

# Eleventh Meeting of the Chaudfontaine Group

*“How the new EU Dual-Use Regulation could benefit third countries?”*



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The Chaudfontaine Group is a think tank gathering actors from academia, industry and (European, national and regional) public authorities dealing with strategic trade control issues.

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## Eleventh Meeting of the Chaufontaine Group

### *“How the new EU Dual-Use Regulation could benefit third countries?”*

# Introduction

The Recast of the European Union (EU) dual-use export control Regulation (hereinafter ‘the Regulation’ or ‘the Recast’) has been published in the Official Journal of the EU on 11 June 2021<sup>1</sup>. It was adopted according to the ordinary legislative procedure at the first reading, following the Position of the European Parliament of 25 March 2021 and decision of the Council of 10 May 2021.

The modernization of the EU export control regime mainly consists in a comprehensive upgrade of the system, including:

- new and updated definitions (e.g., exporter, re-export, technical assistance, supplier of technical assistance, transit, arms embargo, ICP, cyber-surveillance items, essentially identical transaction);
- strengthened harmonization (e.g., controls on the supply of technical assistance, application of catch-all provisions);
- digitalization of licensing;
- enhanced information sharing and transparency;
- introduction of an EU autonomous mechanism to control the export of cyber-surveillance items for human rights considerations and to coordinate national controls on non-listed items (emerging technologies).

The new EU Dual-Use Regulation (EU) 2021/821 entered into force on 9 September 2021, so repealing Regulation (EC) 428/2009.

In the wake of the coming into effect of the new European Regulation, the Chaufontaine Group – gathering actors from research organisations (academia and research institutes), industry and public authorities (of European and national level) working on strategic trade control – took the opportunity to analyse and dissect the

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<sup>1</sup> Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), OJ L 206, 11.6.2021.

complex EU dual-use export control regime in order to distinguish/identify the new and relevant elements which could be useful to third countries – meaning those measures of the European regime that a third country might find effectively operative and transposable for the establishment or development of its strategic trade control system on dual-use items – and conversely, those which are not as their raison d'être which are linked to the internal functioning of the EU.

The starting point of the analysis was the EU Dual-Use Regulation 2021/821. Each section of the legislative text was examined by the Group to determine which provisions could be considered as:

- **Transposable** (reproducible via adaptations in accordance with national specificities);
- **Inspiring** (defining principles: reproducible via adaptations of the national control systems);
- **Inadequate** (but it might be relevant).

The text below does not include the review – and therefore suggestion of potential relevance for third countries implementation – of all the provisions of the Recast but only those that have been substantially modified and/or considered as instrumental for the functioning of the European dual-use goods trade control system by the Chaudfontaine Group.

It is worth mentioning that the implementation of these recommendations should take into account the level of development of the national control system of the country considered.

## **Export (re-export), article 2 (2)(b) – Inspiring** \_\_\_\_\_

The Recast amended the definition of 'export' enshrined in article 2(2). Most of the amendments of the said provision have mainly been done in order to align the Regulation to the Union Custom Code of 2013<sup>2</sup> and the Commission Delegated Regulation (EU) 2015/2446<sup>3</sup>, since the Regulation (EC) 428/2009<sup>4</sup> made reference to Community Customs Code of 12 October 1992<sup>5</sup> and Commission Regulation (EEC) No 2454/93<sup>6</sup>. As Recital 12 of the Recast mentions, considering the important role that customs authorities play in the enforcement of strategic trade controls, it is imperative that the terms in the Regulation are consistent with the above-mentioned legal instruments.

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<sup>2</sup> Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), OJ L 269/1, 10.10.2013.

<sup>3</sup> Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code, OJ L 343, 29.12.2015.

<sup>4</sup> Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ L 134/1, 29.5.2009.

<sup>5</sup> Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ L 302, 19/10/1992.

<sup>6</sup> 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, OJ L 253, 11.10.1993.

However, the new definition of export presents one aspect that has been substantially changed, which concerns the reference to ‘re-export’ – as referred to in article 2 (2) (b). In fact, while the previous Regulation (EC) 428/2009 gave the definition of ‘export’ as inter alia ‘re-export’ (within the meaning of Article 182 of the previous Community Customs Code) but excluding items in transit (article 2 (ii)), the Recast specifies that the re-export may also occur during a ‘transit’. More precisely, a re-export occurs if during a transit through the Union’s customs territory an exit summary declaration is lodged in the event the final destination of the items concerned changes.

The provision of article 2(2)(b), enshrining the principle of export as meaning inter alia ‘re-export’ also during the transit of items whose final destination has been changed, can be considered as inspiring for third countries’ export control systems. Although subjected to specific adaptations to the concerned country, the principle can be useful to apply and enforce in an export control system as long as it covers a wider range of possible cases of export and makes a system more robust and secure since it counters the risk of diversion. This would have otherwise been increased by the changing of final destination during the transit through a country’s custom territory.

### **Exporter, art. 2 (3) – Inspiring**

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The definition of ‘exporter’ is provided in article 2(3) of the Recast. In this new provision, the meaning and scope of ‘exporter’ have been modified and widened compared to those of the Regulation (EC) 428/2009.

First, the previous Regulation 428/2009 defined the ‘exporter’ – in its article 2.3 (i) – as any natural or legal person or partnership on whose behalf an export declaration is made (holding the contract with the consignee in the third country at the time the said declaration is accepted), or the person who determines the sending of the items in question to a third country (in the case of no declaration/contract or in the event that a person/partnership does not act on its own behalf). The Recast – in article 2 (3) (a) – defines the ‘exporter’ similarly except adding and specifying that the above-mentioned declaration to be made and accepted can also be a “re-export declaration or an exit summary declaration”. The rationale behind these additions is linked to the fact that the text needed to be adjusted and harmonised in light of the definitions being added or modified in the new Regulation, notably the “exit summary declaration” and the “re-export declaration” (in the meaning of the amended Union Customs Code).

Second, while the previous Regulation defined the ‘exporter’ – in article 2.3 (ii) – as any (natural or legal) person or partnership who engaged in intangible transfers, i.e. transmitting software or technology (via electronic media and/or means) or making them available outside the EU territory, the Recast expands – pursuant to article 2 (3) (b) – the scope related to the concept of “making them available” by specifying “to natural or legal persons or to partnerships outside the customs territory of the Union”. This minor change may be understood as to avoid leaving any grey zones of interpretation and application, as well as to be exhaustive and precise in the formulation of the provision and being harmonised throughout the text.

Third, the new definition of exporter has been modified in a way as to be more precise and complete by specifying that the exporter is the contracting party established in the Union territory not only in the event if the right to dispose of the dual-use item belongs to a person “established” outside the Union territory but also when this person is “resident” in a third country.

Finally, the Recast brings a crucial novelty with regard to the ‘traditional’ meaning of ‘exporter’. In fact, a new paragraph is added (paragraph c) in order to include into the scope the event of a natural person carrying the dual-use items in his personal baggage. This new meaning aligns with the Union Customs Code. Instead, the previous Regulation, pursuant to article 7, excluded to cover the transfer of technology if that transfer involved cross-border movement of persons.

With regard to third countries’ export control systems, the provision enshrining the meaning of ‘exporter’ can be considered as inspiring. Although the first two points of the above analysis on the definition of ‘exporter’ amended by the Recast – notably referring to the introduction of the re-export declaration or an exit summary declaration in the text– may result in being inadequate for those countries who already have this concept and provisions in their systems, it is definitely ‘inspiring’ for third countries that do not have them included yet in their system. However, it is inspiring – pending the consequent introduction of the definition of the concepts and the related provisions on them – only as long as a re-export declaration or an exit summary declaration can make an export control system more robust in terms of security. With respect to the third point analysed above, covering the transfer of technology if that transfer involved cross-border movement of persons, it may result in being relevant and inspiring. It is noteworthy that, as a specific control is implemented – not to say a complex one to detect –, it definitely requires a full-bodied export control system and a widespread culture of awareness of the risk related to the cross-border movement of persons, including researchers and other entities, bringing dual-use items in their baggage even though just for personal use: this requires a relevant awareness-raising and culture-building effort.

## **Re-export declaration, article 2 (5) – Inspiring** \_\_\_\_\_

The Regulation 2021/821 has introduced the definition of ‘re-export declaration’ in article 2(5). It makes reference to the Union Customs Code, specifically to its article 5(13), that defines such a declaration as the act whereby a person indicates a wish to take non-Union goods (except those under the free zone procedure or in temporary storage) out of the customs territory of the Union. The definition has been introduced by the Recast since the previous Regulation was referring to the Community Customs Code, which did not contain such a definition; therefore, for updating and harmonisation reasons with the Union Customs Code the concept has been introduced.

The provision may be deemed to be inspiring to third countries as long as it gives the principle to be followed that needs to be implemented via adaptations to



the concerned system in light of the fact it makes reference to the EU mechanism and specificity, notably the Union Customs Code. The principle to have a clearing declaration for “non-national items” or “foreign items” that have first been imported in the national territory and then – in a certain specific period – will be exported to another country can be useful to third countries as to maintain a better trace of the sensitive items flow or it can be useful as, inter alia, to have certain duty removed (e.g. claiming back the security deposit or guarantee paid against the import for the re-export declaration) or to counter any risk of diversion.

### **Exit summary declaration, article 2 (6) – Inspiring** \_\_\_\_\_

The “exit summary declaration” definition has been introduced by the Recast, seemingly to the re-export declaration and following the same rationale for harmonisation and conformity with the Union Customs Code. With regard to the meaning of the first, article 2(6) of the Recast refers to the article 5(10) of the Union Customs Code which reads that “exit summary declaration” means the act whereby a person informs the customs authorities that goods are to be taken out of the customs territory of the Union, in accordance with specific form, manner and time-limit.

The inclusion of such a declaration can be considered as inspiring for third countries. With specific adaptations to the system in question, this addition can result in being a useful procedure inter alia to deal with the points of entry/exit of a nation’s custom territory. It can also be a useful practice for carriers to be sure that the “sensitive” items they are carrying, are however not being listed as dual-use items – thus having no related authorisation -, can be recorded and checked if necessary.

### **Broker, art. 2 (8) – Inspiring** \_\_\_\_\_

Article 2(8) of the EU Dual-Use Regulation<sup>7</sup> defines ‘broker’ as “any natural or legal person or any partnership that provides brokering services from the customs territory of the Union into the territory of a third country”. This rather straightforward definition is a simplification of the one contained in Regulation 428/2009.

The notion of ‘broker’ in the previous Regulation, in addition to appearing slightly earlier in the text, specifically under article 2.6, included a specific consideration for those partnerships, natural or legal persons which carry out brokering services in a third State: that of having to be resident or established in the still then referred to as Community when providing brokering services from it and into a third State. Thus, the disappearance of the “resident or established” status as a condition to be considered as a ‘broker’ according to the new EU Regulation streamlines the delimitation of the analysed notion. Moreover, this change is also indirectly widening the contours of the broker figure and therefore, potentially expanding the scope of controls. Since the only requirement is to provide brokering services into a third country from the

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<sup>7</sup> Regulation (EU) 2021/821.

customs territory of the Union – regardless of being a resident or being established in the EU –, the number of profiles that could potentially fall within the definition of ‘broker’ under Regulation 2021/821 is higher than previous.

The only other change, not relevant to third countries nor substantially significant, yet worth mentioning insofar it symbolises the evolution of the European Union itself, is that whereas in the past the location from which the broker had to operate was referred to as the Community, the broker now provides his/her services from the customs territory of the Union.

Regarding the possible advantages that the inclusion of a definition of broker, such as the one analysed here, could have for third states, we should begin by saying that the role of the broker is becoming increasingly important in international strategic trade. It is therefore essential that a robust export control system foresees its inclusion. Bearing this in mind, the current notion of broker can be used as an inspiration for third countries. In fact, after adapting the definition to the potential national specificities, it could be easily reproducible in a third country’s export control system. While it is true that the reference to the customs territory of the EU makes it impossible to transfer it directly, the substance of the provision is undoubtedly transposable to any state or region willing to control brokers operating from its territory. For all these reasons, the definition contained in Regulation 2021/821, which, while simplifying the previous definition also broadens its scope of application, is transposable and completely inspiring for third parties.

## **Technical assistance, article 2 (9) – Transposable** \_\_\_\_\_

The Recast brought a completely new element in the EU Regulation with the notion of ‘technical assistance’ – and, accordingly, of ‘provider of technical assistance’, analysed in the next section. ‘Technical assistance’ was previously covered by the Council Joint Action of 22 June 2000 concerning the control of technical assistance related to certain military end-uses<sup>8</sup>. More precisely, the previous Regulation made some reference to technical assistance, specifically in its Annex I, in the General Technology Note (GTN), where it specified that ‘technology’ means “specific information necessary for the ‘development’, ‘production’ or ‘use’ of goods.” That information, according to the GTN, could also take the form of ‘technical assistance’, which was specified to take forms such as “instructions, skills, training, working knowledge and consulting services and may involve the transfer of ‘technical data’”.

The Recast, compared to the previous Regulation, added a definition in its article 2(9) which is the same one used by the abovementioned Council Joint Action 2000/401/CFSP, except that the latter excluded the assistance provided by electronic means (since it was already covered by article 2(2) iii of Regulation 428/2009). The reason behind the introduction of such controls in the EU export control regime relates to the necessity to align itself to the Lisbon Treaty, which clarifies that the provision of technical assistance involving a cross-border movement falls under Union competence (also mentioned by recital 15 of the Recast). Consequently, it

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<sup>8</sup> Council Joint Action of 22 June 2000 concerning the control of technical assistance related to certain military end-uses, OJ L 159, 30.6.2000, p. 216–217.

appeared necessary to harmonise such controls across the EU, which were covered before by a Council Joint Action that was, by definition, not equally implemented by EU Member States.

### **The new Regulation reads - in its article 2 (9) - as follows:**

“ ‘technical assistance’ means any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, advice, training, 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”

As to the forms that technical assistance may take, the new definition adds that it may take the form of an advice, including by electronic means as well as by telephone or any other verbal forms of assistance. The latter seems to have a crucial impact on the scope of control of technical assistance as long as it includes any concerned information communicated by verbal forms, including not only a call from the EU to a third country but also *inter alia* the exchange of those information *vis-à-vis* a resident of a third country temporarily present in the EU customs territory<sup>9</sup>. The new definition of article 2(9) widely expands the scope of the Regulation and consequently of the controls applied to the export of dual-use items<sup>10</sup>.

The definition of ‘technical assistance’ itself – different from the scope of controls – can be considered as transposable in third countries’ export control systems. This categorization is justified by the fact that the definition is not specific to the EU in any way and therefore suitable also for other systems. Moreover, the inclusion of the concept and definition in a country’s export control system is useful – if not necessary – in order to cover the entire spectrum of activities linked to the transfer of dual-use items<sup>10</sup>.

### **Provider of technical assistance, article 2 (10) – Inspiring**

The definition of the ‘provider of technical assistance’ of article 2 (10) is a consequence of the introduction of the concept – and the related controls – of technical assistance in the Recast. It is a completely new definition, which was not present neither in the previous Regulation nor in the Council Joint Action of 22 June 2000. Any natural or legal person or any partnership is considered to be a provider of technical assistance in three cases, namely: (a) it provides the technical assistance from the EU to a third country; or (b) it is a ‘resident’ or ‘established’ party in a EU Member State providing technical assistance in a third country territory; or (c) it is a ‘resident’ or ‘established’ party in a EU Member State providing technical assistance to a ‘resident’ of a third country who is ‘temporarily present’ in the EU customs territory.

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<sup>9</sup> See section on ‘Provider of technical assistance’ (p. 10).

<sup>10</sup> On the scope of the said controls see section on ‘Technical assistance’ (p. 9).

These cases make the identification of a provider of technical assistance particularly sensitive because it goes beyond the EU “traditional way” to understand it as stated in point (a). In fact, it adds that a provider of technical assistance may also be a non-EU citizen on condition that he is ‘resident’ or ‘established’ in the EU. Finally, and even more complex, the said person or partnership is a provider of technical assistance if it provides the assistance in on EU soil to a non-EU person, *i.e.* resident of third country temporarily present in the EU. This adds somehow a layer of complexity to the controls since this concept - brought for the first time in the EU regime - is similar to the one commonly called ‘deemed export’ in the US regime<sup>11</sup>.

The provision enshrining the meaning of ‘provider of technical assistance’ can be considered as inspiring for third countries’ export control system because it can relevantly help in defining the related principle via some adaptations that have to be specific to the national export control system of the third country. More specifically, the tailored adaptations needed the most may concern the point (c), being a very specific measure requiring specific controls and an increased culture of awareness and compliance, including *inter alia* in research organisations and academia – which is a specific context that has recently started to be substantially taken into consideration<sup>12</sup>. In transposing certain provisions, it can always be useful to have in mind the extent to which the required controls can be enforced and effective and to consider in what measure the country has a full-bodied export control system and a widespread culture of awareness of the risk related to technical assistance.

## **Transit, recital 16, articles 2 (11) and 7 – Inspiring**

Articles 2 (11) and 7 of the EU Dual-Use Regulation<sup>13</sup> refer to the possibility for the competent authority of the Member State to prohibit at any time the transit of non-Union dual-use items listed in Annex I if the items are or may be intended for any of the uses in connection with the proliferation of weapons of mass destruction or a military end use if the country of destination is subject to an arms embargo. It shall be highlighted that the possibility to control the transit consists, contrary to export and brokering, in a prohibition and not in an authorisation even if Member States may, in individual cases, require an authorisation.

In Regulation (EC) 428/2009 the notion of ‘transit’ was already defined. The Recast has completed its definition by detailing the scope of control. Such addition, while including operations like transshipping within or re-exporting from a free zone and temporary storage, it ended the controversy on operations covered by this provision.

The Recast has also dedicated a new paragraph to confirm that in case of transit through several Member States each of them has the possibility to prohibit the transit through its respective territory. Therefore, it could be conceivable that the transit of

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<sup>11</sup> Export Administration Regulations § 734.13 Export (2).

<sup>12</sup> see Recital 13 of the Recast.

<sup>13</sup> Regulation (EU) 2021/821.

an item might pursue its journey on the EU territory by following an unusual road in regard of countries that will or not prohibit the crossing of their territory.

Finally, the Recast includes a provision to identify the legal or the natural person resident and non-resident in the EU customs territory who will be responsible for the transit and who might have to apply for an authorisation<sup>14</sup>.

The notion of ‘transit’ and particularly the version amended by the Recast can be considered as inspiring for third countries’ export control system. The ad-hoc prohibition principle and the provision to identify the person responsible for the transit operation are two elements that could be useful. The ad hoc provision allows a State authority to cope with its UNSCR 1540 commitment to control transit operations by offering a flexible and not too burdensome procedure. The proposed mechanism to identify the person legally responsible might also be inspiring as long as it is based on the designation of the person that has the power to determine the sending of the items passing through the territory, without considering the ownership issue. As long as the objective is to stop potential proliferating transfer focusing on the one who holds the authority to pass through the territory will facilitate his/her identification by the State authorities. Moreover, in case the person is not resident or established in the territory, the authorisation will have to be applied for by the carrier whether it is: a shipping company or an individual carrying the item.

### **Authorisation requirements for technical assistance, article 8 – Transposable**

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Article 8 of the new EU Dual-Use Regulation<sup>15</sup> refers to the authorisation requirements for the new provision of technical assistance that is defined in article 2(9). Under the article 8.1 an authorisation for the technical assistance shall be required in two cases:

- (a) technical assistance must be related to dual-use items listed in Annex I and
- (b) the items in question are or may be intended, in their entirety or in part, for any uses referred to in article 4.1.

Both conditions mentioned under (a) and (b) must be cumulatively fulfilled in order to apply the provision of article 8, which considerably limits the potential application of the provision. Furthermore, the ‘critical end-use’ referred to under article 4.1 in this case is respective to the dual-use item itself and not to the technical support or know-how that is being provided which in some cases can be very difficult to find out and can cause a compliance burden for the exporter.

The provider of technical assistance has to be informed by the competent authority about the critical end use of the items in question or he has to be “aware” of it in order to trigger the control. Being aware is equal to having positive knowledge about

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<sup>14</sup> Article 7.2, third subparagraph, of Regulation (EU) 2021/821.

<sup>15</sup> Regulation (EU) 2021/821.

the critical end use. The competent authority in that case decides if such technical assistance is subject to authorisation.

Additionally, article 8.3 states conditions under which the paragraphs 1 and 2 of article 8 will not apply. For instance, it provides for exceptions to the authorisation requirement for technical assistance to be provided to “EU general export authorisation 001” listed countries or for the provision of technology that is generally accessible or part of basic research. Member States can also still additionally impose national provisions on technical assistance or extend the application of article 8.1 by adding controls to non-listed dual-use items or adding the controls from article 9.2 to 9.4 in connection to article 8. A good example of such practice is Germany where the national provisions on technical assistance have been implemented before the new Dual-Use Regulation was published and those national provisions are still slightly different from the requirements laid down in the Dual-use Regulation.

Article 8 must be read in conjunction with article 2(9) and (10), article 4.1, article 13<sup>16</sup> and additionally with the effective national provisions which can be very challenging for the EU exporter because of the complexity of these provisions.

Since the technical assistance definition in article 2(9) has been newly added to the Recast and article 8 is referring to it, this provision is also new and has not been covered by the previous Regulation 428/2009.

The controls on technical assistance or ‘knowledge transfer’ within the EU and outside the EU could be seen as transposable to third countries with adaptations in accordance with national specificities. This provision reflects the current developments in export controls and technical standards where sensitive knowledge has no borders and can be shared very easily via different electronic means. The adoption of this provision requires a national list of dual-use items to be implemented and that the authorities raise awareness among the different stakeholders, especially among research organizations and universities, since they can be mostly affected by this provision.

## **Authorisation procedures for brokering and technical assistance article 13 – Transposable**

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Article 13 of the EU Dual-Use Regulation 2021/821 refers to authorisation procedures for brokering and technical assistance and aims at unifying the procedures within the EU. Specifically, it regulates in article 13.1 the competences of the Member States based on the residence or establishment status of the broker or the provider of technical assistance. In article 13.2, it regulates the content of the authorisations for brokering services and technical assistance and the EU-wide licences validity. In article 13.3, the obligation of the brokers and providers of technical assistance to provide the competent authority with the “relevant information” for their application

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<sup>16</sup> Respectively: definition of technical assistance ; provider of technical assistance; catch-all clause; authorisation procedure for technical assistance.

is described. The content of the “relevant information” is defined by the Member States, even though the provision lists a series of details. Article 13.4 provides that the decision’s deadline for processing the request for authorisation is determined by national law or practice. This should enhance the procedure transparency. Finally, article 13.5 establishes the necessity to issue the licences, whenever possible, by electronic means in the models set out for brokering services and technical assistance authorisation forms.

The Dual-Use Regulation (EC) 428/2009, compared to the Recast, did not regulate the authorisation procedures for ‘technical assistance’, since the provision on technical assistance was introduced with the Recast. Furthermore, the previous regulation did not consider the case where the broker was not resident or established in the customs territory of the Union.

Since this provision focuses exclusively on authorisation’s procedures it can be considered as transposable and could be easily implemented by third countries without any adaptations. The precondition for this implementation is the necessity to have provisions on technical assistance and brokering into the national legislations.

### **Large project authorisations, article 2 (14) – Transposable**

The article 2(14) on ‘large project authorisations’ has been introduced by the new Regulation (EU) 2021/821. This export authorisation, which can take the form of a global or an individual authorisation, is granted to the exporter for a type or category of dual-use items valid for exports to one or more specified third country(-ies) and end-user(s) for the purpose of a specified large-scale project. Unlike the global export authorisations that are generally valid for up to two years, large project authorisations may be granted for up to four years. The duration of validity of such authorisation is detailed in article 12.3 of the new Regulation.

This provision can be considered as entirely transposable and beneficial to third countries, based on its general content which is not related to any EU-specific trade principle. This authorisation for large projects aims to facilitate exporters’ business and exports of dual-use items involved in large projects with multiple actors. As already stated in the article 12.3, the - Member State’s - competent authority determines the duration of the authorisation and allows an exception for its validity in duly justified circumstances based on the duration of the project, this provision can clearly be applied in the context of third countries national authority.

### **Arms embargo, article 2 (19) – Inspiring**

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The definition of ‘arms embargo’ was already contained in the previous EU DU Regulation in the catch-all clause of article 4 and it did not change in the Recast, except for replacing the term ‘joint action’ by ‘decision’. The latter used to be an operational action by the EU MS within the framework of the Common Foreign and Security Policy which is no longer used since the Treaty of Lisbon came into force in December 2009.

The recast of the EU DU Regulation, in addition to dedicating a specific provision for the definition of ‘arms embargo’<sup>17</sup>, pursuant to article 8.1, has also enlarged the scope of this arms embargo criterion to include technical assistance. Therefore, according to the new Regulation listed or non-listed dual-use items which are or may be intended, in their entirety or in part, for a military end-use would require an export, brokering or technical assistance authorisation, or their transit may be prohibited, if the purchasing country or country of destination is subjected to an arms embargo<sup>18</sup>.

Such a provision can be seen by third countries as an inspiring principle which could be introduced into their export control system in order to comply with their own international obligations, namely an arms embargo imposed by a legally binding resolution of the Security Council of the United Nations or other bodies to which they would have to conform.

## **Internal compliance programme, articles 2 (21), 12.4, 15.2 – Transposable**

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The internal compliance programme (ICP) is one of the new key entries of the Recast of the EU DU Regulation, which defines it under article 2(21) as “ongoing effective, appropriate and proportionate policies and procedures adopted by exporters to facilitate compliance with the provisions and objectives of this Regulation and with the terms and conditions of the authorisations implemented under this Regulation, including, inter alia, due diligence measures assessing risks related to the export of the items to end-users and end-uses”.

In Recital 18 and article 12.4, ICP is presented as a new prerequisite for the exporters using global export authorisations, unless it would be considered unnecessary by the competent authorities. It is indeed noteworthy that, pursuant to article 12.4, Member States shall define the ICP requirements.

Although the Recast does not create a general obligation to implement ICP for general Union export licences, it is explicitly required for the use of the new general licence EU007 for the intra-group export of software and technology<sup>19</sup>.

The inclusion of such clauses in the Regulation points out the implications for businesses and/or research organisations, which are asked to contribute and cooperate in trade control by assessing due diligence, risk related controls, transaction-screening, etc. in order to identify and manage risk related to dual-use items. The Regulation acknowledges the specificities of different exporters, **e.g.** it considers each business to be different, having different risk indicators based on their size, type of activity, structure etc. To conclude, the exporter shall give the competent authorities

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<sup>17</sup> Article 2(19).

<sup>18</sup> On the basis of article 3.1; article 4.1; article 6 paragraphs 1 and 3; article 8 paragraphs 1 and 4; article 7 paragraphs 1 and 3; respectively.

<sup>19</sup> Annex II, Section G, Part 3, paragraph 3 of Regulation 2021/821.



all information considered relevant for application and all the information about the end user of the goods. Global export authorisation applicants should implement ICP as a part of their application requirements and these entities have to comply with reporting obligations.

This provision can be considered as transposable into third countries' export control system. The emphasis given to an effective internal compliance programme reinforces the exporter's reliability. ICP helps companies and other organisations in managing and minimising all risks related to export controls and the ICP requirements can be appropriately adapted to different exporters and their associated risks. The ICP's centrality, as a binding obligation for exporters using global licences, reinforces the compliance programme's role in addressing both export controls and sanctions consideration with respect to any export control maturity levels of a third country.

### **Essentially identical transaction, article 2 (22) – Inadequate**

The term 'essentially identical transaction' is defined as "a transaction concerning items with essentially identical parameters or technical characteristics and involving the same end-user or consignee as another transaction"<sup>20</sup>. The term 'transaction' should be understood as all the operations covered by the Regulation, i.e. export, brokering, technical assistance, transit and transfer of dual-use items.

The purpose of this provision is to further harmonise the EU export control regime by strengthening the coordination among the EU Member States in their decision of whether to grant an authorisation or to prohibit a transit for an "essentially identical transaction", so limiting the possibilities of venue-shopping activities from potential proliferators who would like to circumvent an EU MS's denial by inquiring via another EU MS.

In comparison with the previous Regulation (EC) 428/2009, although the definition of 'essentially identical transaction' of its article 13.5 has remained unchanged in the new article 2(22) of the Recast, its scope has been enlarged. Before the competent authority of a MS decides whether to grant an authorisation or to prohibit a transit, article 16.5 of the new EU DU Regulation requires the MS's competent authorities to "examine all valid denials or decisions to prohibit a transit of dual-use items listed in Annex I" delivered by the competent authorities of another MS for an essentially identical transaction. As specified at the end of the same paragraph, this obligation applies to denials or decisions to prohibit the transit covered by paragraphs 1, 3 and 4 of the article, which includes (in paragraph 4) authorisations for the provision of technical assistance referred to in article 13 of the recast.

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<sup>20</sup> Article 2(22) of Regulation (EU) 2021/821.

Unlike article 13.5 of the prior Regulation, article 16.5 of the Recast also points out that the appreciation of whether the transaction in question is to be considered “essentially identical” or not belongs to the competent authorities of the MS having delivered such decision – i.e. denial or transit prohibition. However, it is important to highlight that, as provided in Regulation 428/2009, the MS’s competent authorities are only obliged to examine the relevant denials or decisions to prohibit a transit delivered by another MS and consult these last ones. Eventually, the decision to grant the authorisation or allow the transit remains in the hands of the MS’s competent authorities, which are only bound to notify and explain their decision to the other MS and the Commission.

It follows from the above explanation of the provision that the reason for being of this article is strictly linked to the internal functioning of the EU, whereas the licensing authorisation process is not centralised under a single authority but is left in the hands of the competent authorities of each MS. Therefore, the inclusion of an ‘essentially identical transaction’ clause in third countries’ export control systems can be considered as inadequate. Yet, such clause could still be relevant in the case of countries characterised by a federal system with various sub-national dual-use export control licensing authorities, or even in the context of enhanced regional cooperation among countries wishing to bring their export control policies closer.

## Cybersurveillance, article 5 – Inspiring

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It should be noted that the development of export controls on cybersurveillance items by the European Union is not unique. Quite the contrary, there has been increasing global attention for the topic for over a decade now. Not only are *some* cybersurveillance items subject to control in the framework of the Wassenaar Arrangement<sup>21</sup> but recently other major players have introduced similar controls<sup>22</sup>. The European focus on cybersurveillance from the perspective of human rights remains unique, although recently the Japanese government has announced considering controls on cybersurveillance items for similar reasons<sup>23</sup>.

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<sup>21</sup>See the following on the Wassenaar Control list: 5.A.1.f (mobile telecommunication interception); 4.A.5., 4.D.4 and 4.E.1.c (intrusion software) and 5.A.1.j (IP network communication surveillance systems). See also for a brief discussion of these items: H. KIM, “Global Export Controls of Cyber Surveillance Technology and the Disrupted Triangular Dialogue”, ICLQ 2021, afl. 70, (379) 389-394.

<sup>22</sup> For example, with regard to export controls imposed by the United States, controls on “cybersecurity items” reflect changes in the Wassenaar Arrangement and feature within the broader possibilities to control “emerging and foundational technologies”. Recently, the Department of Commerce - Bureau of Industry and Security - released an interim final ruling on this subject, outlining controls on cybersecurity items and introducing a new licensing exception and catch-all clause (see: Department of Commerce (BIS), BIS-2020-0038).

The new Export Control Law of the People’s Republic of China, on the other hand, does not explicitly deal with “cybersurveillance” (EU) or “cybersecurity” (U.S.) items, but these technologies certainly feature as an important aspect of the so-called “Made in China 2025” policy. From this perspective, it is certainly possible that similar controls will be imposed in the short- to mid-term (see for example: H. KIM, “Global Export Controls of Cyber Surveillance Technology and the Disrupted Triangular Dialogue”, ICLQ 2021, afl. 70, (379) 404-405).

There exists however an important difference between the European and American (U.S.) - and possibly future Chinese - controls on cybersurveillance/security items. Whereas the former are imposed mainly - although not exclusively - in light of human security concerns, the latter are the implementation of recent changes in the Wassenaar arrangement and feature in a wider trade conflict.

<sup>23</sup> S. Sakamaki, “Japan to consider export control on cyber surveillance tools to prevent human rights violations”, mlexmarketinsight.com.

During the early 2010s, a series of revolts and revolutions – often referred to as the “Arab Spring” – challenged and occasionally overthrew the governments of several Middle Eastern and North African countries<sup>24</sup>. Both during and in the aftermath of these revolts, the challenged – and new – regimes of the region made use of cybersurveillance tools and technology to curb the possibility of future uprisings. In light of these events, the European Parliament pushed for more robust safeguards in the form of export controls on cybersurveillance items<sup>25</sup>. While most emphasise the human security perspective as the rationale for the eventual changes to EU regulation on this matter<sup>26</sup>, we should not underestimate the importance of the more traditional “national” or “Union” security perspective either.

The recitals of the Regulation only provide limited guidance by including two examples. Items used for purely commercial applications – *e.g.* marketing, billing, customer satisfaction – are stated to be generally excluded from the scope of application of the provision<sup>27</sup>. Conversely, items “*specially designed to enable intrusion or deep packet inspection into information and telecommunications systems in order to conduct covert surveillance of natural persons by monitoring, extracting, collecting or analysing data, including biometrics data, from those systems*” are generally covered by the definition of cybersurveillance items<sup>28</sup>.

The question at hand is whether the new provisions of the Regulation – in particular the definition used in article 2(20) – are transposable, inspiring or ill-suited for third countries. In our view, this question must be answered in light of (1) the rationale of this definition and (2) the clarity of the provision. Consequently, our answer must be two-fold.

First, as far as the rationale of the inclusion of “cybersurveillance items” in the Regulation goes, it is often argued that this was inspired by the desire to prevent the use of European items for violations of human rights. This is undoubtedly true, yet it would be a mistake to assume this means that export control systems that do not particularly attach much value to human rights considerations could not profit from including provisions on cybersurveillance items. Quite on the contrary. The inclusion of cybersurveillance items seems as much justified by national security concerns as by human security concerns. Indeed, national – or Union – security concerns are an integral part of the rationale underlying the inclusion of cybersurveillance items in the Regulation, albeit less mediated than its human security counterpart.

A second criterion for the use and transposability of the provisions to third countries is their clarity. Here, more caution is desirable. While the definition of cybersurveillance

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<sup>24</sup> For an overview, see: “Arab Spring” Encyclopedia Britannica, 27 Jan. 2021, <https://www.britannica.com/event/Arab-Spring>. Accessed 18 January 2022.

<sup>25</sup> European Parliament, Human rights and technology: impact of intrusion and surveillance systems on human rights in third countries, 2014/2232(INI) - 08/09/2015 and EUROPEAN PARLIAMENT, resolution of 22 November 2016 on the European Defence Union (2016/2052(INI)).

<sup>26</sup> See for example: M. KANETAKE, “The EU’s dual-use export control and human rights risks: the case of cyber surveillance technology”, *Europe and the World: A Law Review* 2019, afl. 16, (1) 1-16; M. BROMLEY, “Export controls, human security and cyber-surveillance technology”, *SIPRI* 2017, 13-15; O.L. VAN DAALEN et al., “The new rules for export control of cyber-surveillance items in the EU”, *Institute for Information Law* 2021, 22 (and following) and H. KIM, “Global Export Controls of Cyber Surveillance Technology and the Disrupted Triangular Dialogue”, *ICLQ* 2021, afl. 70, (379) 405 and following.

<sup>27</sup> Recital 8 of Regulation (EU) 2021/821.

<sup>28</sup> *Ibid.*

items may seem adequate at first sight, a closer inspection reveals several undefined terms that may be interpreted in different ways. For example, the understanding of ‘specially designed’ remains unclear and open to differing interpretations between the EU Member States. Further clarification would be useful, which is exactly what the United States have done in their – complex – cascading definition of the term. Similarly, the meaning of “surveillance” proposed by the Regulation is highly dependent on European case law on privacy and data protection and leaves much room for interpretation. Admittedly, this should not hamper the inclusion of a similar understanding of “surveillance” to third countries, as this term is given a broad and technical meaning, independent from the actual scope of human rights protection.

Finally, articles 5.6, 5.7, 5.8, 5.10 and 5.11 are not adequate to be implemented by third countries since they are related to the EU internal functioning, such as the coordination and exchange of information between MS, as well as the examination of valid denials from other MS.

For these reasons, we qualify the definition of “cybersurveillance items” in article 2(20) and of the Regulation as inspiring, but not immediately transposable, depending on the specificity of the third country, including its Democracy Index<sup>29</sup> and resilience of its democratic institutions. The absence of a country's human rights protection environment might indeed represent a potential obstacle to transposing the provisions of Article 5 of the Recast, even though, such clause could still be justified by national security concerns.

## **Brokering services, articles 6 and 13 – Transposable** \_\_\_\_\_

The authorisation requirements for brokering services, which in Regulation (EC) 428/2009 were established in articles 5 and 10, are now regulated under articles 6 and 13. These provisions have undergone some minor changes. However, they still aim at controlling the provision of brokering services with items that may be used for any of the purposes referred to in article 4.1.

Starting with article 6, contained in Chapter II of Regulation 2021/821, which establishes the scope of application, its first provision requires an authorisation to provide brokering services for dual-use items listed in Annex I if the competent authority notifies the broker that such items are or may be entirely or partly intended for any of the uses listed in article 4.1. This has remained the same as in the former Regulation.

From a formal point of view, the first paragraph of the previous article 5 is divided into the two first paragraphs of current article 6. Thus, provision 6.2 is now the one establishing that when a broker who proposes to provide brokering services of dual-use items listed in Annex I is aware that they are or may be intended, in entirety or

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<sup>29</sup> See “Democracy Index 2021: the China challenge”, <https://www.eiu.com/n/campaigns/democracy-index-2021/>. Accessed 31/01/2022.

in part, for any of the uses mentioned in article 4.1, (s)he shall notify the competent authority so that it can decide whether such brokering services should be subject to authorisation. Now, like before, this decision remains in the hands of the competent authority.

Moreover, article 6.3 allows Member States to extend the application of paragraph 1 to dual-use items that are not listed and, unlike its predecessor it does not impose any further conditions. This means that, as the reform has removed any explicit reference to the possible uses of the items and to the provisions of articles 4.1 and 4.2, the Member State may decide to subject the brokering of any unlisted dual-use goods, software and technology to control.

Finally, the fourth and fifth provisions of article 6 carry over the same content as the previous Regulation. Thus, article 6.4 enables Member States to adopt or maintain national legislation imposing an authorisation requirement for the provision of brokering services for dual-use items if they have grounds to suspect that these are or may be intended in whole or in part for the purposes covered by article 4.1; and article 6.5 provides that in the event a Member State, following paragraphs 3 or 4 of the same article, extends controls on non-listed goods or imposes specific legislative requirements to authorise brokering of certain items, then paragraphs 2, 3 and 4 of article 9 – which concern publication and notifications to the Commission and other Member States–, shall apply.

For its part, Chapter III of the Regulation is entitled “Export authorisations and authorisation for brokering services and technical assistance”, and article 13 deals precisely with the latter, the authorisations necessary to cover brokering activities and the provision of technical assistance. This article practically replicates the content of former article 10 although it incorporates a very significant new feature: the inclusion of technical assistance. The joint treatment of these two activities is therefore the main change as far as this article is concerned.

Throughout article 13, all provisions refer simultaneously to brokers and technical assistance providers and their corresponding activities. However, for the purpose of clarity, this section will only address the references related to the broker and its brokering services<sup>30</sup>. Paragraph 1 establishes that, in the first place, the competent authority to grant the authorisation for the provision of brokering services will be that of the Member State where the broker is either resident or established. Subsidiarily, if the broker is neither resident nor established in the territory of the EU, then the competent authority will be that of the Member State from which the brokering activities are being carried out. This clause is a new feature of Regulation 2021/821, which aligns well with the new definition of broker discussed in Article 2(8) above.

The last part of what used to be article 10.1 can now be found in article 13.2, where it is established that “authorisations for the provision of brokering services shall be

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<sup>30</sup> To know more on technical assistance, please consult the relevant sections (pp. 9, 10, 13).

granted for a set quantity of specific items and shall clearly identify the location of the items in the originating third country, the end-user and the exact location of the end-user". Following the same trend already mentioned, the Community is changed to "the customs territory of the Union", recalling that authorisations will be valid throughout it.

The next two paragraphs of the article, i.e. articles 13.3 and 13.4, detail the relevant information that brokers must supply the competent authority with and the deadlines they must observe in the authorisations requests' processes. These two, rather technical and logistical provisions, are direct heirs to articles 10.2 and 10.3 of Regulation (EC) 428/2009.

The last paragraph of article 13, 13.5, is completely new and comes to substitute the obligation that Member States had according to article 10.4 of supplying the Commission with a list of authorities empowered to grant authorisations for a provision that establishes that all brokering services authorisations "shall be issued, whenever possible, by electronic means on forms containing at least all the elements of and in the order provided for in the models set out in Section B of Annex III" of Regulation 2021/821.

The inclusion of such clauses in an export control system should not raise any doubts, as brokering is an inherent and fundamental part of regulating strategic trade controls. Both, article 6 and article 13 are standardizing controls on brokering services and they can be considered as transposable insofar they are easily reproducible in any national export control system. Furthermore, they allow for national adaptations to be implemented. Hence, by including adaptations in accordance with national specificities and moving away from concrete references to the idiosyncrasies of the European Union, the provisions regarding brokering services and its authorisations are certainly inspiring and close to being directly transposable.

## **Catch-all, article 9 – Transposable/Inspiring** \_\_\_\_\_

The catch-all clause enshrined in article 9 of the EU Dual-Use Regulation<sup>31</sup> now allows MS to prohibit or impose an authorisation requirement on the export of dual-use items not listed in Annex I on grounds of public security reasons, including the prevention of acts of terrorism, or for human rights considerations. With respect to Regulation (EC) 428/2009, which already contained a catch-all clause focused on public security and the human rights considerations (article 8), the Recast explicitly mentions the inclusion of the prevention of acts of terrorism and it strengthens the human rights considerations by introducing the definition of cyber-surveillance items and the related catch-all mechanism laid down in article 5.

The implementation of article 9 requires a close interagency and inter-MS communication on any adopted measures on the basis of this provision. MS are

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<sup>31</sup> Regulation (EU) 2021/821.

required to provide clear explanations of the reasons for the adopted measures and, in case of establishment of national control lists or of their amendment, MS shall provide the Commission and the other MS with a description of the controlled items.

The principle of a "catch-all" clause for reasons of public security, including the prevention of acts of terrorism, or for human rights considerations, could be concomitantly categorised as transposable and inspiring for third countries due to, inter alia, its high relevance related to the significant risk of terrorism of recent years. The inter-institutional and inter-state cooperation associated to the establishment of national control lists outside of the scope of Annex I is an inspiring principle, which might be even transposable for states which are members of the same customs union.

Additionally, keeping in mind that the EU dual-use control list is a "reference control list" for many countries, the access to the updated consolidated information on items controlled in the framework of the EU catch-all will enhance the international level of security.

### **Catch-all (recognition of other MS catch-all application), article 10 – Inadequate**

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Article 10 of the EU Dual-Use Regulation refers to a catch-all clause allowing the imposition of an export authorisation for dual-use items not listed in Annex I but contained in national control lists adopted by other EU MS.

This provision is inadequate for third countries' export control systems because it reflects the cooperation of States within the Union. However, it might be relevant for countries belonging to a common customs union and/or economic area.

### **Intra-EU transfers and Annex IV, article 11 – Inadequate/ Inspiring**

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Article 11 of the EU Dual-Use Regulation<sup>32</sup> refers to the exception to the principle of free trade of the dual-use items within the European Union customs territory. Concretely, article 11.1 provides that the items listed in Annex IV of the Regulation are subjected to an authorisation requirement prior to their transfers, i.e. their movement between two EU Member States. The reason of this lies in the specific attention which is paid to these items with regard to their proliferation concerns. Although most of these Annex IV items can be the object of a general transfer authorisation, the items specifically listed in part 2 of the Annex IV – *i.e.* the items that are considered as the "most concerning" – cannot be transferred via a national or EU general transfer authorisation. Paragraph 2 allows for a Member State to subject the transfer of other

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<sup>32</sup> Regulation (EU) 2021/821.

dual-use items not listed in Annex IV to an authorisation requirement for the specific reasons detailed in the article. The other paragraphs of article 11 subsequently organise the practical modalities of the implementation of these two paragraphs.

In the Regulation (EC) 428/2009 the provisions of the article 22 were similar to those of the new Article 11, with the exception of the former paragraph 8, which is now paragraph 4 of article 27. Substantially, therefore, the EU Recast did not affect the applicable provisions.

At first sight, the provisions of article 11 seem objectively inadequate for third countries' trade control systems as, by definition, these systems are not part of the EU regime. However, if the same trading environment based on the EU model could be found or reproduced elsewhere, these provisions could also be reproduced or, at least, be a source of inspiration. Article 11, indeed, shows the high degree of integration that exists within the EU market. If a group of countries would be willing to reinforce the cohesion of a potentially shared market, guaranteed by free movement of goods internally, such provision would be adequate. It serves a dual purpose in the sense that it guarantees the free movement of dual-use goods as a principle and its restriction as an exception and, at the same time, it allows for the member states to preserve their capacities to operate their own security policies. Both positively and negatively, such provision acts as a confidence-building measure.

Hence, specifically in the configuration of a regional integration trend, such as the one met in the ASEAN, this provision is also inspiring. It could serve as a support for enhancing a real internal common market and customs territory while preserving the sovereignty of the member states in security. Nonetheless, an article 11-inspired provision can be inserted in a regional legal framework only if the general legal framework provides for the principle of a regional integration. In this sense, article 11 is at the same time an input and an output of the regional integration in trade matters.

Article 11 is thus mainly inadequate for a third country but, in very specific circumstances, it is also potentially inspiring.

## **Authorisations, article 12 – Transposable** \_\_\_\_\_

The Council Regulation (EC) No 428/2009 article 9 listed different authorisations. Article 12 of the Recast has completed and enhanced former article 9 with two additional provisions on large project authorisations and ICP requirements, presented above.

Along with a few required amendments, this article can be considered transposable for third countries. Article 12 lists different types of authorisations as well as refers to the e-licensing. Both elements may not be entirely and directly applicable to third countries. Notwithstanding, elements such as the end-use statement for individual licences, the ICP precondition for global licences applications, and authority's licensing competence can be considered building blocks for third countries' export control regulations.



## Customs procedures, article 21 – Transposable

Article 21 of the EU Dual-Use Regulation<sup>33</sup> enshrines the role of EU Member States' customs office, particularly their right to suspend the process of export from their territory or otherwise prevent the dual-use items that are or are not covered by a valid export authorisation from leaving the customs Union via their territory in the cases mentioned in article 21.3. In the Regulation (EC) 428/2009, "customs procedures" were already consecrated under article 16. While the notion of "customs procedures" remained unchanged, the customs' mandate has broadened as a consequence of the extension of the scope of the Recast, due to inter alia the provisions on the new catch-all clauses or the harmonisation of national control lists.

This provision is transposable for third countries – especially for states that are members of unified customs and/or economic territories – depending on the development level of the elements of export control like control lists, catch-all and authorities. The inclusion of such clause in an export control system can be double-edged. It has a positive impact in terms of national and international security, prevention of acts of terrorism, enhancing of human rights protection. It has a negative impact in terms of influence on business entities due to delivery delays and total related costs, in case of suspension also all costs. For customs, there is increased pressure on customs operations.

The new provision in article 21 of the Recast, compared to article 16 of the Regulation (EC) 428/2009, is that "(...) the Commission, in cooperation with the Member States, may develop guidance to support interagency cooperation between licensing and customs authorities". This notion is also transposable to the third countries for enhancing interagency cooperation and faster decision-making.

## Customs empowering, Article 22 – Transposable

Article 22 of the EU Dual-Use Regulation refers to the right of Member States to only recognise the competence, to deal with customs formalities for the export of dual-use items, of customs offices mandated to do so. For transparency reasons, the second paragraph specifies that Member States implementing this provision shall inform the Commission of the empowered customs offices, which will publish the information in the Official Journal of the European Union<sup>34</sup>. The Recast has not introduced changes compared to article 17 of the previous Regulation.

Article 22 can be considered as transposable into third countries. The first paragraph would allow the centralisation of the customs formalities for the export of

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<sup>33</sup> Regulation (EU) 2021/821.

<sup>34</sup> On 8 February 2022, the EU Commission has published in the Official Journal the Information Note containing the measures adopted by Member States in conformity with, inter alia, article 22. For further information see: Information note Regulation (EU) 2021/821 of the European Parliament and of the Council setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items: Information on measures adopted by Member States in conformity with Articles 4, 6, 7, 9, 11, 12, 22 and 23, OJ C 66, 8.2.2022, p. 27–60.

dual-use items in the hands of only few empowered customs offices, even though this option could, in case of weak democratic control over institutions, lead to excesses of power.

## Control list updating, articles 17, 18, 19, 20

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### ***o Delegation to the Commission for the amendment of items and destinations lists and designation of international obligations as the basis of the amendments by adopting the delegated acts, article 17.1 and 17.2<sup>35</sup> – Transposable***

Article 17.1 and article 17.2 of the EU Dual-Use Regulation<sup>36</sup> provide a delegation for Commission to amend items or destinations lists respectively. Both indicate that the amendments to the lists shall accommodate international obligations stemming from international non-proliferation regimes and export control arrangements of which EU or its MS are members. Items lists shall also be based on relevant international treaties. The destination list shall take into account geopolitical considerations.

The Recast did not introduce changes to this rule and it remains the same as in the Regulation (EC) 428/2009, after the Regulation (EU) No 599/2014 of the European Parliament and of the Council of 16 April 2014 introduced into it the procedure for "regular and timely updates of the common list of dual-use items in conformity with the obligations and commitments taken by the Member States within the international export control regimes (...)"<sup>37</sup>.

This provision may be transposable to third states national law, or is at least inspiring as long as it is reproducible via adaptations in accordance with national specificities. This provision identifies international commitments and export control regimes as the basis for the control lists. It provides a basis for a third country to base its national control lists on the lists adopted by international export control regimes and by international treaties, *e.g.* the Chemical Weapons Convention (CWC). The export control regimes include between 35 and up to 45 States who are producing or exporting dual-use items. These are mostly EU MS, US, Canada, the largest South American states – Argentina and Brazil –, Russia, Australia, South Africa and a few other States. The participation to the CWC is nearly universal. As a rule, regimes' control lists are updated – *i.e.* those items may be added or deleted – annually based on proliferation concerns and current technological developments.

A third country may also decide to adopt the EU control lists set out in the Regulation. The EU bases its items control lists on the lists adopted by international export control regimes, including Australia Group, the Missile Technology Control

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<sup>35</sup> Please note that art. 17 identifies the source of the lists – international commitments and export control regimes; whereas art. 18 describes a simplified procedure by which the lists may be adopted by a state (through a delegation to one of its authorities).

<sup>36</sup> Regulation (EU) 2021/821.

<sup>37</sup> Regulation (EU) No 599/2014 of the European Parliament and of the Council of 16 April 2014 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ L 173, 12.6.2014.

Regime, the Nuclear Suppliers Group, the Wassenaar Arrangement and also the Chemical Weapons Convention. All EU Member States are parties to the CWC. Nearly all EU Member States participate in the regimes or voluntarily adhere to their principles.

Many states have decided to use the EU control lists as “a reference” or “standard model”<sup>38</sup>. The rapid amendments mechanism might motivate third countries to reconsider their updating procedures, thus contributing to a “win-win domino effect” of the global strategic trade control system generation.

Decisions undertaken by export control regimes are taken by consensus. Therefore, regimes provide international legitimacy to the lists adopted by the members of these regimes, which fact might be perceived as an advantage for third states. The EU list, based on them, attaining this legitimacy.

Linking a third country’s control list to international standards in export controls assures that the scope of controls is informed by the newest technological developments and harmonized with all countries’ main exporters of dual-use items. It also reduces the administrative burden on the third state of creating one’s own lists.

One recent development regarding export control regimes, that may affect their legitimacy, is worth mentioning. In the Autumn 2021, the 76th UN General Assembly First Committee adopted a Chinese proposition of resolution “Promoting International Cooperation on Peaceful Uses in the Context of International Security”<sup>39</sup>. This resolution has a potential to undermine export control regimes. It calls on the promotion of international cooperation on materials, equipment and technology for peaceful purposes, and requires that no restrictions on such cooperation are imposed, which is incompatible with the UN Member States’ obligations. The resolution puts its provisions in the context of the economic and social development needs of the developing countries and underlines the importance of sharing of materials, equipment and technologies for achieving this goal.

The wording may seem vague, but it is evidently applicable to restrictions imposed on export of advanced technologies – including dual-use and cyber – by the export control regimes. This is clearer, in the context of further provision of the resolution, which asks the UN Secretary General to prepare a report presenting views and recommendations of the Member States on the promotion of international cooperation on peaceful uses, including identifying undue restrictions on exports to developing countries of materials, equipment and technology, of possible measures to achieve a balance between non-proliferation and peaceful uses, and the way forward.

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<sup>38</sup> See the research of the ESU, University of Liege, on countries that have adopted totally or partially the EU dual-use control list established in Annex I to the EU Dual-Use Regulation, <https://www.esu.ulg.ac.be/research-on-countries-that-have-adopted-the-eu-dual-use-control-list/>. (Accessed on 20/01/2022).

<sup>39</sup> The resolution was narrowly approved with a recorded vote of 75 in favour to 55 against, and with 43 abstentions. <https://www.un.org/press/en/2021/gadis3678.doc.htm>. (Accessed on 20/01/2022).

The practical result of the resolution in the medium term might be a criticism levelled at the UN voiced by some States against export control regimes. That also opens the door for advocating the lifting of ‘undue restrictions’ allegedly imposed by export control regimes. This would lead to firstly, challenging the legitimacy of one of the important elements of non-proliferation architecture. Secondly, by undermining international control standards it would constrict their appeal and usage increasing the proliferation risk of trade in dual-use goods and resulting in national constrictions and limitations in trade and exchange in technologies.

Among the co-sponsors of the resolution are: Russia – one of the members of export control regimes; Algeria and Kazakhstan and States included in the outreach programmes of the EU. Other co-sponsors are: Algeria, Belarus, Burundi, Cambodia, Cameroon, Chad, Congo, Cuba, Dominica, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Kiribati, Lao People’s Democratic Republic, Nicaragua, Pakistan, Somalia, Syrian Arab Republic, Vanuatu, Bolivarian Republic of Venezuela, Zimbabwe. China is a participant to NSG and Zangger Committee, oldest regimes focused on nuclear technologies, and to the CWC.

***o Articles 18 and 19 – Procedures governing the adoption of the lists by authorised institution, including urgent amendments – Transposable***

Article 18 describes the procedure for the adoption of the lists by the Commission and puts forward certain conditions: time-period, obligatory consultations and notification, possibility of objection or revocation by other institutions. Article 19 introduces a possibility for an urgent update of the lists by the Commission and introduces relevant provisions for objecting it by the European Parliament and the Council.

The Recast did not introduce changes to these procedures and they remain the same as in the Regulation (EC) 428/2009. In turn, the EU Regulation No 599/2014 of the European Parliament and of the Council of 16 April 2014 amended the Council Regulation (EC) No 428/2009 and included the procedure for "regular and timely updates of the common list of dual-use items". The EU Regulation No 599/2014 delegated the power to adopt acts in accordance with article 290 of the Treaty on the Functioning of the European Union (TFEU) to the Commission with respect to amending Annex I to Regulation (EC) No 428/2009 and within the scope of article 15 of the Regulation<sup>40</sup>.

These provisions may be transposable to third countries’ national law and are reproducible via adaptations in accordance with national specificities. This provision delegates to one of the bodies in national administration the task of adopting control lists without using the full parliamentary procedure, which may be lengthy

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<sup>40</sup> Articles 23a and 23b of the Regulation (EU) No 599/2014.

and cumbersome resulting in delays and not up-to-date controls. Empowering the Commission by adopting the delegated acts to amend control lists of dual-use items allows increased flexibility and responsiveness to changes and relevance of controlled items, also for removing items from the list. Article 18 provides a convenient basis for describing states own procedure in governing the adoption of the lists in a timely manner, setting out main the procedural points and assuring that relevant check mechanisms for other authorities are introduced. From an institutional perspective, such a mechanism could even inspire the division of the responsibilities between the legislator and the government.

#### ***o Article 20 – Adoption of Annex IV list by Commission – Inadequate***

Article 20 indicates that public policy and public security interests of MS shall be the basis for the creation of a list of items controlled during intra-EU transfers (Annex IV of the EU Dual-Use Regulation). The Recast did not introduce changes to the procedure and it remains the same as in the Regulation (EC) 428/2009.

This provision seems to be rather inadequate for third states as its implementation would impose internal control within one country. Unless, the State is a federation and deems it necessary for its safety and security to control internal movement of certain dual-use goods.

### **Cooperation among authorities, article 23 – Transposable/ Inspiring**

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Article 23 falls under Chapter VI of the EU Dual-Use Regulation<sup>41</sup> and concerns administrative cooperation provisions for ensuring the harmonised and effective implementation/ enforcement of the Regulation across the EU. Indeed, article 23 sets a requirement for the EU Member States to establish direct coordination and exchange of information between the competent authorities of each MS with a view to ensuring the consistent implementation of trade controls throughout the customs territory. The information exchange shall be facilitated by the Commission, which is in charge of publishing all information that is to be made publicly available in the C series of the official journal (OJ) of the EU. On that latter point, article 23.1 specifies information that is to be made available in the OJ of the EU, i.e. a list of the EU MS authorities that are empowered to grant authorisations for exports/brokering/technical assistance and in charge of prohibiting transit as well as the penalties applied for infringement of the export control law in each EU MS.

Article 23.2 elaborates further on the areas of the implementation of the Regulation for which an increased level of coordination and exchange of information is deemed necessary. These areas concern:

- licensing data (e.g. value, destination and type of license per authorisation);

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<sup>41</sup> Regulation (EU) 2021/821.

- additional information regarding licensing criteria (particularly those set out in the article 15);
- analyses underpinning the implementation of additional national controls pursuant to reasons of public security (as further elaborated under article 9);
- enforcement of controls including information on audits, disqualified exporters and application of penalties;
- data of sensitive end-users and routes involved in suspicious procurement attempts.

Finally, article 23.3 to 23.6 describes the modalities under which such information exchange shall take place, such as the frequency of data exchange on licensing or the applicable laws and procedures concerning data privacy, security and confidentiality. On this latter issue, the EU regulation provides for a secured and encrypted system (DUES) which has been already developed by the Commission and used for a number of years to support the direct and secure information exchange among the EU MS authorities.

Overall, the new Regulation considerably increases the scope of information exchange required previously under article 19 of the Regulation (EC) 428/2009 although some elements, such as the exchange of information concerning disqualified exporters, sensitive end-users and the use of an encrypted electronic system, also constituted an established practice under the previous EU framework.

Administrative cooperation procedures and requirements as proposed in the EU context can have a twofold interest for non-EU countries. On the one hand, information exchange and cooperation procedures among the competent authorities within a country is an important component for the well-functioning of every trade control system. This is particularly true for licensing and customs officers who are in charge of distinct aspects of the overall implementation of trade controls and need to coordinate closely, collect and exchange information and data on the technical parameters of an export, risk indicators linked to a transaction and administrative documentation to be checked. More broadly, the licensing of a dual-use export is a truly cross-sectoral issue that involves the opinion or in some cases approval of different agencies and ministries. In some countries, the legal framework and ensuing competencies are quite scattered rendering the need for an appropriate level of coordination imperative. Therefore, inter-agency coordination at different levels and according to the needs of a given administrative system is very important and, the specific requirements referred to in the article 23 can be considered as largely transposable to third country jurisdictions.

On the other hand, article 23 is to be understood in connection with coordination procedures and information exchange mechanisms among the MS authorities who are primarily in charge of the licensing implementation and customs enforcement aspects of the regulation. In other words, their original objective is to serve the harmonised and seamless implementation of trade controls among a group of countries who operate under a common customs union and one single market. From that point of view, the coordination standards and obligations set out in article 23 can be inspirational for other constellations of countries who aspire to strengthen

regional approaches and collaborations among them. Although the EU represents a sui generis case of a supranational organisation uniting several European states, there are other economic and regional unions that could decide to enhance cooperation vis-a-vis trade controls such as the Association of Southeast Asian Nations (ASEAN) and the Gulf Cooperation Council (GCC).

### **Technical expert groups, article 24.3 – Inspiring** \_\_\_\_\_

Article 24.3 formalises a current practice within the EU of which there was no formal mention in the ancient Regulation 428/2009, *i.e.* the creation of technical expert groups (TEG) which are mandated to address specific issues relating to the implementation of controls. A TEG is set up by the Dual-use Coordination Group (DUCG) and it is composed by MS and the Commission experts and usually has specific objectives, linked deliverables and a timeline to achieve them. In the past, there have been two cases where TEG have been tasked to establish EU guidance for implementing ICP tailored to industry and academia respectively<sup>42</sup>. Following the entry into force of the new regulation, the EU plans to continue operating or set up new TEG with the view to address challenging requirements of the new EU regulation such as coordinating EU policies/controls concerning emerging technologies, cyber surveillance items under article 5, data collection and transparency, and EU capacity-building and technical reachback activities.

As illustrated by the mentioned ICP guidance examples, the contribution of technical experts to the policy-making – namely concerning the implementation of controls and updating of the dual-use control list – can be very constructive and can favour the development of a collaborative export control network. One could consider this type of mechanism, deepening and diversifying the cooperation and knowledge sharing in the export control policy-making, as an inspiring principle that third countries could apply via adaptations of their national control systems.

### **Capacity building programme, article 24.4 – Transposable**

Article 24.4 provides that the Commission will support in consultation with the DUCG, a Union licensing and enforcement capacity building programme for officials from the EU MS. This is a novel element as in the previous Regulation there was no such provision. It responds to an identified shortcoming of the EU system as training of licensing and customs personnel in the EU MS was left entirely to the national initiative. That said, the EC in-house science service – the JRC – in collaboration

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<sup>42</sup> Commission Recommendation (EU) 2019/1318 of 30 July 2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) No 428/2009, C/2019/5528, OJ L 205, 5.8.2019, p. 15–32; and Commission Recommendation (EU) 2021/1700 of 15 September 2021 on internal compliance programmes for controls of research involving dual-use items under Regulation (EU) 2021/821 of the European Parliament and of the Council setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items. C/2021/6636, OJ L 338, 23.9.2021, p. 1–52.

with some MS and with the support of the EU Partner-to-Partner Programme for third countries have provided in the past – 2018 and 2021 – two main training events on licensing procedures and dual-use research for EU officials. Besides, the JRC in collaboration with the US Department of Energy, has trained more than 300 officers coming mostly from the EU licensing authorities, under its series of joint JRC-NNSA workshops that have been organised for the last 14 consecutive years<sup>43</sup>.

Export controls is a multidisciplinary subject and keeping pace with policy developments, technological breakthroughs, and patterns of unlawful trade is a very demanding task requiring continuous effort and training. The inclusion of a provision similar to the one stipulated in article 24.4 of the EU Regulation can be easily transposed to any jurisdiction and it may provide the impetus for funding and creating training programmes for customs and licensing staffs which are a sine qua non for operating effective export controls.

## **Enforcement coordination mechanism, article 25 – Inspiring/Inadequate**

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Article 25.2 of the EU Dual-Use Regulation 2021/821 introduces for the first time, compared to the former Dual-use Regulation(s), the so-called ‘Enforcement Coordination Mechanism’ to stipulate information sharing and direct cooperation between competent authorities and enforcement agencies of the Member States. This is the main and only difference between the provision in the Recast and the previous Regulation. The ‘Enforcement Coordination Mechanism’ should serve as a platform to exchange best practices of national enforcement authorities, the detection and prosecution of unauthorised exports of dual-use items and possible infringements of the Dual-Use Regulation and/or relevant national legislation.

The direct addressees of article 25.1 are the Member States, which are obliged to implement and enforce the regulatory framework properly by imposing sanctions for violations of the Dual-Use Regulation. The penalties for the unlawful conducts should be effective, proportionate, and dissuasive. The substantive aim of article 25 is to control the behaviour of all relevant stakeholders that need to implement the Regulation into their internal compliance programmes.

As an EU regulation, the Dual-Use Regulation is directly applicable in the Member States and, in principle, does not need to be transposed into national law. The obligations for the Member States ensuing from article 25.1 to lay down penalties applicable to infringements cover all provisions of the Dual-Use Regulation.

Article 25.1 can be considered as inadequate or at the most inspiring to third countries considering that the provision just lays down the principle of a regulatory

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<sup>43</sup> Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EU) 2021/821 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items, COM/2021/716 final.



sanction's framework, leaving it to the MS's national law to establish the penalties for the potential violations. However, the legal principle "*Nulla poena sine lege*" as the basic requirement of the rule of law must be a standard also in third countries.

Article 25.2 and the 'Enforcement Coordination Mechanism' on the other side can be considered more inspiring or even inadequate because it requires similar political and economic systems to the EU and cannot only be implemented in one third country.

## **Implementing measures, article 26.1 – Transposable \_\_\_\_\_**

In view of improving the consistency and efficiency of the Union export control system, the first paragraph of article 26 of the Recast invites the Commission, the Council and the MS to make guidelines and recommendations available for best practises for the subjects falling withing their competence.

Article 26.1 of Regulation 2021/821 does not add much more compared to article 19.5 of Regulation 428/2009, except for the addition of technical assistance to the scope of the new Regulation and the particular attention paid to the small and medium enterprises (SME).

This attention was already evident in the Commission Recommendation (EU) 2019/1318 of 30 July 2019 on ICP tailored to industry, where potential implementation challenges for SME were systematically considered<sup>44</sup>.

Taking duly into account the national specificities of their market, operators and legal framework, these implementing measures can be transposed into third countries export control systems. Guidelines and recommendations for best practises are valuable tools operating as a bridge between the legal and the operational framework, making it easier to implement the rules and in doing so ensuring a more homogenous implementation of the export control rules.

## **Transparency measures, article 26.2 to 26.4 – Transposable**

Transparency measures are enshrined in article 26 of the Recast. These measures consist of the publication of reports on the implementation of the legislation and other activities arising from the latter, as well as evaluating the effect of the legislation after a period of time in order to carry out any necessary adjustments.

The prior EU DU Regulation already contained an article addressing the topic – article 25-. According to it, the Commission was required to review the implementation

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<sup>44</sup> For further information on this ICP guidance see the section on 'Technical expert groups' (p. 30).

of the Regulation and send a report to the European Parliament and the Council on its application every three years. By contrast to the Regulation (EC) 428/2009, where article 25 was inserted in a long chapter under the title “Other provisions”, in the Recast the EU legislator dedicated an entire new chapter to these transparency provisions<sup>45</sup>, increasing the reporting frequency to an annual basis and further specifying the modalities and content of the report.

The last paragraph of the same article also requires the Commission, after a period from five to seven years, to carry out an evaluation of the Regulation as a whole, as well as an *ad hoc* evaluation for the article 5 “catch-all” clause on cyber-surveillance items for human rights considerations<sup>46</sup>.

These transparency measures are fundamentally useful for ensuring the good health of the export control system. Regular reports allow for the monitoring of the actual implementation status of the legislation, facilitating the assessment and potential reorientations or adjustments. Furthermore, these measures are also simple to implement and as such they can be considered as transposable in third countries systems via adaptations in accordance with national specificities, such as the content of the report, depending on the commercial operations covered by the national legislation, or the authority in charge of the report and the assessment.

## **Control measures, article 27 – Transposable** \_\_\_\_\_

Article 27 of the EU Dual-Use Regulation refers to the exporter and broker obligation to keep detailed registers or records of their activities at the disposal of the State authority. This article has not been fundamentally amended by the Recast. Only its scope has been enlarged to include technical assistance.

The provision can be considered as transposable as all export control systems should include provisions on registration of activities and data to keep at the disposal of the State authority to allow the control of conformity of activities with trade control rules.

## **Internal competences, article 28 – Transposable** \_\_\_\_\_

Internal competences are enshrined in the article 28 and require Member States to take all necessary measures to allow their respective authorities to gather information on transaction involving dual-use items and to control, in particular on the premises, that trade control measures are properly applied. This article has not been fundamentally amended by the Recast. Only its scope has been enlarged to include technical assistance.

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<sup>45</sup> Chapter VII “Transparency, Outreach, Monitoring, Evaluation”, article 26 of Regulation (EU) 2021/821.

<sup>46</sup> For further information see the section ‘Cyber-surveillance’ (p. 17).

The provision can be considered as transposable as all export control systems should include provisions on registration of activities and data to keep at the disposal of the State Authority to allow the control of conformity of activities with trade control rules.

## **Cooperation with EU-third countries, article 29 – Transposable**

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Article 29 of the EU Dual-Use Regulation refers to the cooperation of the European Union, including its Member States, with the third countries. It appears for the first time in the EU legal framework with the 2021 Recast, as such provision did not exist in the Regulation (EC) 428/2009. This article is, alone, Chapter IX of the Regulation.

The first paragraph of this new article relates to the dialogues that the EU is expected to maintain with third countries on dual-use goods' trade controls. Although these dialogues can take several forms, such as the exchange of information, capacity-building activities and support in implementing international good practices, the paragraph does not set any legally-binding obligation for the EU or its Member States. Nonetheless, it is the expression of a formal commitment by the EU to support cooperation and, thereby, the outreach programmes of the Union in this area, such as the "Partner-to-partner" (P2P) programme<sup>47</sup>.

Although paragraph 1 does not deal with the communication of information on the implementation or enforcement of the controls, it is not necessary for the regular running of these controls. As such, it is not essential for the functioning of a trade control system and, therefore, not directly transposable. However, communicating about this specific provision may inspire other countries to engage in promoting and cooperating at international level for globally enhancement of controls. For instance, if the communication is enhanced with a number of partner countries, this could serve as a critical mass for exploring alternatives to the current dual-use trade control practices or, on the contrary, maintain the foundations of these controls. In this respect and even without being copied in other legislations, paragraph 1 can be seen as inspiring.

The second paragraph of article 29 provides that the EU, through the Commission, is entitled to negotiate with third countries to establish agreements on the mutual recognition of dual-use trade controls set up by these parties. Similar to paragraph 1, this paragraph does not set any legally-binding obligation for the EU or its Member States. The principle of the mutual recognition of the effectiveness and efficiency of the controls is in position to support the adoption of differentiated policies of the EU

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<sup>47</sup> The EU P2P programme for the dual-use goods aims at enhancing the effectiveness of dual-use export controls worldwide. It is taking place in the global EU Chemical, Biological, Radiological and Nuclear (CBRN) Risk Mitigation Centres of Excellence (CoE) Initiative. For more information European Union (January 2022): [https://europa.eu/cbrn-risk-mitigation/eu-p2p-export-control-programme/dual-use-trade-control\\_en](https://europa.eu/cbrn-risk-mitigation/eu-p2p-export-control-programme/dual-use-trade-control_en).

vis-à-vis the partner countries. For instance, as done in other countries such as the United Arab Emirates, the recognition may become a criterion for the visa policies of the Union and, collaterally, the student vetting policies – thereby become an instrument for controlling deemed export of dual-use technology. It may also become a criterion for the EU macro policies, such as the funding of the infrastructure's development worldwide. For instance, the EU Global Gateway programme<sup>48</sup> could be directed to the support of logistical nodes only in countries for which the controls are acknowledged and formally recognised.

Although the provisions related to the mechanism of negotiations in paragraph 2 are only objectively relevant for the EU and, as such, are not transposable, the principle of concluding agreements on the mutual recognition of trade controls of dual-use items is inspiring. Indeed, it may eventually allow for harmonising – or standardising, international practices through the convergence of the control objectives, the principles and/or the mechanisms of control.

Article 29, therefore, is inspiring for third countries and for the EU itself and the actors of its cooperation policy.

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<sup>48</sup> For more information, European Commission (January 2022): [https://ec.europa.eu/info/strategy/priorities-2019-2024/stronger-europe-world/global-gateway\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/stronger-europe-world/global-gateway_en).

## Summary Table of the EU Dual-Use Regulation's provisions classification

The implementation of these recommendations should take into account the level of development of the national control system of the country considered

	Transposable (Reproducible via adaptations in accordance with national specificities)	Inspiring (Defining principles: reproducible via adaptations of the national control systems)	Inadequate (But it might be relevant)
Re-export art. 2.2 (B)		<input checked="" type="checkbox"/>	
Exporter art. 2 (3)		<input checked="" type="checkbox"/>	
Re-export declaration art. 2 (5)		<input checked="" type="checkbox"/>	
Exit summary declaration art. 2 (6)		<input checked="" type="checkbox"/>	
Broker art. 2 (8)		<input checked="" type="checkbox"/>	
Technical assistance art. 2 (9)	<input checked="" type="checkbox"/>		
Provider of Technical assistance art. 2 (10)		<input checked="" type="checkbox"/>	
Transit art. 2 (11)		<input checked="" type="checkbox"/>	
Large project authorisation art. 2 (14)	<input checked="" type="checkbox"/>		
Arms embargo art. 2 (19)		<input checked="" type="checkbox"/>	
Cyber-surveillance art. 2 (20)		<input checked="" type="checkbox"/>	
ICP art. 2 (21), 12.4, 15.2	<input checked="" type="checkbox"/>		
Essentially identical transaction art. 2 (22)			<input checked="" type="checkbox"/>
Cyber-surveillance art. 5		<input checked="" type="checkbox"/>	
Brokering art. 6, 13	<input checked="" type="checkbox"/>		
Transit art. 7.2		<input checked="" type="checkbox"/>	
Technical assistance art. 8, 13	<input checked="" type="checkbox"/>		
Catch-all art. 9	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
"Catch-all" art. 10			<input checked="" type="checkbox"/>
Intra-EU transfers Annex IV Art. 11		<input checked="" type="checkbox"/> (Regional cooperation, e.g. ASEAN)	<input checked="" type="checkbox"/>
Authorisations (large project, general, global, individual) art. 12	<input checked="" type="checkbox"/>		
Customs procedure art. 21	<input checked="" type="checkbox"/>		
Customs empowering art. 22	<input checked="" type="checkbox"/>		
Control list updating art. 17, 18, 19, 20	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Cooperation among authorities art. 23	<input checked="" type="checkbox"/> (Internal cooperation)	<input checked="" type="checkbox"/> (Regional cooperation)	
Technical expert group art. 24.3		<input checked="" type="checkbox"/>	
Capacity-building programme art. 24.4	<input checked="" type="checkbox"/> (Outreach, "inreach")		

	Transposable (Reproducible via adaptations in accordance with national specificities)	Inspiring (Defining principles: reproducible via adaptations of the national control systems)	Inadequate (But it might be relevant)
Enforcement coordination mechanism art.25		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Implementing measures art. 26.1	<input checked="" type="checkbox"/>		
Transparency measures art. 26.2, 3, 4	<input checked="" type="checkbox"/>		
Control measures art. 27	<input checked="" type="checkbox"/>		
Internal competences art. 28	<input checked="" type="checkbox"/>		
Cooperation with third countries art. 29	<input checked="" type="checkbox"/>		

*\* The provisions highlighted in the table are those which did not undergo changes in the Recast but were discussed by the Chaudfontaine Group in light of their potential relevance for third countries trade control systems.*

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