

On 18 November 2020, the Council published an **informal version of the final compromise text of the new EU Export Control Regulation (Recast of the Dual-Use Regulation 428/2009)**.

The agreement was reached after five informal trilogues and Council's position presents substantial differences with regard to the RECAST as proposed by the European Commission and as successively amended by the European Parliament.

The main changes characterising the final compromise text are the following:

- Introduction, under certain conditions, of **further controls on cyber-surveillance technologies** and higher EU-level coordination mechanism which allows for greater exchange between the Member States concerning the export of cyber-surveillance items;
- **Broadening of catch-all provisions** such as a wider definition of “military end-use” in article 4, the introduction of a new article 4a on catch-all clauses for cyber-surveillance items and the extension of catch-all provisions for human rights or public security issues to acts of terrorism in article 8.
- A new provision on **transmissible controls**, allowing, in certain cases, a member state to introduce export controls on the basis of the legislation established by another Member State, thereby allowing for a cross-border effect of Member States’ export controls (see new article 8a establishing the possibility to require an authorisation for items not listed in Annex I but listed on other MS’ national control lists, published by the Commission, and if the exporter has been informed of the possible misuse of these items for reasons of public security, prevention of acts of terrorism or HR considerations);
- Harmonisation of certain services at the EU level, with regard to dual-use items currently regulated at national level (such as technical assistance in article 7)
- **Updating of key concepts and definitions** (Several new or deeper defined entries in article 2, such as “exporter”, “re-export”, “technical assistance”, “supplier of technical assistance”, “transit”, “arms embargo”, “ICP”, “cyber-surveillance items”, “essentially identical transaction”);
- **Improved cooperation between national licencing authorities and customs authorities** (see for example the Enforcement coordination mechanism established under article 22);
- **New EU general authorisations** - one on cryptography and one on intra-group technology transfers;
- New reporting rules.

A more detailed view of the major updates is listed here below.

- **Article 2.2b:** Broader definition of **re-export**, also when during a transit through the customs territory of the Union, an exit summary declaration has to be lodged because the final destination of the items has been changed.
- **Article 2.3 Exporter:** re-export declaration and exit summary are added as documents as well as the definition of exporter for *any natural person carrying the dual use items to be exported where these dual use items are contained in the person's personal baggage*.
- **Article 2.5 and 2.5a:** Introduction of the definitions of “**exit summary declaration**” (the act within the meaning of Article 5(10) of the Union Customs Code) and “**re-export declaration**” (the act within the meaning of Article 5(13) of the Union Customs Code).
- **Article 2.8:** Introduction of the definition of “**technical assistance**”: *any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, advice, training, transmission of working knowledge or skills or consulting services, including by electronic means as well as by telephone or any other verbal forms of assistance*.
- **Article 2.9:** Introduction of the definition of “**supplier of technical assistance**”.
- **Article 2.10:** wider definition of “transit”.
- **Article 2.13:** Introduction of the **large project authorisation**.
- **Article 2.19:** introduction of the definition of **arms embargo**.
- **Article 2.21:** introduction of the definition of “**cybersurveillance items**”.
- **Article 2.22:** introduction of the definition of “**ICP**”.
- **Article 2.24:** introduction of the definition of “**essentially identical transaction**”.
- **Article 3: Broader scope of application of catch-all clauses: pursuant to Articles 4, 4a, 8 or 8a.**
- Article 4.b: Wider definition of “military end-use” (catch-all provisions).
- Article 4.4: duty to inform the Customs administration other MS and the Commission about new authorisation requirements under the catch-all clause provisions.
- **Article 4a: new article to introduce catch-all provisions for cyber surveillance items** (mandatory for level 1 and 2, but up to MS for level 3).
- Article 4a: duty to inform the Customs administration other MS and the Commission about new authorisation requirements under the catch-all clause provisions for cybersurveillance and duty to take into account new measures notified by other MS and review its criteria within 30 working days.

- Article 4.6: if notification by all MS of catch-all provisions under article 4a, Commission will publish on the OJ under C series information regarding cybersurveillance items and if appropriate also destinations.
- Article 4.10: Member States shall consider supporting the inclusion of items published pursuant to paragraph 6 in the appropriate international non-proliferation regimes or export control arrangements with a view to extending controls.
- Article 6.2: additional clarification on the possibility to prohibit a transit where several MS are involved and depending if the person authorised to decide on the export is established or not on the EU customs territory.
- Article 6.3: possibility to extend these measures for non-listed items.
- **Article 7:** introduction of **authorisation for technical assistance** related to dual-use items listed in Annex I if the supplier of technical assistance has been informed or is aware of any possible misuse, as listed in art.4.1.
Exceptions to this rule are established for countries listed in Part 2 of Section A of Annex II, information in the public domain or basic scientific research, supply by authorities in their official tasks, to armed forces of a Member State, it is cited in the exceptions for items in the MTCR in Annex IV, it is the “minimum necessary” of an authorised exported item).
Article 11 : authorisation for technical assistance shall clearly identify the end-user and its exact location.
- Article 7.4: MS can extend these measures for non-listed items.
- Article 7.5: MS can adopt national measures if the supplier of technical assistance has grounds for suspecting misuses.
- **Article 8:** Extension of catch-all provisions (for human rights or public security issues) to **acts of terrorism** and need to notify the measure to the Commission and other MS indicating the exact reason and also if the MS established a national control list (These will be published by the Commission).
- Article 8a: New requirement for an authorisation for items not listed in Annex I but listed on other MS’ control lists published by the Commission and if the exporter has been informed of misuse of these items for reasons of public security, prevention of acts of terrorism or HR considerations. If MS refuses such an authorisation, it has to inform the Commission or, in case of adoption, shall inform the customs administration and other MS and the Commission with information about the item and the end-users.
- **Article 10: The validity period for individual and global export authorisation is fixed up to 2 years** (unless decided differently by competent authority), **while for large project** authorisations, the validity period shall be established by the competent national authority but **it cannot be longer than 4 years**.

- **Article 22:** Introduction of a **more active role for the Dual-Use Coordination Group** which shall, among other tasks, be consulted by the Commission for the update of Annexes and set an **enforcement coordination mechanism**.

- Article 24: The provision of guidelines and/or recommendations for best practices to exporters, brokers and suppliers of technical assistance shall be the responsibility of the Member States.

- **Article 24:** annual report to the EP and to the Council by the Commission in consultation with the DUCG on a series of defined information (information on authorisations, denials and prohibitions, administration and enforcement of controls). The annual report shall also include information specifically dedicated to cyber surveillance.
The Commission and the Council shall make available guidelines on the methodology for data gathering and processing for the preparation of the annual report, including the determination of the types of items and the availability of enforcement data.
Between five and seven years after the date of application of this Regulation, the Commission shall carry out an evaluation of this Regulation and report on the main findings to the European Parliament, the Council and the European Economic and Social Committee.
After three years after the date of application of this Regulation, the Commission shall carry out an evaluation of Article 4a and report on the main findings to the European Parliament, the Council and the European Economic and Social Committee.

- **Article 25: Record-keeping for at least 5 years** (instead of 3 years)
Documents and records of intra-Union transfers of dual-use items listed in Annex I shall be kept for **at least three years**.

- Adding of chapter IX on cooperation with third countries (notably, outreach activities on dual-use items trade controls).

- **Annex II G: new EUGEA 007 Intra-group export of software and technology.**

- **Annex II H: new EUGEA 008 Encryption.**