Member States. Such authorisation shall appear on the European firearms pass.	Article 12(1), paragraph 1
Plural Travel Authorisation	Granted to persons travelling through two or more Member States. Such authorisation is valid for more than one journey for a maximum period of one year. It shall appear on the European firearms pass.	Article 12(1), paragraph 2
Derogation for Hunters	Exclusively applicable to categories C and D. No authorisation required if: - Journey with a view of engaging in hunting activities; - Possession of a European firearms pass; - Capability to substantiate the reasons for the journey (i.e. invitation, other proof). N.B. Authorisation is required if Member State prohibits/makes subject to authorisation the acquisition and possession of the firearm in question.	Article 12(2), paragraph 1
Derogation for Marksmen	Exclusively applicable to categories B, C and D. No authorisation required if: - Journey with a view of engaging in target shooting activities; - Possession of a European firearms pass; - Capability to substantiate the reasons for the journey (i.e. invitation, other proof). N.B. Authorisation is required if Member State prohibits/makes subject to authorisation the acquisition and possession of the firearm in question.	Article 12(2), paragraph 1

1. Firearms may, without prejudice to Article 12, be transferred from one Member State to another only in accordance with the procedure laid down in the following paragraphs. These provisions shall also apply to transfers of firearms following a mail order sale.

2. Where a firearm is to be transferred to another Member State, the person concerned shall, before it is taken there, supply the following particulars to the Member State in which such firearm is situated:

- the names and addresses of the person selling or disposing of the firearm and of the person purchasing or acquiring it or, where appropriate, of the owner,
- the address to which the firearm is to be consigned or transported,
- the number of firearms to be consigned or transported,
- the particulars enabling the firearm to be identified and also an indication that the firearm has undergone a check in accordance with the Convention of 1 July 1969 on the Reciprocal Recognition of Proofmarks on Small Arms,
- the means of transfer,
- the date of departure and the estimated date of arrival.

The information referred to in the last two indents need not be supplied where the transfer takes place between dealers.

The Member State shall examine the conditions under which the transfer is to be carried out, in particular with regard to security.

Where the Member State authorizes such transfer, it shall issue a licence incorporating all the particulars referred to in the first subparagraph. Such licence shall accompany the firearm until it reaches its destination; it shall be produced whenever so required by the authorities of the Member States.

3. In the case of transfer of the firearms, other than weapons of war, excluded from the scope of this Directive pursuant to Article 2 (2), each Member State may grant dealers the right to effect transfers of firearms from its territory to a dealer established in another Member State without the prior authorization referred to in paragraph 2. To that end it shall issue an authorization valid for no more than three years, which may at any time be suspended or cancelled by reasoned decision. A document referring to that authorization must accompany the firearm until it reaches its destination; it must be produced whenever so required by the authorities of the Member States.

Prior to the date of transfer, the dealer shall communicate to the authorities of the Member State from which the transfer is to be effected all the particulars listed in the first subparagraph of paragraph 2. Those authorities shall carry out inspections, where appropriate on the spot, to verify the correspondence between the information communicated by the dealer and the actual characteristics of the transfer. The information shall be communicated by the dealer within a period allowing sufficient time.

Comment: It shall be noted that during amendment procedure, the European Parliament opted for the delay of 5 days which was at the disposition of dealer to communicate necessary information. Nevertheless, this requirement was not endorsed in this Directive.

4. Each Member State shall supply the other Member States with a list of firearms the transfer of which to its territory may not be authorized without its prior consent.

Such lists of firearms shall be communicated to dealers who have obtained approval for transferring firearms without prior authorization under the procedure laid down in paragraph 3.

Comment: this provision introduces derogation to main principle on this Directive, namely the possibility for Member States to issue authorisation for export of firearms from their territory.

Indeed, Article 11(4) allows Member State to establish a list of firearms which shall obtain an authorisation thereof before being transferred to its territory. This is the sole possibility provided by this Directive which gives to Member States a right to issue a so-called “import authorisation”.

Article 12

1. If the procedure provided for in Article 11 is not employed, the possession of a firearm during a journey through two or more Member States shall not be permitted unless the person concerned has obtained the authorization of each of those Member States.

Member States may grant such authorization for one or more journeys for a maximum period of one year, subject to renewal. Such authorizations shall be entered on the European firearms pass, which the traveller must produce whenever so required by the authorities of the Member States.

2. Notwithstanding paragraph 1, hunters, in respect of categories C and D, and marksmen, in respect of categories B, C and D, may, without prior authorisation, be in possession of one or more firearms during a journey through two or more Member States with a view to engaging in their activities, provided that they are in possession of a European firearms pass listing such firearm or firearms and provided that they are able to substantiate the reasons for their journey, in particular by producing an invitation or other proof of their hunting or target shooting activities in the Member State of destination.

Member States may not make acceptance of a European firearms pass conditional upon the payment of any fee or charge.

Comment: This Directive introduces a facilitation regarding possession of firearms, but it should be pointed that this exception is conditional upon several elements such as:

- The profession of the possessor,
- The category of firearm under his possession,
- The activities to undertake,
- The territory of undertaking.

It should be kept in mind that only journeys within the European Community are covered by this Directive. It does not regulate conditions of firearm holding in the Member State where the possessor is resident.

Besides, amended Article 12(2) enlarges the set of documents to be produced by hunters and marksmen in order to substantiate the reasons for their journey by amplifying that the “*other proof of their hunting or target shooting activities in the Member State of destination*” can be accepted. Whereas, the former provision stipulated that sole invitation must be produced (see also comment relative to Recital 14).

However, this derogation shall not apply to journeys to a Member State which prohibits the acquisition and possession of the firearm in question or which, pursuant to Article 8 (3), makes it subject to authorization; in that case, an express statement to that effect shall be entered on the European firearms pass.

Comment: This disposition limits the derogation as concerns hunters and marksmen who do not need a prior authorisation for firearms they possess while travelling with a view to

engaging in their activities. Indeed, they will have to obtain an authorisation for those firearms which other Member States unilaterally included in their national lists of prohibited firearms or those subject to authorisation. Taking into account the Member States right to modify firearms categories via their national legislations, it shall be concluded that there is no common list of firearms which can be uniformly applicable in all Member States.

In the context of the report referred to in Article 17, the Commission in consultation with the Member States, will also consider the effects of applying the second subparagraph, particularly as regards its impact on public order and public security.

3. Under agreements for the mutual recognition of national documents, two or more Member States may provide for arrangements more flexible than those prescribed in this Article for movement with firearms within their territories.

Article 13

1. Each Member State shall communicate all useful information at its disposal concerning definitive transfers of firearms to the Member State to the territory of which such a transfer has been effected.

2. All information that Member States receive by way of the procedures laid down in Article 11 for transfers of firearms and in Article 7 (2) and Article 8 (2) for the acquisition and possession of firearms by non-residents shall be communicated, not later than the time of the relevant transfers, to the Member States of destination and, where appropriate, not later than the time of transfer to the Member States of transit.

3. For the purposes of the efficient application of this Directive, Member States shall exchange information on a regular basis. To this end, the Commission shall set up, by 28 July 2009, a contact group for the exchange of information for the purposes of applying this Article. Member States shall inform each other and the Commission of the national authorities responsible for transmitting and receiving information and for complying with the obligations set out in Article 11(4).

Comment: A number of articles focus on the relevance of information communicating, namely 4(4), 7(2), 8(2), 8(3), 11(4) 13, 15(3), 15(4), 18. Indeed, former Article 13(3) required **Member States** to establish, by 1 January 1993 at the latest, networks for the exchange of information for the purposes of applying this Article.

Apparently those networks were not satisfactory; therefore amended version of Article 13(3) requires the **Commission** to set up a contact group for the purpose of information exchange. Indeed, the group was established: E02211 Group of contact (exchange of information) for application of the new Directive 2008/51/CE.

This consideration indicates the willingness of the Commission to create a discussion forum with larger degree of effectiveness which will act as co-ordination forum for the application and the enforcement of the Directive. The contact group shall serve as a place where specific

proposals for improving the exchange of information would be examined in order to find solutions for equivocations issued from application of this Directive⁷⁸.

Article 13a

1. The Commission shall be assisted by a committee.
2. Where reference is made to this paragraph, Articles 5 and 7 of Council Decision 1999/468/EC⁷⁹ of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [] shall apply, having regard to the provisions of Article 8 thereof.
The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

Article 14

Member States shall adopt all relevant provisions prohibiting entry into their territory:

- of a firearm except in the cases defined in Articles 11 and 12 and provided the conditions laid down therein are met,
- of a weapon other than a firearm provided that the national provisions of the Member State in question so permit.

⁷⁸ The list of authorities competent for communicating information can be consulted on http://ec.europa.eu/enterprise/regulation/goods/docs/dir91477/contact_points_directive_91-477-eeec.doc.

⁷⁹ Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission is available at the following website: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999D0468:EN:HTML>, amended by Council Decision 2006/512/EC of 17 July 2006: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:200:0011:01:EN:HTML>.

CHAPTER 4 Final provisions

Article 15

1. Member States shall intensify controls on the possession of weapons at external Community frontiers. They shall in particular ensure that travellers from third countries who intend to proceed to another Member State comply with Article 12.
2. This Directive shall not preclude the carrying out of controls by Member States or by the carrier at the time of boarding of a means of transport.
3. Member States shall inform the Commission of the manner in which the controls referred to in paragraphs 1 and 2 are carried out. The Commission shall collate this information and make it available to all Member States.
4. Member States shall notify the Commission of their national provisions, including changes relating to the acquisition and possession of weapons, where the national law is more stringent than the minimum standard they are required to adopt. The Commission shall pass on such information to the other Member States.

Article 16

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

Comment: Former Article 16 required Member States to introduce sufficient penalties for failure to comply with the provisions adopted in accordance with this Directive. Present Article 16 does not use the term “penalties” but the one of “rules on penalties”, which must be “effective, proportionate and dissuasive.”

It shall be noted that Commission’s initial proposition required Member States to set up as criminal offences the following conduct, provided that it was committed intentionally:

- *illicit manufacturing of firearms, their parts and components and ammunition;*
- *illicit trafficking of firearms, their parts and components and ammunition;*
- *falsifying or illicitly obliterating, removing or altering the markings on firearms required by Article 4(1).*

Such attempts, or participation as an accomplice in the latter shall also be considered as criminal offences, when committed intentionally.

These offences shall be punishable by a confiscation measure as provided for in Article 2 of Council Framework Decision 2005/212/JHA of 24 February 2005 on the Confiscation of Crime-Related Proceeds, Instrumentalities and Property”.

The European Parliament attempted to modify 1st paragraph of Article 16, by appending a following subparagraph: “The failure to carry a European firearms pass shall not be subject to custodial sentences”. This disposition aimed at protecting persons being lawfully in possession of weapon from eventual incarceration if they are in impossibility to present an EFP providing that they possess all other necessary documents.

It shall be emphasised that this provision concerned, in particular, the travellers to the United Kingdom which must provide the original of their EFP six to eight weeks in advance, thereby permitting the local police to make all necessary procedures. None of those provisions appears in Directive 2008/51/EC.

Nevertheless, the issue of establishment of sanctions for the infringement of European law endures sensitive. The main discord concerns the distribution of competences; in particular it

remains uncertain whether the establishment of sanctions constitutes a national competence or the one of the Community.

Article 17

The Commission shall, by 28 July 2015, submit a report to the European Parliament and the Council on the situation resulting from the application of this Directive, accompanied, if appropriate, by proposals.

The Commission shall, by 28 July 2012, carry out research and submit a report to the European Parliament and the Council on the possible advantages and disadvantages of a reduction to two categories of firearms (prohibited or authorised) with a view to the better functioning of the internal market for the products in question by means of possible simplification.

The Commission shall, by 28 July 2010, submit a report to the European Parliament and the Council presenting the conclusions of a study of the issue of the placing on the market of replica firearms in order to determine whether the inclusion of such products within the scope of this Directive is possible and desirable.

Comment: It shall be emphasised that former Article 17 restrained the Commission with obligation to submit a report to the European Parliament and to the Council concerning the situation resulting from the application of this Directive. 15 December 2000 required Report was submitted by the Commission.

This Report concerns 15 States members of the European Union including Austria, Finland and Sweden which joined the EU during the Fourth enlargement thereof on 1 January 1995⁸⁰.

Article 18

1. Member States shall, by 28 July 2010, bring into force the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those measures.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such references are to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Comment: List of references to the national transposition measures adopted by 15 Member States as concerns the implementation of Directive 91/411/ EEC is included in Annex I of the Report of the Commission to the European Parliament and the Council of 15 December 2000 (see comment relative to Article 17).

⁸⁰ This Report is available at:
http://eur-lex.europa.eu/LexUriServ/site/en/com/2000/com2000_0837en01.pdf.

Article 19

This Directive is addressed to the Member States. Done at Strasbourg, 21 May 2008.

For the European Parliament

The President

H.-G. PÖTTERING

For the Council

The President

J. LENARČIČ

ANNEX I

I. For the purposes of this Directive, 'weapon' means:

- any firearm as defined in Article 1 of the Directive,
- weapons other than firearms as defined in national legislation.

II. For the purposes of this Directive, 'firearm' means:

A. Any object which falls into one of the following categories, unless it meets the definition but is excluded for one of the reasons listed in section III.

Category A - Prohibited firearms

1. Explosive military missiles and launchers.
2. Automatic firearms.
3. Firearms disguised as other objects.
4. Ammunition with penetrating, explosive or incendiary projectiles, and the projectiles for such ammunition.
5. Pistol and revolver ammunition with expanding projectiles and the projectiles for such ammunition, except in the case of weapons for hunting or for target shooting, for persons entitled to use them.

Category B - Firearms subject to authorization

1. Semi-automatic or repeating short firearms.
2. Single-shot short firearms with centre-fire percussion.
3. Single-shot short firearms with rimfire percussion whose overall length is less than 28 cm.
4. Semi-automatic long firearms whose magazine and chamber can together hold more than three rounds.
5. Semi-automatic long firearms whose magazine and chamber cannot together hold more than three rounds, where the loading device is removable or where it is not certain that the weapon cannot be converted, with ordinary tools, into a weapon whose magazine and chamber can together hold more than three rounds.
6. Repeating and semi-automatic long firearms with smooth-bore barrels not exceeding 60 cm in length.
7. Semi-automatic firearms for civilian use which resemble weapons with automatic mechanisms.

Category C - Firearms subject to declaration

1. Repeating long firearms other than those listed in category B, point 6.
2. Long firearms with single-shot rifled barrels.
3. Semi-automatic long firearms other than those in category B, points 4 to 7.
4. Single-shot short firearms with rimfire percussion whose overall length is not less than 28 cm.

Category D - Other firearms

Single-shot long firearms with smooth-bore barrels.

B. Any essential component of such firearms:

The breach-closing mechanism, the chamber and the barrel of a firearm which, being separate objects, are included in the category of the firearms on which they are or are intended to be mounted.

III. For the purposes of this Annex objects which correspond to the definition of a 'firearm' shall not be included in that definition if they:

(a) have been rendered permanently unfit for use by deactivation, ensuring that all essential parts of the firearm have been rendered permanently inoperable and incapable of removal, replacement or a modification that would permit the firearm to be reactivated in any way;

Comment: Former point (a) did not use the term “deactivation” but the one of “application of technical procedures” which had to be guaranteed or recognised by an official. Present point (a) introduces the procedure of deactivation which concerns not only a firearm as a whole but also its essential parts which should be also rendered permanently inoperable and incapable of removal, replacement or a modification.

(b) are designed for alarm, signalling, life-saving, animal slaughter or harpoon fishing or for industrial or technical purposes provided that they can be used for the stated purpose only;
(c) are regarded as antique weapons or reproductions of such where these have not been included in the previous categories and are subject to national laws.

Member States shall make arrangements for the deactivation measures referred to in point (a) to be verified by a competent authority in order to ensure that the modifications made to a firearm render it irreversibly inoperable. Member States shall, in the context of this verification, provide for the issuance of a certificate or record attesting to the deactivation of the firearm or the apposition of a clearly visible mark to that effect on the firearm. The Commission shall, acting in accordance with the procedure referred to in Article 13a (2) of the Directive, issue common guidelines on deactivation standards and techniques to ensure that deactivated firearms are rendered irreversibly inoperable.

Comment: Article 9 of the Protocol determines the procedure of deactivation of firearms by providing the frame of general principles of deactivation:

“(a) All essential parts of a deactivated firearm are to be rendered permanently inoperable and incapable of removal, replacement or modification in a manner that would permit the firearm to be reactivated in any way;

(b) Arrangements are to be made for deactivation measures to be verified, where appropriate, by a competent authority to ensure that the modifications made to a firearm render it permanently inoperable;

(d) Verification by a competent authority is to include a certificate or record attesting to the deactivation of the firearm or a clearly visible mark to that effect stamped on the firearm.”

Pending coordination throughout the Community, Member States may apply their national laws to the firearms listed in this Section.

IV. For the purposes of this Annex:

- (a) 'short firearm' means a firearm with a barrel not exceeding 30 centimetres or whose overall length does not exceed 60 centimetres;
- (b) 'long firearm' means any firearm other than a short firearm;
- (c) 'automatic firearm' means a firearm which reloads automatically each time a round is fired and can fire more than one round with one pull on the trigger;
- (d) 'semi-automatic firearm' means a firearm which reloads automatically each time a round is fired and can fire only one round with one pull on the trigger;

ANNEX I

- (e) 'repeating firearm' means a firearm which after a round has been fired is designed to be reloaded from a magazine or cylinder by means of a manually-operated action;
- (f) 'single-shot firearm' means a firearm with no magazine which is loaded before each shot by the manual insertion of a round into the chamber or a loading recess at the breech of the barrel;
- (g) 'ammunition with penetrating projectiles' means ammunition for military use where the projectile is jacketed and has a penetrating hard core;
- (h) 'ammunition with explosive projectiles' means ammunition for military use where the projectile contains a charge which explodes on impact;
- (i) 'ammunition with incendiary projectiles' means ammunition for military use where the projectile contains a chemical mixture which bursts into flame on contact with the air or on impact.

ANNEX II

EUROPEAN FIREARMS PASS

The pass must include the following sections:

- (a) identity of the holder;
- (b) identification of the weapon or firearm, including a reference to the category within the meaning of the Directive;
- (c) period of validity of the pass;
- (d) section for use by the Member State issuing the pass (type and references of authorizations, etc.);
- (e) section for entries by other Member States (authorizations to enter their territory, etc.);
- (f) the statements:

'The right to travel to another Member State with one or more of the firearms in categories B, C or D mentioned in this pass shall be subject to one or more prior corresponding authorizations from the Member State visited. This or these authorizations may be recorded on the pass.

The prior authorization referred to above is not in principle necessary in order to travel with a firearm in categories C or D with a view to engaging in hunting or with a firearm in categories B, C or D for the purpose of taking part in target shooting, on condition that the traveller is in possession of the firearms pass and can establish the reason for the journey.'

Where a Member State has informed the other Member States, in accordance with Article 8 (3), that the possession of certain firearms in categories B, C or D is prohibited or subject to authorization, one of the following statements shall be added:

'A journey to . . . (State(s) concerned) with the firearm . . . (identification) shall be prohibited.'

'A journey to . . . (State(s) concerned) with the firearm . . . (identification) shall be subject to authorization.'

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