A decade of evolution of dual-use trade control concepts: strengthening or weakening non-proliferation of WMD

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Evolution of conditions and criteria in the last decade

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The EU trade control system dedicated a provision to criteria and conditions from its first set of legislation. The objective was to enhance common understanding and implementation by Member States' licensing authorities. It shall be recalled that the EU has not adopted one trade control system implemented by one single EU authority, but its legislation consists of an attempt to coordinate Member States' trade control systems.

The first set of legislation was an unusual mix of a legally binding act in the form of a Council Regulation[1], and a politically binding act in the form of a Council Joint Action[2], with cross-references between the two documents. The Regulation defined principles governing the export of dual-use items and the Joint Action adopted lists of items and criteria.

Article 8 of the Regulation obligated Member States' authorities to take into consideration the *common guidelines set out in Annex III to Decision 94/942/CFSP* when considering whether or not to grant an export authorisation. The term "guidelines" has to be assimilated to criteria rather than conditions, as the Council Joint Action was referring to factors to be considered and not to elements to be fulfilled by the end-user to obtain the authorisation. Four categories of criteria were listed in the Joint Action:

– Member States' commitments under international agreements on non-proliferation and the control of sensitive goods;

1 Council Regulation (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods *OJ L 367, 31.12.1994, P. 1–7.*

2 Council Decision (94/942/CFSP) of 19 December 1994 on the Joint Action adopted by the Council on the basis of Article J.3 of the Treaty on European Union concerning the control of exports of dual-use goods *OJ L 367, 31.12.1994, P. 8–167.*

– Member States' obligations under sanctions imposed by the UN Security Council or agreed in other international fora;
– Considerations of national foreign and security policy including, where relevant, those covered by the criteria agreed at the European Council in Luxembourg in June 1991 and in Lisbon in June 1992 with regard to the export of conventional weapons;
– Considerations about intended end-use risk of diversion.

In 1994, twelve States were members of the European Union and all were parties of the same international trade control regimes. It could therefore be expected that they shared and considered the same set of criteria concerning the granting of authorisations. It is interesting to note that two export conditions became indirectly compulsory for all Member States due to the ratification of certain international treaties.

The first is a general commitment taken from the CWC, the BWC and the NPT, which prohibits the transfer of chemical, biological and nuclear weapons to a third State[3].

The second is the commitment to grant an export authorisation for certain nuclear material only if the State end-user had signed and implemented a safeguards agreement with the IAEA[4].

A similar analysis could be made for some conditions requested by international trade control regimes like the NSG, the Australia Group, the Wassenaar Arrangement, the MTCR and the Zangger Committee as long as all EU Member States are parties to those regimes.

For example, the NSG has adopted two conditions that consist of formal governmental assurances from the recipient State. The first should explicitly exclude uses which could result in any nuclear

3 It shall be recalled that ownership of WMD is prohibited by those treaties except for nuclear weapons, which five States have the right to hold under certain conditions, including a disarmament commitment.

4 Article III.2 NPT.

explosive device before transferring certain nuclear items[5]. The second concerns the retransfer of items or the transfer of listed items derived from facilities originally transferred by the supplier, where the same assurances as those required by the original transfer will be required for the new recipient[6]. The MTCR has adopted similar conditions consisting in formal assurance concerning the modification of the use of transferred and retransferred items[7].

In June 2000, the EU trade control system was replaced by one single Regulation that directly integrated the criteria of the Joint Action[8]. The list of criteria has remained similar:

A. the obligations and commitments they have each accepted as a member of the relevant international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties;

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

C. considerations of national foreign and security policy, including those covered by the European Union Code of Conduct on arms exports;

D. considerations about intended end-use and the risk of diversion.[9]

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5 Paragraph 2 of INFCIRC/254. Part I.

6 Paragraph 9 of INFCIRC/254. Part I.

7 Article 5 of the MTCR Guidelines: "5. Where the transfer could contribute to a delivery system for weapons of mass destruction, the Government will authorize transfers of items in the Annex only on receipt of appropriate assurances from the government of the recipient state that:

the items will be used only for the purpose stated and that such use will not be modified nor the items modified or replicated without the prior consent of the Government;

Neither the items nor replicas nor derivatives thereof will be re transferred without the consent of the Government."

8 Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology *OJ L 159, 30.6.2000*, p. 1–215.

9 Article 8 of Regulation 1334/2000.

The wording of the first criterion has been amended to better reflect the international ruling of dual-use trade control, which consists of a mix of international laws (essentially the three treaties) and soft laws (the five dual-use trade control regimes). The text has also been amended to formally confirm that criteria listed by one of those instruments is obligatory for all Member States only if they have all ratified it or are parties to it. In 2000, the 15 Member States were all part of the same instruments, so this amendment had almost no consequences.

Since the adoption of the first system, the potential for the EU to unilaterally impose sanctions concerning dual-use items against a third State has been controversial. If EU treaties seem to have empowered the Council, most of its decisions involved the implementation of a UNSCR. The new wording of the second criterion has closed the debate by making it possible for the Council to adopt only EU grounded dual-use items-related sanctions, since an increasing number of countries have been targeted by EU dual-use items-related sanctions[10].

In 2008, the EU dual-use trade control system was reviewed and the Regulation was amended substantially, but provisions relating to the four criteria were not amended[11]. However, while in 2000 the Member States were all parties of the same instruments, in 2008 this was no longer the case. Cyprus, Estonia, Latvia, Lithuania, Malta, Slovenia, Slovakia and Romania were not and are still not members of the MTCR, and Cyprus is not a member of the Wassenaar Arrangement. Questions have therefore been raised regarding how criteria defined by the MTCR and the Wassenaar Arrangement should be considered by Member States which are not parties to those instruments. According to the Regulation, only criteria adopted by instruments to which all Member States

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10 It concerns countries like Iran, Myanmar, Syria, Venezuela and Zimbabwe (see https://sanctionsmap.eu/#/main).

11 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, 29.5.2009, p. 1–269.*

are parties are compulsory. As such, in principle, Member States not party to the instruments do not have to take such criteria into account. However, the scope of the commercial policy, which is an exclusive competence of the EU, includes dual-use items. To avoid the risk of unfair competition between suppliers, it would be difficult for Member States which are not parties to the instruments to be exempt from considering the MTCR or Wassenaar criteria when they are analysing a transfer application for an item listed by one of those regimes.

If the set of criteria defined by the EU trade control system has remained almost unchanged, the one defined by international regimes to which the EU refers has been lightly amended in light of the evolution of the international situation. For example, the unacceptable risk of diversion to acts of terrorism has been included in most trade control regimes after the New York World Trade Center Twin Tower terrorist attack in September 2001.

The situation was the same for conditions, as there was no consensus between the Council and the Parliament regarding the inclusion of trade control conditions in the EU Regulation, and the conditions already established by international trade control regimes have also been amended in light of the evolution of the international situation. An example of this is the condition that the transfer of enrichment and reprocessing facilities must be denied if the recipient State is not adhering to the NSG Guidelines and has not reported to the Security Council of the United Nations that it is implementing effective export controls as identified by Security Council Resolution 1540.

In 2016, the EU Commission, considering that there was a need to upgrade the EU Regulation, tabled a proposal to revise it[12]. While the document does not include conditions to be fulfilled by

12 Proposal for a Regulation of the European Parliament and the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast) {SWD(2016) 314 final} {SWD(2016) 315 final} available at https://eur-lex.europa.eu/resource.html?uri=cellar:1b8f930e-8648-11e6-b076-01aa75ed71a1.0013.02/DOC_1&format=PDF.

the recipient to supply the items, the list of criteria has been partly amended and completed. The first group of proposed amendments attempts to clarify existing criteria (a, e and f), while the second group adds new elements (b, c, and d) to be assessed by Member States' authority.

The first group concerns:

- The need to consider Member States' individual commitments and obligations in international regimes, as well as EU commitments as long as the EU is a member of the Australia Group and an observer of the NSG;
- The commitment not only to consider the eight criteria of Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing the exports of military technology, but also to consider more globally the security of Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries;
- The need to consider the intended end use and the risk of diversion, but also the risk that the dual-use items will be diverted or re-exported under undesirable conditions.

The second group adds new criteria that might be already considered by certain Member States' authorities in the assessment process of a transfer application but were not included in the Regulation. It shall be recalled that the EU list of criteria is not comprehensive and that Member States have the possibility to consider any element they consider suitable. The new criteria proposed by the Commission are:

- The respect for human rights in the country of final destination as well as respect by that country of international humanitarian law;
- The internal situation in the country of final destination – competent authorities will not authorise exports that would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination;

– The preservation of regional peace, security and stability.

The three criteria are copied/pasted from the list defined by Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing the control of exports of military technology and equipment. If their insertion into the Regulation formally commits States' authorities to assess them in the authorisation granting process, this was already the case in the present Regulation that referred directly to the Common Position.

The Commission's proposal is submitted to the codecision of Council and Parliament, and is still under discussion. It is not clear when it will be adopted or if the new criteria will remain as they stand at the end of the negotiation.

Over the last decade, criteria and conditions defined by the EU trade control system have remained almost identical. Few modifications have been added, and those that were adopted were essentially to reflect the evolution of the international situation.

This does not mean that the policy followed by Member States to grant or deny an authorisation has not evolved. The overly broad scope of the criteria and conditions and the possibility for Member States to add any element that they consider relevant at the national level makes it impossible to identify a common EU policy regarding the implementation of the criteria. Moreover, unlike in the case of the export of weapons, Member States do not publish dual-use export control data identifying the criteria or the conditions they have considered.

Chapter
02

Definitions of concepts: Dual-use goods

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1. INTRODUCTION

The definition of any issue subject to regulation appears to be one of the first steps necessary to achieve an efficient regulatory framework. In international law, however, it is not unusual to find concepts that still lack a universally accepted definition. This is precisely the case of the notion this chapter deals with: dual-use goods. Although this notion is governed by relatively extensive international regulation, the lack of consensus when defining it entails some of the challenges set out below.

In the absence of a legally complete and homogeneous definition, which is intrinsically difficult to achieve at present, we should not disregard the fact that the different approaches contained in the treaties and agreements studied here have managed to be accepted by a considerable majority of states that agree on the way of identifying this type of goods. For this reason, the first section of this chapter focuses on the definitions available in the different rules and regulations currently in force. The second section, for its part, analyses two of the main challenges that specialised regulations must face: the growing relevance of intangible goods in the definition of dual-use goods, and the ongoing expansion of the limits of the notion under study.

2. DEFINING DUAL-USE GOODS

To date, the international community has been unable to agree on an exact definition of the term "dual-use good", despite its relevance from both the commercial and the development angle, as well as the non-proliferation and security perspective. In fact, specialised books and articles are not particularly engaged with the mission of defining dual-use goods *per se*, in spite of dealing with such items with relative assiduity – a situation that, given their strategic and industrial importance, seems likely to increase. On the contrary, to define these intrinsically complex goods, relevant sources generally resort to one of the several dichotomous criteria which acknowledge the contrast between what might be referred to as *positive* and *negative* uses, from the perspective of the maintenance of international peace and security. Thus, the lack of a universal consensus on how to define dual-use goods does not seem to have been an impediment for the different legal instruments to proceed to regulate them and for scholars to discuss them. It is therefore interesting to contrast the different ways in which this term is approached by the diverse international norms and regulations.

In order to approach the notion of "dual-use good", we have taken into account the most important instruments dealing with these items, and we have done so on the basis of current international practice and analyses of the various definitions of dual-use good in international legal texts. Something that is especially noteworthy when conducting this analysis is that the term "dual-use good" itself appears only in the framework of two export control regimes (namely the guidelines of the Nuclear Suppliers Group and the Wassenaar Arrangement). The remaining sources – that is, international treaties, normative acts of international organisations and soft-law instruments – opt to employ dichotomies, such as those that differentiate between *civil* and *military* uses or *peaceful* and *non-peaceful* ends to refer to the dual uses of certain materials. This review of the different criteria used in international regulation

sheds some light on the evolution that this term has undergone, an evolution that is still underway, as is pointed out in the second section of the chapter.

While the most usual dichotomy in conventional norms, when speaking of the two possible uses of a given product, is that which distinguishes between peaceful and non-peaceful ends, in the doctrine, the differentiation between civil and military purposes is also very common. Furthermore, due to the changes in the type of threats that are occurring in international society, mention should also be made of the criterion that distinguishes between *benevolent* and *malevolent* ends. This last criterion, explained below, must be understood as a consequence of the potential use of certain goods by non-state actors. These three forms of classifying "dual-use" are the most commonly used in the different international non-proliferation and arms control regimes. Consequently, and by way of establishing a principle, the notion of "dual-use good" can be delimited in relation to two parameters: the intrinsic technical characteristics of certain types of goods and the objectives underpinning their two possible (opposing) uses.

3. PEACEFUL AND NON-PEACEFUL

In reviewing the relevant international treaties in the field, it becomes evident that these legally binding texts require that the goods be used exclusively for *peaceful* purposes. Such a provision undoubtedly admits that a given item may be diverted or "misused" for *non-peaceful* purposes. This dichotomous criterion, which understands duality in terms of peaceful purposes and their opposite, is used by the Treaty on the Non-Proliferation of Nuclear Weapons(NPT)[1], the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological

1 Article III.1, NPT.

(Biological) and Toxin Weapons and on their Destruction (BTWC)[2], and the Convention on the Prohibition, Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC)[3]. None of these texts mention the term "dual-use good" *per se*; however, they all establish the conditions states must fulfill to guarantee that certain items with a potential double application are only used for peaceful ends.

This dichotomy is broad and somewhat vague in practice. What is to be understood by *non-peaceful*? Given the certainty that we are dealing with international conventions concerned with the proliferation of weapons of mass destruction (WMDs) - which is an obviously non-peaceful purpose - this vagueness and breadth of the term must be interpreted in connection with the wording of the treaties. Thus, *non-peaceful uses* shall be understood as any use intended to produce such a weapon. Consequently, while on the one hand the usefulness of this dichotomy may be called into question by its lack of precision, it can be justified and overcome by the context in which it is used.

This meaning of "dual-use" – in terms of peaceful and non-peaceful – also appears in UN Security Council Resolution 1540, which refers to such dual-use items as "related materials"[4]. The objective of this Resolution was very clear: to prevent the proliferation of WMDs, avoiding, in particular, their eventual use by non-state actors. The way in which the Resolution foresees fighting such proliferation is by deciding that states should control the transfer of the aforementioned "related materials".

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2 Article I, BTWC.

3 Article II.9.a), CWC.

4 Footnotes UNSC Resolution 1540: "materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery".

4. CIVILIAN AND MILITARY USES

It is worth giving some consideration to the dichotomous criterion that identifies the two contradictory uses of a possible good as its *civil* and *military* uses, given its widespread use. Because of the context in which discussions about dual-use goods originate – in the framework of Cold War debates about technology transfers between the civil and military realms, where "dual-use" denoted a civil application that might be derived from military research[5] – there are many doctrinal texts[6], specific articles[7] and even regulations and directives that define dual-use goods as those items "*that can be used for both civil and military purposes*"[8]. Not only the Wassenaar Arrangement, but also the EU dual-use goods Regulation uses this dichotomy in the first part of its definition when it establishes that "*dual-use items" shall mean items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices*"[9].

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5 Malcolm R. Dando, "Did we make a huge mistake over dual use?', Bulletin of the Atomic Scientists, 2011 https://thebulletin.org/did-we-make-huge-mistake-over-dual-use.

6 Sibylle Bauer and Ivana Mićić, "Controls on Security-Related International Transfers', in *SIPRI Yearbook 2010: Armaments, Disarmament and International Security*, ed. by SIPRI Stockholm International Peace Research Institute (Oxford: Oxford University Press, 2010), pp. 447–66 (p. 447) Note 1; Katherine Prizeman and Daniel Fiott, "The Arms Trade Treaty and the Control of Dual-Use Goods and Technologies: What Can the European Union's Export Control Regime Offer?', *Institute for European Studies, IES, Vrije Universiteit Bruseel (VUB)*, IES Workin (2013), 24, p. 8.

7 Michael D. Beck, "Reforming the Multilateral Export Control Regimes', *The Nonproliferation Review*, Vol. 7.No. 2 (2000), 91–103 (p. 93); Sibylle Bauer and Mark Bromley, "The Dual-Use Export Control Policy Review: Balancing Security, Trade and Academic Freedom in a Changing World', *EU Non-Proliferation Consortium Non-Proliferation Papers*, No. 48 (2016), p. 1; Bruno Gruselle and Perrine Le Meur, "Technology Transfers and the Arms Trade Treaty: Issues and Perspectives', *Recherches & Documents, La Fondation Pour La Recherche Stratégique*, 2012, p. 27.

8 The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use goods and technologies, *WA-DOC (17) PUB 001 - Public Documents: Volume I. Final Declaration and Guidelines, and Procedures, Including the Initial Elements.*

9 Council of the EU, *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, 29.5.2009, Art. 2.1.

In spite of just how widespread the system of categorisation which identifies dual-use as the dichotomous relation between civil and military uses is, this interpretation does not seem altogether adequate, especially nowadays. Affirming the *civil* uses of which an item of dual nature is capable as its *desired, legitimate* and *peaceful* ends, and, on the other hand, attributing its military quality to uses whose ends are *hostile, illegitimate* and *unwanted*, gives rise to confusion, since the word *military* today encompasses more than what it used to represent; and the same is true of the adjective *civil*. The term *military* is an express reference – direct and unequivocal – to the uses that an army could give to the development of certain goods and technologies. However, it should not be disregarded that, on occasion, the military may have a peaceful purpose and the civil a "paramilitary" use, and thus the application of this criterion to define the two potential uses of dual-use goods seems rather limited and inadequate. Hence, this criterion can easily be outdated, especially if we consider the increasing role and growing relevance of non-state actors in the area of international peace and security.

5. CRITERIA OF INTENTIONALITY

Historically, some export control regimes used the previous criterion (i.e. *civil* vs. *military*) to define the two potential uses of the goods they regulated, addressing in this way the risk of the proliferation of arms, weapon systems and war materials in the military context. However, since 9/11, a conceptual transition has been taking place, and these multilateral regimes have been adopting measures to address the terrorist threat as well[10]. With the emergence of new non-state groups and criminal associations and a greater role for terrorism, the *military* and *civil* terminology has

10 Disposition 1, Nuclear Suppliers Group Guidelines; Disposition 1, Australia Group Guidelines; Disposition I.4, Wassenaar Arrangement; Disposition 3.F, Missile Technology Control Regime Guidelines.

become insufficient, and as a result, a reference to the *malevolent* or *benevolent* purposes that such actors may give to dual-use goods has become necessary. In fact, the incorporation of the criterion of intentionality into the definition has been taking place throughout these last years. Such a shift enables acts carried out by non-state actors and alien to the military forces of a state to be taken into account when dealing with the term "dual-use goods".

In our opinion, of all the dichotomies studied, the categorisation that most closely approximates to the essence of dual-use goods is that which refers to the intentionality of those that use them. Thus, dual-use goods are those that have the potential to produce positive or negative effects (the latter being linked to the production and/or use of WMDs), which will depend on the intentionality of those who possess them. However, we are aware of the highly abstract character of this definition, which is so essentialist and conceptual in nature, that, legally, it is very difficult – if not impossible – to regulate. In any case, nonetheless, it grasps the essential idea that the dual use of goods subject to international regulation will depend on their utilisation, that is, whether they are used for good or for evil.

6. CHALLENGES WHEN DEFINING DUAL-USE GOODS

6.1. Tangible and intangible goods and technologies

The notion of "dual-use goods" also includes intangible goods or what is known as "technology". "Technology" is described by the multilateral export control arrangements as the specific information necessary for the development, production or use of a product. The information takes the form of technical data or technical assistance[11]. Thus, software, publications or intangible knowledge

11 Samuel A. W. Evans, *Revising Export Control Lists*, (Flemish Peace Institute, 2014), p. 3.

are considered "items" of dual use. This, in turn, leads to changes in other concepts, such as the gradual replacement of "export" by "transfer", which seems more appropriate for non-tangible goods.

Technological developments have led to substantial changes in export controls, as they have expanded beyond the mere export of goods to include the transmission of technology through intangible means (thus referring to the means of transport, export or transmission) and transfers of intangible technology (where the technology itself is not and has not previously been tangible, such as oral transmission, technical assistance or electronic exchanges). The speed at which technology is advancing augurs a greater difficulty in controlling transfers of intangible dual-use goods. Huge amounts of data are constantly being transferred through email attachments, shared virtual storage facilities, and uploads and downloads on electronic platforms. There are also new practices enabled by the Internet which could be englobed under the term "cloud computing", which allows files to be stored without the "cloud" being geographically located anywhere. Obviously, the traditional control function based on physical borders and *in situ* supervision is no longer applicable, which poses an unquestionable challenge for all national authorities, from the public officers in charge of licensing to the law enforcement agents. Data transferred through electronic means is nearly invisible to customers officers, since they have historically dealt with tangible items[12]. Perhaps only those authorities that have set out resources for business audits on dual-use transfer controls consisting in controlling computers and email transactions will have a clearer role in the implementation of controls on intangible items. In any case, and regardless of the kind of

12 Ian Anthony, 'The Evolution of Dual-Use Technology Controls: A Historical Perspective', in *Technology Transfers and Non-Proliferation. Between Control and Cooperation* (New York: Routledge, 2014), p. 33.

storage medium being used to keep and share strategic knowledge, it would be advisable to set an information security standard for all companies holding controlled technology in an electronic form[13].

Some export control regimes have attempted to overcome this challenge - the first to cover intangible transfers in their Guidelines was the Australia Group, and the Wassenaar Arrangement provides us with a definition of "technology" that has come to be reflected in a number of national transfer control legislations[14] - but for the time being, no workable and fully effective solution has been found to control transfers of intangible technologies associated with physical goods.

6.2. Expansion of the notion

Without having to go back to the Cold War times in which dual-use items started to attract attention in the international arena, we have seen that in the last decade this notion has expanded – or rather, has been expanded by legislators - in order to include other materials, substances and technologies not necessarily connected to the proliferation of WMDs. In recent years, the potential "undesired" use given to items with a possible dual nature does not seem to be exclusively linked to WMD. Indeed, a debate is underway in which those involved are considering regulating as "dual-use goods" certain items whose potential negative effects - although unrelated to WMD - could end up being detrimental to international peace and security, violating legally protected assets on a massive scale.

Non-conventional dual-use goods – that is, items related to WMDs – are regulated by the guidelines of the NSG, the Australia Group and the MTCR, as well as by the NPT, the BTWC, the CWC and Resolution 1540. However, the Wassenaar Arrangement uses the same term to refer to a category of goods that is quite distinct

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13 Ian J. Stewart, *Examining Intangible Controls, Project Alpha* (London: King's College, 2016), p. 16.

14 Quentin Michel, Odette Jankowitsch-Prevor et al., *Controlling the Trade of Strategic Goods: Sanctions and Penalties* (Liège: European Studies Unit – University of Liège, 2016), p. 74.

from the meaning employed by the other guidelines. This appears to be a relic of the past, when the dual nature of a good did not necessarily have to be related to WMDs to be recognised as a dual-use good. Reopening this door could lead to the emergence of new problems, as, indeed, we are beginning to see. What this evolution reflects is the criterion of subjectivity that underlies the delimitation of the notion of the dual-use good.

In recent years, an expansion of the notion of "dual-use goods" has taken place, and this is worth analysing. Under this broader definition of "dual-use goods", products (besides WMDs) whose undesired ends are prejudicial to legally protected values or interests have begun to be identified. Thus, some export control regimes already include on their control lists goods that can be linked to the production of conventional weapons, to strengthening the military capabilities of third states or to facilitating terrorist attacks. Technological developments, the shift of the monopoly on strategic assets once held by governments to new actors (i.e. industry and the private sector), and the changing perception of what constitutes a threat are for Ian Anthony the "drivers", that is to say, the main conditioning factors, of the change that is occurring (and that is going to occur) in the concept and what it encompasses. Thus, the scope of application of the lists of "dual-use goods" of export control regimes is being extended to include materials that "*are supplied to a programme of concern or that has a sensitive end-use – whether or not it has been rated as sensitive on the basis of its technical characteristics*"[15].

An example of this extension of the concept can be found in the modification made in 2013 that affected the control lists of the Wassenaar Arrangement[16]. In the periodic updating of the lists of this export control regime for conventional weapons and dual-use goods and technologies, cyber-surveillance software was included for the first time, and since then it has remained a permanent fixture

15 Ian Anthony, p. 25.

16 The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use goods and technologies, *WA-LIST (13) 1 - List of Dual-Use Goods and Technologies and Munitions List*, 2013.

on subsequent revisions of the lists[17]. Taking its inspiration from this amendment to the Wassenaar Arrangement lists, the proposal that the European Commission adopted in 2016 to reform the EU Dual-Use Goods Regulation included cyber-surveillance technologies likely to commit serious human rights violations as controlled goods. If such a reform were to be approved - it was put on hold, and debate must be resumed by the new composition resulting from the EU elections in May 2019 - the hitherto unequivocal relationship between dual-use goods and means of combat would be broken, to encompass goods that have the potential to damage international peace and security in a way that differs from traditional WMD[18]. Indeed, by introducing a "human rights" perspective, the recast proposal attempted to strengthen the current regime of control of trade in dual-use goods, thus seeking to prevent violations caused in third countries through the software and strategic technologies of European companies[19]. Specifically, this broadening was aimed at including the aforementioned technologies that may be used by regimes with a questionable record of respect for fundamental rights, or that may pose a threat to international security and Europe's own digital infrastructure. This possibility – the eventual requirement of the human rights benchmark – was and will probably always be met with reluctance by industry and exporters, due to the potential disadvantage that these administrative obstacles may entail compared to other technology suppliers who would not be forced to implement such controls. The stricter the controls, the weaker

17 The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use goods and technologies, *WA-LIST (18) 1 - Public Documents: Volume II. List of Dual-Use Goods and Technologies and Munitions List*, 2018, p. 221.

18 European Commission, Proposal for a Regulation of the European Parliament and of the Council Setting up a Union Regime for the Control of Exports, Transfer, Brokering, Technical Assistance and Transit of Dual-Use Items (Recast) - SWD(2016) 315 Final (Brussels, 2016), 0295.

19 Mentions of human rights violations, particularly in the context of dual-use export control regimes, are not yet relevant or numerous. However, for more on the relationship between human rights and export controls, see: Mark Bromley, *Export Controls, Human Security and Cyber-Surveillance Technology: Examining the Proposed Changes to the EU Dual-Use Regulation* (Stockholm: SIPRI, 2017).

the competitiveness of the affected industry. Thus, it is difficult to imagine how a stricter export control regime would not be detrimental to the competitiveness of technology companies when faced with major exporting powers from other countries. In any case, that the notion may continue to undergo expansion reflects the fact that the initial definition was, in its origins, somewhat imprecise.

Before concluding this section on the different delimitation criteria used to define dual-use goods, it can be said that there could still be other dichotomies, such as, for example, one that is more ambitious than the aforementioned but which is less in line with concrete research schemes, consisting as it does in differentiating between *constructive* and *destructive* purposes. This distinction is essential and, although objections might be raised as regards exactly what it means to construct and destroy, its moral connotation is clear. Another dichotomy is that which distinguishes between *defensive* and *offensive* uses; or, that which differentiates between items that can be used in both *nuclear* and *non-nuclear* programmes, with the obvious limitations that the latter category entails.

7. FINAL CONSIDERATIONS

The notion of "dual-use goods" assembles a whole set of hard-law regulations, soft-law guidelines, actors and institutions which seem to have reached a shared understanding of what dual-use items are, despite the lack of a unique and universally accepted definition of them.

The analysis of prevailing international practice reveals the existence of three main criteria for the delimitation of the notion of dual-use goods: peaceful and non-peaceful ends (this terminology is used in legally binding rules), civil and military uses (this terminology is found in some export control regimes' guidelines and in specialised doctrine) and benevolent and malevolent purposes (used by certain export control regimes in order to be able to address the terrorist threat in transfer control systems). The study carried out

also shows that all the sources that attempt to define dual-use goods do so on the basis of the following premise: they are goods which, on the one hand, have certain indisputable and objective technical characteristics and, on the other hand, are susceptible of having two opposing uses. The fact that the same good could be used for one of two opposite purposes leaves it to the free will of the person who will use it to decide whether the item will be employed for a peaceful, civil or benevolent purpose or, on the contrary, for a non-peaceful, military or malevolent purpose. Nonetheless, and in spite of all that follows this two-fold premise, different legal sources resort to different criteria to describe those two potential uses. In this sense, it should be stressed again that in the current context of international security, where threats are often posed by non-state actors, the criterion that best encompasses the two potential uses that may be given to these items is the dichotomy that differentiates between benevolent and malevolent ends, although we are aware that their marked abstract - and even moral - component makes legal regulation particularly difficult.

It should also be recalled that, as part of the evolution undergone by the term "dual-use goods", two specific factors particularly stand out: the inclusion of the increasingly present intangible goods as dual-use items that must be subject to control - with all the difficulties that this implies - and the expansion of the traditional limits of the notion to cover certain materials not necessarily linked to nuclear, biological or chemical weapons. If the limits of the notion continue to be expanded, it will consequently imply new regulatory difficulties and new obstacles for actors interested in transferring, exporting and benefiting from the industrial side of dual-use goods. In such a case, the legislator will have to find a way to strike a new balance between the right to development and the obligation to control to ensure security.

Chapter
03

The definition-scope gap when considering human rights in EU dual-use items – Regulation 428/2009

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1. INTRODUCTION

This contribution seeks to analyse the content of the EU dual-use items Regulation 428/2009[1] with regard to human rights provisions intended to control dual-use goods and technologies that might be used to violate human rights.

To this end, the definition of "dual-use items", as laid out in article 2 of Regulation 428/2009, will be considered together with the scope of application, as defined in article 3 and including catch-all clauses provisions (articles 4 and 8) and Annex I.

Finally, a comparison will be drawn between the scope of application of Regulation 428/2009 and the RECAST as proposed by the European Commission.[2] Although there is very little chance that this piece of legislation will ever be adopted as tabled by the European Commission, it is still interesting from an analytical perspective to note the efforts that have been made in this document to bridge the gap between the definition of "dual-use items" and the real scope of application.

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1 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 of 29/05/2009, available from: https://eur-lex.europa.eu/resource.html?uri=cellar:1b8f930e-8648-11e6-b076-01aa75ed71a1.0013.02/DOC_1&format=PDF.

2 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast), Brussels, 28.9.2016 COM(2016) 616 final 2016/0295 (COD). Available from: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:134:0001:0269:en:PDF.

The aim of the analysis will be to answer the following questions: does the scope of application of the EU dual-use Regulation match with the definition, and what are the consequences of matching or not matching?

2. THE EMERGENCE OF NEW SECURITY THREATS AND THE DUAL-USE DEFINITION

Through the years, the scope of dual-use items to control has increased given the evolution of security threats. In fact, besides the classic security threats, such as the non-proliferation of weapons of mass destruction (WMD) in the hands of States and the threat of WMD in the hands of terrorists (this last international security threat was officially recognised in the UN Security Council Resolution 1540 of 28 April 2004 (UNSCR 1540)), new and more insidious threats have emerged on the international scene, mainly linked to the always evolving "information society". One of the main risks in this sort of society appears to be growing surveillance.

These new concerns were already recognised by the European Commission in the Green Paper issued on 30 June 2011, as established by Art. 25 of Regulation 428/2009 requiring the Commission to prepare a report on the implementation of the EU trade control system and possible areas of reform[3]. Among the challenges that the EU trade control system has to face, the Green Paper recognises new threats to security coupled with technological progress leading to the increased availability of sensitive items.

On 17 January 2013, a report on the 2011 Green Paper results was published which confirmed and expanded on the challenges

3 European Commission, "Green Paper: The Dual-use Export Control System of the European Union: Ensuring Security and Competitiveness in a Changing World," COM(2011) 393 final, Brussels, June 30, 2011.

raised by new technologies and technological development[4]. Among the new technologies, transformational technologies and cloud computing are cited, while the term "cyber-tools" appears for the first time in the Commission's documents on dual-use trade control. The connection between international political events, such as the Arab Spring, and the need to prevent human rights abuses through the export control of telecommunications surveillance and internet monitoring systems is, for the first time, brought to the attention of the Commission by some Member States, some MEPs, civil society organisations and researchers.

In this context, security threats linked to human rights violations seem more likely than classical ones, and the need to control dual-use items with HR considerations is therefore higher. Article 2 of Regulation 428/2009 defines dual-use items as:

> *(...) items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices (...).*

The definition of dual-use items used by this Regulation attempts to mix two different understandings of the term. The first considers items that could have military and non-military purposes (as for the Wassenaar Arrangement, the Australia Group and the Missile Technology Control Regime), and the second includes items that could have nuclear and non-nuclear purposes (as for the Nuclear Suppliers Group). As it appears, the definition does not consider the human rights dimension.

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4 European Commission, "Commission Staff Working Document, Strategic Export Controls: Ensuring Security and Competitiveness in a Changing World - A Report on the Public Consultation Launched under the Green Paper," COM(2011) 393, SWD(2013) 7 nal, Brussels, January 17, 2013.

3. THE SCOPE OF APPLICATION OF THE EU DUAL-USE REGULATION

Despite the "crystallised", although already comprehensive, definition of "dual-use items", the scope of application is wider than the definition laid down in article 2, as stated in article 3:

1. *An authorisation shall be required for the export of the dual-use items listed in Annex I.*
2. *Pursuant to Article 4 or Article 8, an authorisation may also be required for the export to all or certain destinations of certain dual-use items not listed in Annex I.*

Three main elements represent the scope of application as indicated in this article: items listed in Annex I, non-listed items covered by article 4 and non-listed items covered by article 8.

Annex I to Regulation 428/2009 is a compilation of the control lists of the international export control regimes: the Wassenaar Arrangement, the Missile Technology Control Regime (MTCR), the Nuclear Suppliers Group (NSG) and the Australia Group (AG). Each amendment to one of the international export control lists is integrated in Annex I by the European Commission, which, following Regulation 599/2014[5], can adopt delegated acts to modify and update the lists of items and countries covered by the Regulation. Previously, the annual update was done by the Council and the European Parliament under the normal legislative procedure (which takes around a year).

In this context and with regard to human rights considerations, on 30 December 2014, the Commission Delegated Regulation

5 European Union, 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 173/79 of 12/06/2014.

(EU) No 1382/2014[6] entered into force, updating Annex I to include modifications adopted by export control regimes in 2011, 2012 and 2013. Among the updates introduced, the Commission Delegated Regulation inserted the Wassenaar Arrangement's December 2013 updates, including some "Intrusion Software" and "IP Network Surveillance Systems". In Annex I of the EU Dual-Use Regulation, "Intrusion software" falls within Category 4, (Computers Systems, Equipment and Components), control entry 4A005, while "IP Network Surveillance Systems" fall within Category 5 (Telecommunications systems, equipment, components and accessories), control entry 5A001. Although these controls were not included in the Wassenaar Arrangement on the basis of human rights considerations, they paved the way for the control of items which might also be used to violate human rights.

The Regulation establishes the possibility of controlling non-listed items on the basis of articles 4 and 8. These provisions, called "catch-all clauses", allow the possibility of controlling unlisted items for reasons established in the relevant provision. As per article 4, items may be controlled if there is a risk of military end-use or a WMD-related risk, or if the country of destination is subject to an arms embargo. As stated in article 4:

1. *An authorisation shall be required for the export of dual-use items not listed in Annex I if the exporter has been informed by the competent authorities of the Member State in which he is established that the items in question are or may be intended, in their entirety or in part, for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons.*

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6 Commission Delegated Regulation (EU) No 1382/2014 of 22 October 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 371/1 of 30/12/2014, available on: https://eur-lex.europa.eu/eli/reg_del/2014/1382/oj/eng.

2. *An authorisation shall also be required for the export of dual-use items not listed in Annex I if the purchasing country or country of destination is subject to an arms embargo decided by a common position or joint action adopted by the Council or a decision of the Organisation for Security and Cooperation in Europe (OSCE) or an arms embargo imposed by a binding resolution of the Security Council of the United Nations and if the exporter has been informed by the authorities referred to in paragraph 1 that the items in question are or may be intended, in their entirety or in part, for a military end-use. For the purposes of this paragraph, "military end-use" shall mean:*
   a. *incorporation into military items listed in the military list of Member States;*
   b. *use of production, test or analytical equipment and components therefor, for the development, production or maintenance of military items listed in the abovementioned list;*
   c. *use of any unfinished products in a plant for the production of military items listed in the abovementioned list.*
3. *An authorisation shall also be required for the export of dual-use items not listed in Annex I if the exporter has been informed by the authorities referred to in paragraph 1 that the items in question are or may be intended, in their entirety or in part, for use as parts or components of military items listed in the national military list that have been exported from the territory of that Member State without authorisation or in violation of an authorisation prescribed by national legislation of that Member State.*
4. *If an exporter is aware that dual-use items which he proposes to export, not listed in Annex I, are intended, in their entirety or in part, for any of the uses referred to in paragraphs 1, 2 and 3, he must notify the authorities referred to in paragraph 1, which will decide whether or not it is expedient to make the export concerned subject to authorisation.*
5. *A Member State may adopt or maintain national legislation imposing an authorisation requirement on the export of dual-use items*

not listed in Annex I if the exporter has grounds for suspecting that those items are or may be intended, in their entirety or in part, for any of the uses referred to in paragraph 1.
(...).

During the evolution of Regulation 428/2009, article 4 broadened its scope of application, passing from Council Regulation (EC) No 3381/94 of 19 December 1994[7] to Council Regulation (EC) No 1334/2000 of 22 June 2000[8]. In fact, while the first EU dual-use Regulation only covered unlisted items for misuses related to WMD proliferation issues, Council Regulation (EC) No 1334/2000 broadened the scope by including a risk of military end-use and if the country of destination is subject to an arms embargo in the present Regulation 428/2009.

As stated in

Article 8 establishes the possibility of controlling non-listed items but for reasons linked to human rights violations. As stated in the article:

1. *A Member State may prohibit or impose an authorisation requirement on the export of dual-use items not listed in Annex I for reasons of public security or human rights considerations.*
2. *Member States shall notify the Commission of any measures adopted pursuant to paragraph 1 immediately after their adoption and indicate the precise reasons for the measures.*
(...).

As it appears from the articles above, the implementation of catch-all clauses is left to individual Member States, which may

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7 Council Regulation (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods, Official journal of the European Union (OJ L 367, 31.12.1994).

8 Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, Official Journal of the European Union, (OJ L 159, 30.06.2000).

adopt such measures on a case-by-case basis. Moreover, the quantity and variety of items which might be controlled through a catch-all provision are potentially high and might divert from one Member State to another.

The implications for the implementation of trade controls due to human rights concerns cannot be neglected, since the scope of the Regulation can be widely expanded through this provision.

It is interesting to note that although this provision, which gives Member States the possibility of controlling items for human rights concerns, already existed in the previous EU dual-use regulation (Council Regulation (EC) No 1334/2000 of 22 June 2000), it was only used for the first time in 2012 by Italy (published on September 19 (C 283/4, 19.9.2012)), when the Italian competent authority adopted a catch-all clause against Syria due to public security and human rights considerations.

From the brief analysis above, it emerges that although the definition of dual-use items does not take into account human rights considerations, the scope of application of the EU dual-use regulation goes far beyond the definition given in article 2. Indeed, both in terms of listed and non-listed items, the scope of controls has followed developments going on in the technology and international security fields.

Still, a sort of hysteria seems to surround the EU dual-use Regulation implemented in two different but parallel dimensions following different timeframes. One dimension concerns the definition of "dual-use items", which seems stuck in the past, at the very origin of international security threats; the other dimension is dominated by the scope of application of the regulation, which seems more fluid in its implementation as it tries to keep pace with developments in the international arena.

4. THE RECAST AS AN ATTEMPT TO FILL THE GAP

The RECAST, as tabled by the European Commission in September 2016, seemed to be an attempt to put an end to this "temporal inconsistency" and bridge the definition-scope gap.

The first element that acknowledges the link between security and human rights is a broader definition of "dual-use items". Indeed, the RECAST adds a paragraph to the classical definition in a way that includes the human rights dimension:

> **B.** *cyber-surveillance technology which can be used for the commission of serious violations of human rights or international humanitarian law, or can pose a threat to international security or the essential security interests of the Union and its Member States.*

The scope of catch-all clauses is also broadened by adding the possibility of controlling non-listed items for serious violations of human rights in situations of armed conflict or internal repression in the country of destination:

> *(...)*
>
> **D.** *for use by persons complicit in or responsible for directing or committing serious violations of human rights or international humanitarian law in situations of armed conflict or internal repression in the country of final destination, as identified by relevant public international institutions, or European or national competent authorities, and where there is evidence of the use of this or similar items for directing or implementing such serious violations by the proposed end-user;*
>
> **E.** *for use in connection with acts of terrorism.*

In line with the broadened scope, the amended article 14 adds the human rights dimension to the list of control criteria to assess when deciding whether or not to grant an authorisation:

> **1.** *In deciding whether or not to grant an individual or global export authorisation or to grant an authorisation for brokering services or technical assistance under this Regulation, the competent authorities of the Member States shall take into account:*
>
> *(...)*
>
> **B.** *respect for human rights in the country of final destination as well as respect by that country of international humanitarian law; (...).*

Finally, the RECAST introduces more controls on cyber-surveillance technologies in a newly added second part of Annex I (Annex I-B), which allows for autonomous EU controls, independent of international export control regimes lists updates.

The European Parliament contributed, by a series of amendments proposed to the Commission's initial proposal, to broadening and further clarifying the human rights dimensions in the legislative proposal. The draft of the European Parliament's legislative resolution, contained in the Draft report of the Committee of International Trade[9], introduced 57 amendments[10] to the Commission's proposal. Some example of efforts aimed at clarifying the scope are: the definition given by the EP to "intrusion software" to stress that it may cover both malicious and desirable defensive purposes; the limitation of the category of "data retention system" to systems

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9 Draft report on the proposal for a regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast) (COM(2016)0616 – C8-0393/2016 – 2016/0295(COD)), Committee on International Trade, Rapporteur: Klaus Buchner. Available on the European Parliament official website: https://www.europarl.europa.eu/doceo/document/A-8-2017-0390_EN.html.

10 *Amendment 13* starts the series of amendments made to articles of the Regulation. Previous amendments modify some recitals of the Regulation, in line with amendments made to articles.

connected with interception systems; and the exclusion of "digital forensics" from the scope of the Regulation since there is no clear definition of this term yet.

On the side of broadening the scope in relation to human rights, one of the parliamentary amendments proposed eliminating the limitations on respect of human rights only in cases of armed conflict or internal repression. In other words, violations of human rights or international humanitarian law would have become a reason to control non-listed items, even outside the framework of armed conflict or internal repression.

Following the draft report containing amendments proposed by the European Parliament's Committee on International Trade – INTA (rapporteur MEP Klaus Buchner) to the EU dual-use Regulation Recast[11], the EP's Committee on Foreign Affairs – AFET (rapporteur MEP Marietjie Schaake) delivered its own draft opinion[12].

The AFET draft opinion includes 26 amendments in total (8 to the recital and 18 to articles).

Most of the AFET amendments concern the link between human rights and cyber-surveillance technology. For example, the AFET report proposes:

– to specify which human rights are often violated by means of cyber-surveillance technology;
Text proposed by the Commission - Article 2 – paragraph 1 – point 1 – point b

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11 Draft report on the proposal for a regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast) (COM(2016)0616 – C8-0393/2016 – 2016/0295(COD)), Committee on International Trade, Rapporteur: Klaus Buchner. Available on the European Parliament official website: https://www.europarl.europa.eu/doceo/document/A-8-2017-0390_EN.html.

12 Draft opinion of the Committee on Foreign Affairs for the Committee on International Trade on the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace (Rapporteur: Marietjie Schaake), (COM(2016)0447 – C8-0264/2016 – 2016/0207(COD)).

B. cyber-surveillance technology which can be used for the commission of serious violations of human rights or international humanitarian law, or can pose a threat to international security or the essential security interests of the Union and its Member States;

Text proposed by the AFET

B. cyber-surveillance technology which can be used *to directly interfere with human rights, including the right to privacy, the right to data protection, freedom of speech and freedom of association*, or which can be used for the commission of serious violations of human rights law or international humanitarian law, or can pose a threat to international security or the essential security interests of the Union and its Member States;

– to clarify the definition of "cyber-surveillance technology" by adding the dimension of non-authorisation/awareness on the side of the owner or administrator of the system;

Text proposed by the Commission - Article 2 – paragraph 1 – point 21 – introductory part

21. "cyber-surveillance technology" shall mean items specially designed to enable the covert intrusion into information and telecommunication systems with a view to monitoring, extracting, collecting and analysing data and/or incapacitating or damaging the targeted system. This includes items related to the following technology and equipment:

Text proposed by the AFET

21. "cyber-surveillance technology" shall mean items specially designed to enable the covert intrusion into information and telecommunication systems with a view to monitoring, exfiltrating, collecting and analysing data and/or incapacitating or damaging the targeted system without the specific, informed and unambiguous authorisation of the owner or administrator of the systems. This includes items related to the following technology and equipment:

– to eliminate the adjective "serious" in reference to violations of human rights, explaining that human rights violations committed with dual-use items often will not qualify as serious human rights violations;

Text proposed by the Commission - Article 4 – paragraph 1 – point d

D. for use by persons complicit in or responsible for directing or committing serious violations of human rights or international humanitarian law in situations of armed conflict or internal repression in the country of final destination, as identified by relevant public international institutions, or European or national competent authorities, and where there is evidence of the use of this or similar items for directing or implementing such serious violations by the proposed end-user;

Text proposed by the AFET

D. for use by persons complicit in or responsible for directing or committing violations of international human rights law or international humanitarian law in countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe, the Union or national competent authorities, and where there is evidence of the use of this or similar items for directing or implementing such violations by the proposed end-user;

– to add the requirement of an end-user statement for authorisations for cyber-surveillance technology;

Text proposed by the Commission - Article 10 – paragraph 4 – subparagraph 2

Authorisations may be subject, if appropriate, to an end-use statement.

Text proposed by the AFET

Authorisations for cyber-surveillance technology shall be subject to an end-use statement. Authorisations for other items may be subject to an end-use statement if appropriate.

5. LATEST DEVELOPMENTS IN THE RECAST PROCESS AND WAYS FORWARD

After a very lengthy procedure which lasted for several months at the Council level, on 5 June 2019, EU ambassadors agreed on the Council's negotiating position on the Recast[13]. However, the Council's position differs significantly from the RECAST as proposed by the European Commission, and in particular as amended by the European Parliament. Indeed, only a few elements are added to the current EU dual-use Regulation, mainly to bring it into line with the new Union Customs Code (such as the introduction of re-export declaration and exit summary declaration) and clarify the definitions of some concepts (e.g. technical assistance and supplier of technical assistance, military end-use, ICP, arms embargo, non-Union dual-use items).

The only meaningful amendment proposed by the Council as regards human rights is the extension of the catch-all provision as set out in article 8 (for human rights or public security issues) to acts of terrorism.

13 Proposal for a REGULATION 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 (recast) - Mandate for negotiations with the European Parliament, Brussels, 5 June 2019 (OR. en) 9923/19. Available from: https://www.consilium.europa.eu/media/39555/mandate-for-negociations.pdf.

Article 8

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

Still, it is worth noting that although the scope of application of article 8 is broadened to include acts of terrorism, these are not defined in the Council's position and the definition of "terrorist acts" as set out in the RECAST proposal is erased in the Council's position.

It appears from the evolution of the ordinary legislative procedure, its different steps and related issued documents that there is no will among Member States to broaden the scope of the EU dual-use regulation with the "human security package" and, in doing so, to make the burden even heavier for implementers. Indeed, on the side of licensing authorities and industries, it would imply a considerably higher number of items to control but also a deeper analysis with regard to the end-user and the country of destination.

The fact remains that the definition no longer matches the scope of application which evolved following major changes in the security and information environments.

Although a pragmatic approach is bridging the existing gap by means of Annex updates and catch-all clauses, legal certainty will have to take over and clearly define what is already contained in the regulation. Of course, the possibility of "switching" perspective still remains, and the human issue package could be dealt with in another context than dual-use trade controls by passing it in the so-called EU anti-torture regulation.

It is clear that a political decision has to be taken on this issue, which cannot remain off the "trade controls table" given the outstanding topicality of the human rights issue in the context of a growing information society.

As a conclusion cannot be drawn given the "work in progress" discussion between the main EU institutions, it might be wise in this context to remember Benjamin Franklin's famous quote, "Those who desire to give up freedom in order to gain security will not have, nor do they deserve, either one."

Chapter
04

"Internal Compliance Programme" in the EU dual use export control system from 2009 to 2019

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1. INTRODUCTION

During the last decades, national and international regulations on export control of dual use technologies have become increasingly sophisticated. The scope of the regulations has gradually broadened, and more details have been added to their provisions. Examples of this include the inclusion of the controls on "catch-all items", brokering and transit, intangible technology transfers, and finally the introduction of Internal Compliance Programmes (ICP) for the dual use industry. The latter was required due to the complexity of the technologies under control and continuous technological development in the 1990s and later on, resulting in a need to involve the exporters themselves in the process of controlling the trade in sensitive goods.

As this article will present, since the 1990s the notion of an ICP has been included in the documents agreed upon at international political fora (like the Wassenaar Arrangement), in national laws and in EU law. In some national regulations, the notion of the ICP was introduced as early as the late 1980s (as in the case of Japan) and the beginning of the 1990s (Germany)[1]. In the first EU regulations

1 Tamotsu Aoi, "Historical Background of Export Control Development in Selected Countries and Regions", http://www.cistec.or.jp/english/service/report.html); "Key Elements of an Effective Export Control System", Institute for Science and International Security (ISIS), 2003, https://books.google.be/books?id=PbLddoNkxi4C&lpg=PA61&ots=-Nm8IM3JEN&dq=http%3A%2F%2Fwww.exportcontrols.org%2Fkey_elements.html&hl=fr&pg=PA61#v=onepage&q=http://www.exportcontrols.org/key_elements.html&f=false.

on export control established in 1994[2] and in 2000[3], there was no mention of an ICP or comparable procedures. However, the regulations allowed national authorities to establish additional control measures at their discretion if they deemed them necessary. The notion of ICP was finally introduced into the EU export control law in 2009. As a result, the ICP has become one of the basic notions in modern export control regulations even though, in contrast to other elements mentioned above, it did not become obligatory in most of the jurisdiction.

This article will examine the evolution of the EU's regulation on ICP during the 2009-2019 period. It will then conclude with one national example from an EU Member State – that of the Republic of Poland. The case of Poland has been chosen not because the author is a Pole, but rather due to the fact that this example is unique, as since 2000 the ICP has been obligatory for all Polish exporters of dual use goods (although in 2012 this burden was significantly reduced).

2. INTERNAL COMPLIANCE PROGRAMME (ICP) – A SHORT EXPLANATION

An ICP provides the first line of control built into a company's structure. By knowing the customer and the specifications and potential application of the item in question, its manufacturer is well positioned to give the first judgment on the probable civilian or military end-use.

ICP[4] is "an arrangement in which a company ensures that it is completing legal transactions, obeying the regulations enacted by the government, and fulfilling company export policies. Internal

2 Council Regulation (EC) No. 388/94 and Decision 94/943/CFSP.

3 Council Regulation 1334/2000.

4 "Key Elements of an Effective Export Control System", Institute for Science and International Security (ISIS), 2003, http://www.exportcontrols.org/key_elements.htm.

compliance systems typically include a set of procedures that company officials must satisfy before an item leaves the company. Such procedures include a thorough investigation of the buyer and end-user prior to the shipment of a purchased item off-site." An ICP should consist of "operational export compliance policies and procedures (…) and a written set of guidelines that captures those policies and procedures." It provides guidelines for employees on what should be done before an export takes place and helps document what has been done in this regard. An ICP helps to ensure that exports are in compliance with export control legislation and enables reporting to the government when required or requested. Such processes help build trust between companies and government agencies. This system should also help companies keep up to date with legislation and enable them to know what goods are subject to export controls. An ICP should also advise employees on how to check a planned transaction in light of any concerns relating to the customer and the end use of the good[5].

Detailed guidelines on ICPs for exporters have been provided by several national authorities, including the US and Germany[6].

3. ICP IN EU LAW IN 2009

Because the ICP has been considered useful for decreasing the risk of incompliance with export control regulations, it was introduced into the EU export control law in 2009, although the corresponding article was not very demanding. The EU Dual-Use

5 "Key Elements of an Effective Export Control System", Institute for Science and International Security (ISIS), 2003, http://www.exportcontrols.org/key_elements.htm.

6 German guidelines: https://www.bafa.de/SharedDocs/Downloads/EN/Foreign_Trade/afk_information_leaflet_internal_compliance_programms.pdf?__blob=publicationFile&v=2. US Guidelines: https://www.bis.doc.gov/index.php/documents/pdfs/1641-ecp/file.

Regulation 428/2009[7], which remains in force, does not explicitly require companies to put in place an Internal Compliance Programme, nor does it provide a definition of an ICP. However, it states that during the authorisation process it is possible to consider whether an exporter has "proportionate and adequate" means and procedures to ensure compliance. Art. 12.2 of the Regulation lists the implementation of an ICP as one of the criteria against which an application for a global licence (not an individual one) should be assessed by national authorities. The provision says: "*when assessing an application for a global export authorisation Member States shall take into consideration the application by the exporter of proportionate and adequate means and procedures to ensure compliance with the provisions and objectives of this Regulation and with the terms and conditions of the authorisation*".

Hence, there is no obligation for an exporter applying for a global licence to have an ICP. The EU law recommends that national authorities take the existence and outline of an ICP (here under the notion of "*means and procedures*") into consideration as an additional criterion in the assessment process, but it is definitely left up to the national authorities to decide whether they consider an ICP obligatory or not. The provision also underlines that the ICP implemented by the exporter needs to be "*proportionate and adequate*". This should be understood as meaning proportionate and adequate to the size of the company and the volume and characteristics of its trade in dual use goods.

It can be said that the ICP was "recommended" by the European legislator to be used in national export control systems. It was considered that its implementation by exporters would increase their standing with the authorities by virtue of having high compliance standards, resulting in the decreased risk of proliferation. Nevertheless, the ICP has not been made mandatory at the EU level.

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7 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, 29.5.2009).

The decision as to whether or not to use the ICP as an assessment criterion was left with the national authorities of the EU Member States. Among them, the situation varied. The approaches taken by the EU MS could be divided into 4 general clusters[8]: a) states requiring an ICP for individual licences[9]; b) states requiring an ICP for the use of the national or EU General Export Authorisations[10] or c) when applying for global authorisations[11]; d) states which do not require an ICP but would take its existence into account when assessing an application[12].

Moreover, when assessing the EU MS approach to the ICP, it should be noted that even though it is not obligatory as part of the EU law on export control, it has been successfully introduced into EU outreach programmes[13].

4. ICP ON THE INTERNATIONAL AGENDA 2009-2019

On the international level, the concept of the Internal Compliance Programme was also widely discussed at export control-related fora between 2009 and 2019. After many months of debates, in 2011 the Wassenaar Arrangement, which currently comprises 42 states, agreed on the Best Practices document on the ICP[14]. Even

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8 Prof. Dr. Quentin Michel, Lia Caponetti, Dr. Ilaria Anna Colussi, "The European Union Dual-Use Items Control Regime. Comment of the Legislation article-by-article" June 2017 (DUV5Rev7).

9 E.g. Bulgaria and Hungary.

10 Austria, Bulgaria, Croatia, Denmark, Hungary, Romania and Slovenia.

11 Croatia, Finland, Hungary and Germany.

12 Belgium, Ireland, The Netherlands, Sweden.

13 The Author personally delivered lectures on ICP during the subsequent editions of the EU P2P Export Control Programme for Dual Use Goods (2011-2016). For more information on the EU outreach programmes, please visit: https://ec.europa.eu/jrc/en/research-topic/chemical-biological-radiological-and-nuclear-hazards/eu-p2p-outreach-programmes-export-control/dual-use-goods.

14 https://www.wassenaar.org/app/uploads/2019/consolidated/2-Internal-Compliance-Programmes.pdf.

though it is not legally binding, it provides an important common reference for all the Arrangement's members (among them EU states, Australia, Japan, Russia, South Korea and the USA). The Best Practices also help to advertise the ICP among third countries, with the aim of encouraging governments to consider introducing this policy instrument. The ICP has also been an element of the US Export Control and Related Border Security Assistance (EXBS) outreach programmes and of US co-sponsored International Export Control Conferences[15]. As it is engaged in research on non-proliferation and in EU outreach programmes, the Stockholm International Peace Research Institute has undertaken several studies on national approaches to ICPs[16]. The Wiesbaden Process dedicated to dialogue on export control compliance between regulators and the industry naturally included the issue of ICPs in the agenda of its meetings[17].

Through briefings and presentations about national approaches to the ICP during different outreach activities, nations shared information and exchanged experience on their policies, procedures or in some cases regulations related to the issue. The inclusion of the industry made it possible to broaden the picture and take into account their point of view on the advantages and disadvantages of the ICP. All these endeavours contributed to raising awareness and understanding of the ICP.

However, it should be noted that the notion of the ICP was not included in the UN Security Council Resolution 1540 (2004) on preventing the proliferation of WMD and their means of delivery to non-state actors, in particular for terrorist purposes. The reason

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15 https://2009-2017.state.gov/strategictrade/program//index.htm. E.g. The EU- and US-sponsored 12th International Export Control Conference in Singapore in 2011 included ICP as a topic for one of the sessions co-led by the Author.

16 E.g.: a report from 2011 undertaken for SEESAC and UNDP entitled "Internal Compliance Programmes"; even though this report was produced in the framework of arms export control, it is useful in comparing ICPs implemented in Germany, Poland, Romania, Sweden and one private company. https://www.sipri.org/sites/default/files/2016-03/Internal-Compliance-Programmes.pdf.

17 E.g. during the 2015 edition of the Wiesbaden Conference, a panel dedicated to "Discussion of identified effective industry compliance practices" took place. Source: materials from the conference in the possession of the Author.

for this may be the fact that the Resolution sets out what nations should control (like intangible transfers or catch-all controls), but not how exactly they are to do it (e.g. by using an ICP). The notion of the ICP with regard to dual use export controls might still be too specific for several states that do not experience notable dual use transfers.

5. ICP IN THE COURSE OF THE RECAST OF THE EU REGULATION (2014-2019)

An important development regarding the ICP took place in the European Union in 2019, when on 30 July 2019 the European Commission published its Commission Recommendation (EU) 2019/1318 *on internal compliance programmes for dual-use trade controls under Council Regulation (EC) no 428/2009.* The "ICP Recommendation" is so far the only tangible outcome of the revision process of the EU export control law initiated in 2016[18]. This article will discuss the ICP Recommendation in more detail in the following paragraphs.

During the recast process, in the 2016 Proposal for a Regulation, the European Commission recommended a full revision of the EU export control law. In the resulting draft legislation, the Commission proposed that ICP implementation should be a prerequisite for using global authorisations and some general authorisations. It also proposed a definition of the ICP (art. 2.22[19]). According to its assessment, this step would ensure an EU-wide level playing field

18 The process began with the 2013 Commission report on the implementation of EU Regulation 428/2009. "Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast)"; http://trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154976.pdf.

19 "'internal compliance programme" shall mean effective, appropriate and proportionate means and procedures (risk based approach), including the development, implementation, and adherence to standardised operational compliance policies, procedures, standards of conduct, and safeguards, developed by exporters to ensure compliance with the provisions and with the terms and conditions of authorisations set out in this Regulation".

and increase the effectiveness of controls[20]. This judgment was shared by the European Parliament, which in its 2018 Proposal accepted the Commission's text. The EP also aimed to introduce the possibility for companies "on a voluntary basis, to have its ICP certified free of charge by the competent authorities on the basis of a reference ICP established by the Commission, in order to obtain incentives in the authorisation process from the national competent authorities"[21]. In November 2019, the review process was still ongoing, being in the phase of interinstitutional negotiations between the Parliament and Commission and the Council[22].

Important developments with regard to the ICP took place in the EU in 2009, though in the field of arms trade. At that time, the Directive 2009/43/EC *of the European Parliament and of the Council simplifying terms and conditions of transfers of defence-related products within the Community* was adopted with the aim of facilitating industrial cooperation in the defence industry in the EU. In general, it simplified export procedures among companies involved in long-term industrial cooperation in the field of the production of military equipment. While introducing the possibility of lessening requirements for licensing, it also established a standard for certifying the recipients of arms. For example, entities wishing to take advantage of the general authorisations published by national authorities (art.

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20 Regarding the potential financial and bureaucratic burden on exporters, the Commission argued: "the proposal does not provide for exemptions in favour of Small and Medium Enterprises (SMEs): due to overriding security reasons, it is imperative that SMEs comply with controls. However, the scope of certain provisions which may be particularly demanding in terms of human and IT resources has been limited to avoid excessive regulatory burden on SMEs. Thus, the requirement for companies to implement an effective Internal Compliance Programme (ICP) – a set of formal measures and procedures ensuring compliance with export controls – mainly applies in relation to global licences (and certain general export authorisations), while small companies that cannot afford to develop a formal ICP can export under most general authorisations and/or individual licences. Moreover, the proposal's simplification of licensing procedures and enhanced legal clarity will bring important benefits to SMEs".

21 Recital 14 and art. 2.22 of the proposed Regulation. http://www.europarl.europa.eu/doceo/document/TA-8-2018-0006_EN.html

22 The Council Presidency began negotiations with the European Parliament's delegation on 21 October 2019. https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2016)589832.

5) need to obtain a certificate that proves their reliability as regards their capacity to observe export limitations received under a transfer licence. The process of this certification includes checking if the company has established an internal compliance system (art. 9). The entity must appoint a senior executive as the dedicated officer personally responsible for transfers and exports who will ensure that the undertaking will take all necessary steps to observe and enforce all specific conditions related to the end-use and export. Finally, the Directive requires that a certified company provides a description of the internal compliance programme or transfer and export management system implemented in the undertaking. This description shall provide details of the organisational, human and technical resources allocated to the management of transfers and exports, the chain of responsibility within the undertaking, internal audit procedures, awareness-raising and staff training, physical and technical security arrangements, record-keeping and traceability of transfers and exports.

In 2011 the Commission published its Recommendation on the certification of defence undertakings under Article 9 of Directive 2009/43/EC[23]. Its Annex 1 contains a detailed table of "Questions and guidelines on the description of internal compliance programmes and for subsequent assessment". The questions guide the reader through a practical outline of an ICP (e.g. *Are compliance manuals being provided and kept up to date for export/transfer control staff?*). Additionally, examples of best practices are provided (e.g. *Compliance manuals for the use and guidance of export/transfer control staff should be available, at least in electronic version (for instance, on the undertaking's intranet)*). However, no detailed explanation of the ICP itself is provided. Rather, the questions in the Annex seem to be useful for the assessment process of the ICP itself during the certification by national authorities.

23 file:///C:/Users/kolakowskai/Downloads/l_01120110115en00620074.pdf.en.pdf.

6. EU GUIDANCE ON ICP FOR DUAL USE TRADE CONTROLS (2019)

A significant improvement came in 2019 with another EU ICP guideline, but this time prepared for the benefit of dual use exporters. Even though the recast of the EU dual use export Regulation was still ongoing, in 2018 the European Commission put forward a draft EU Guide on ICPs for consultation with the industry and MS[24]. After the consultation period, in July 2019 the recommendation was published as an official Commission document: Commission Recommendation (EU) 2019/1318 of 30 July 2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) no 428/2019[25].

The objective of the ICP guidance is to provide a non-binding document that describes the concept of the ICP and aids the industry in implementing such programmes. By being a potential reference guide on ICPs in the EU, it has a chance of setting a standard approach to the issue among the EU MS. Its other important aim is to advise the national authorities in EU MS on risk assessment in the licensing process.

The Commission's Recommendation identifies the core elements of an effective ICP under the EU Dual-Use Regulation. While describing these 7 elements, it draws on previous international documents and discussions in this regard (e.g. the Wassenaar Arrangement Best Practices, EU 2011 Recommendation on ICP for arms exporters). These elements are:

1. Top-level management commitment to compliance,
2. Organisational structure, responsibilities and resources,
3. Training and awareness-raising,
4. Transaction screening process and procedures,
5. Performance review, audits, reporting and corrective actions,

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24 https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157336.pdf.

25 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019H1318&from=EN.

6. Recordkeeping and documentation,
7. Physical and information security.

For each of the elements, the Recommendation provides a clear, comprehensive explanation of "*what is expected"* from the company[26] and how it may be achieved (*What are the steps involved?*[27]). This approach helps readers to see in practice and understand what EU Regulation 428/2009 "wants" from the industry when it vaguely states: the "*application by the exporter of proportionate and adequate means and procedures to ensure compliance with the provisions and objectives of this Regulation and with the terms and conditions of the authorisation".*

The comprehensiveness and user-friendly outline of the Recommendation makes it useful for practical implementation. Moreover, as it was produced by the Commission, the document has a chance of drawing the attention of the European industry.

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26 E.g.: "The company has an internal organisational structure that is set down in writing (for instance in an organisational chart) and that allows for conducting internal compliance controls. It identifies and appoints the person(s) with the overall responsibility to ensure the corporate compliance commitments. Please be aware that in some Member States this must be a member of the top-level management." Point 2. of the Guidelines.

27 E.g.: "Determine the number of dual-use trade control staff, taking into account legal and technical aspects which need to be covered. Entrust at least one person in the company with the company's dual-use trade compliance and ensure that an equally qualified substitute can assume the task in case of absence (such as sickness, holiday and so on). Depending on the average volume of orders, this person may only have to handle tasks relating to dual-use export control on a part-time basis. "Point 2. of the Guidelines.

7. EXAMPLE OF A NATIONAL APPROACH TO THE ICP – THE CASE OF POLAND

7.1. ICP as an obligatory measure between 2000 and 2012

When it comes to national approaches to Internal Compliance Programmes during recent decades, one of the most interesting examples has always been that of the Republic of Poland. In Polish export control law, the notion of the ICP was introduced in 2000[28], when the previous law from 1997[29] was amended[30]. Between 2000 and 2012, the implementation of an ICP by the exporter was a mandatory criterion for all transactions in dual-use or military items, and for all types of export licence, be it individual, global or general ones[31]. Moreover, the implementation of an ICP was subject to a mandatory ISO-9001 certification procedure undertaken in each company every 3 years. Additionally, the enterprise had to undergo an external audit every 6 months (resulting in 5 audits during the 3-year period between ICP certifications). If an

28 The Act of 29 November 2000 *on foreign trade in goods, technologies and services of strategic importance to the security of the State and to maintaining international peace and security* http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20001191250/O/D20001250.pdf. See also Irena Kołakowska, "Poland" in Quentin Michel (ed.), "Sensitive Trade: The Perspective of European States (Non-Prolifération et Sécurité / Non-Proliferation and Security)", 2011.

29 Act of 11 December 1997 on Administering of Foreign Trade in Goods and Services and on the Arms Trade http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19971571026. However, the first national legislation on dual use export control was introduced in 1993 with the Act on the Rules of Special Control of Foreign Trade in Goods and Technologies Related to International Agreements and Obligations, published in the Journal of Laws (Dziennik Ustaw) No 129 of 24 December 1993.

30 https://www.sipri.org/sites/default/files/2018-01/poland_2016.pdf.

31 Art. 10.2 and art. 11 of the Act of 29 November 2000 on foreign trade in goods, technologies and services of strategic importance to the security of the State and to maintaining international peace and security.

entity wanted to apply for a general licence, it needed to have had the ICP in place for the last three years. This approach resulted in a very low number of dual use licence applications[32].

The Polish Law was rather general regarding the description of ICPs. It provided that the exporter "shall establish and implement an internal system of control and management of trade in military goods" to be able to verify that the exported items are not intended for human rights violations, terrorist purposes or other unlawful purposes, and do not endanger peace or stability (Art. 10. 2). The Law also included a list of the elements of an ICP: "the internal control system shall define in particular the tasks of the bodies of the enterprise, basic tasks of jobs related to control and management of trade, the rules of employee recruitment, data archiving, internal control, completion of orders and training" [33]. Even though the national law provided a general outline of an ICP, it did not go into details that would help entities to understand this concept.

In comparison to other EU Member States, but probably also globally, as indicated by many export control experts, this demanding approach was extraordinary. Even though some other EU MS required an ICP for individual licences (Bulgaria, Hungary[34]), none required ICP certification along with an ISO standard and external audits conducted every 6 months. This was a substantial bureaucratic and financial burden on the exporters.

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32 Irena Kołakowska, "Poland" in Quentin Michel (ed.), "Sensitive Trade: The Perspective of European States (Non-Prolifération et Sécurité / Non-Proliferation and Security)", 2011.

33 Art. 11. Ibidem.

34 Prof. Dr. Quentin Michel, Lia Caponetti, Dr. Ilaria Anna Colussi, "The European Union Dual-Use Items Control Regime. Comment of the Legislation article-by-article" June 2017 (DUV5Rev7).

7.2. 2012 amendment: cancellation of the ICP for DU goods

A significant change of approach took place in 2012. At that time, as a part of the National Reform Programme Europa 2030, the Polish government was undertaking an initiative to simplify national legislation and reduce the administrative burden[35]. As a result, the requirement for an ICP for all types of licences for trade in dual use items was cancelled. Since then, only companies dealing with arms exports have needed to have an ICP, and even in their case, the number of obligatory audits of the ICP has been decreased from 5 to 3 during a 3-year period.

Nevertheless, according to exporters and representatives of the authorities, the current law in Poland with regard to the ICP is still overregulated, too costly and not effective. This is due to the requirements for an ISO certification and external audits, which are costly and time consuming. Accompanying the ongoing discussion on the recast of the EU Regulation, further changes to the Polish law are being considered, which would enable harmonisation with the EU law and the introduction of less restrictive ICP provisions for arms exporters[36]. This could result in the lack of certification of ICPs by external actors, with the latter being replaced by a simple obligation to register. On the other hand, if it is accepted on the EU level, the ICP may once again become an obligation for the dual use exports, but only for global licences. Moreover, the national authority is considering providing a national standard schematic of an ICP. The Commission Recommendation on the ICP may be helpful in this regard. As the EU dual use Regulation is still under review, the outcome of these deliberations is to be seen in the future.

35 https://ec.europa.eu/info/sites/info/files/file_import/nrp_poland_en_0.pdf.

36 Interview with a representative of the Polish export control authority, May 2019.

8. CONCLUSIONS – THE ICP HAS BECOME A STANDARD, BUT IS NOT AN OBLIGATORY REQUIREMENT

After looking at the developments around the concept of the Internal Compliance Programme since the 1990s, it can be argued that it became a widely recognised element of export control systems by states exporting dual use items (members of the Wassenaar Arrangement), especially those with high volumes of strategic trade (Germany, Japan, the US). National authorities responsible for controlling dual use exports consider it an important and useful instrument for decreasing proliferation risks and enabling trading companies to safely engage in exporting activities. This was proved by the adoption by the Wassenaar Arrangement Participating States of the Best Practices Guidelines on ICP, but also by the inclusion of the ICP in their global outreach activities. The Wassenaar Arrangement's Best Practices provide the notion of the ICP with a firm standing as an important element in export control systems. However, it did not become an obligation and is not universally applied by nations, not even the EU Members. The Wassenaar Arrangement's Best Practices are merely politically binding, and there is no document or supranational regulation making an ICP obligatory. It remains a national competence to decide on the applicability of the ICP to any particular national export control system.

In the European Union, the ICP has a rather strong position. One Member State introduced the notion of an ICP as early as the 1990s (Germany), while another made it obligatory for all dual use exporters without differentiating between the size of their exports (Poland in 2000). About half of them include the ICP in their licensing system. In a few states, having an ICP has been made an obligation for certain licences, whereas in others it is just a recommendation. In the EU export control law, a reference to the ICP was introduced in 2009. Since then, the European-level law explicitly recommends that national MS authorities include the ICP

in their national dual use export systems. However, it is still not obligatory, even for general or global license users. This reflects the balance between EU MS who have different approaches to the ICP. This settlement seems to be a fair solution. The EU general recommendation on the ICP enables national authorities, which are familiar with their local industry, to decide on the appropriateness and the scope of the ICP obligation. If the national authority deems it appropriate in their particular case to require an ICP, it would find sufficient ground for such a requirement in the EU Regulation 428/2009. This balance has continued over the last 10 years. It is also worth noting an important development in Poland that took place in 2012 when, after a period when ICPs were obligatory for all dual use exporters, the ICP was erased from the dual use trade. This case is an example of stepping back from overregulation.

In the case of the arms trade, the ICP was introduced in 2009 as a confidence-building measure in the framework of EU intra-community arms transfers. It became obligatory for companies wishing to take advantage of the simplified control measures (e.g. use general licences). Thanks to this development, all EU Member States became familiar with the notion of the ICP and its implementation, even though it concerned only the field of arms exports.

Another important development in dual use export control, though not a game changer, was the introduction of the non-binding Commission Recommendation on the ICP in 2019. It provides a detailed manual of Internal Compliance Systems, and should result in increasing awareness and familiarity with the ICP. It serves as one of the steps within the ongoing process of the recast of the EU Regulation 428/2009 aimed at introducing an obligatory ICP for companies using global licences. If completed, this would be the first time the ICP has been obligatory at the EU level. It would also further increase the demand for consulting services on ICPs across the EU. With both EU manuals referring to internal compliance systems (the 2011 recommendation for intracommunity arms trade

and the 2019 recommendation for dual use goods), the national authorities now have sufficient material to aid their national entities in the process of establishing ICPs.

The situation of the ICP in the EU export control system reflects the ongoing struggle in the process of establishing export control regulations to find the right balance between the need to assure industry compliance and the need to not overload the private sector. The 2009 EU Regulation on dual use controls enables national authorities, which are familiar with their local industry, to decide on the appropriateness and the scope of the ICP obligation. This provides flexibility and allows the level of control to be matched with the size of the industry and the scope of its production. This situation indicates a balance between a need to assure adequate controls and the proportionality of the burden.

The possible introduction of an EU-level obligation to have an ICP for global licences would increase the burden on the industry, but it would also assure effective controls in times of significant technological development. At the same time, the current European Parliament proposal on the dual use Regulation includes caveats on the ICP which require it to be proportional, thus preventing the risk of overregulation.

Chapter
05

Comprehensive approaches to trade controls: Pros and cons

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Although international practices in managing international commercial transfers seem to make use of similar principles and mechanisms, the question can be asked whether a "trade control" culture shall be the basis of the applicable norms at national level. The United Nations Security Council Resolution 1540 (2004)[2], for dual-use items, and the Arms Trade Treaty[3], for conventional arms, set principles that, despite their general terms, are essentially convergent: an obligation of control on certain goods and for certain transactions. Often, their implementations follow parallel paths, such as the creation of control lists, the insertion of catch-all clauses, the listing of criteria, inter-ministerial decision-making processes, etc. While they are undoubtedly similar, the question that shall be asked is whether these controls should be truly identical. Or, formulated in a different way, if a "comprehensive approach" to trade controls is meant to lead to "comprehensive controls".

An empirical review, based on the observation of national systems using dual-use trade management mechanisms for controlling other items than dual-use ones, followed by an exploration of the assets and drawbacks of "going comprehensive", will attempt to delineate the expectations one might have about this rising trade control culture.

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2 Resolution 1540 (2004) adopted by the Security Council of the United Nations at its 4956th meeting on 28 April 2004.

3 The Arms Trade Treaty.

1. EXAMPLES OF "COMPREHENSIVE APPROACHES" TO TRADE CONTROLS AND THEIR ROOTS

1.1. Different approaches for enlarging the scope of dual-use trade controls

An empirical review of the national systems for controlling the trade of dual-use items allows the identification of different tendencies in the approaches selected for extending the controls to other items. These are presented according to the growing level of integration they treat the other-than-dual-use items with.

A first family is characterised by a form of extension of the dual-use trade controls to other items not listed in the international-European single list, which is taken as the reference in the present article. Nonetheless, these items are "dual-use" ones, and are controlled independently from the use of "catch-all" provisions. For instance, Ukraine adds to the single list, which it uses as its national control list, nationally-controlled items it considers as corresponding to the definition of dual-use items and inserts these items into the list with a specific export control classification number (ECCN)[4]. This is the case for industrial explosives, detonators, and material and equipment for their production, numbered 1A906, 1B904 and 1C913 respectively. The United Arab Emirates have not published their control list, but they also use in practice the single list, to which they have added armoured vehicles and related equipment. It could be said that the countries of this family have only "extended" the single list to include more items and, in doing so, have extended their definitions of "dual-use" items.

A second family is composed of countries whose dual-use trade control systems are characterised by an overarching legislation covering other-than-dual-use items but making distinctions in the regimes applied. Switzerland, for instance, has passed an

4 Numbering these nationally-controlled items from 901 to 999 in the list.

ordinance[5] which applies to 4 different lists: "dual-use" in a similar meaning to the EU single list (Annex 2), "special military goods" as per the meaning of the Munitions List (Annex 3), "strategic goods" (Annex 4), and "goods subject to national export control" (Annex 5)[6]. However, in the text, the Ordinance assigns different regimes to the different types of items. The Law of Georgia[7] controls both dual-use items, using the single list as the reference, and military items, using the Munitions List. Within the Law, different provisions apply to the items depending on the list they belong to, notably regarding import, transit and brokering controls. The two types of items - military and dual-use - are even more integrated in the Belarussian system. The Law on export control[8] does not make the distinction between the two in principle - and even counts 6 lists as these ones are individually linked to international control regimes, like in Russia - but establishes some exceptions in relation to the specificities of the items, such as a differentiation of criteria applied in the licensing processes[9].

A third family is characterised by the highest level of integration, as its members merge dual-use trade controls with controls on other items. Although the first two families envision a comprehensive "approach" to trade controls, this family proposes truly comprehensive "controls" comprising, but not limited to, dual-use trade controls. Kazakhstan has designed a whole category 10 in the single list which it also uses for its controls. This category is meant to contain nationally-controlled dual-use goods, which thus belong to dual-use "concept-extending" countries, but it also controls the

5 Ordinance on the Export, Import and Transit of Dual Use Goods, Specific Military Goods and Strategic Goods (2016).

6 The contents of Annex 2 correspond exactly to those of the European Union's single list, Annex 3 is the Munitions List set up in the framework of the Wassenaar Arrangement, Annex 4 is currently empty, and Annex 5 contains weapons excluded from controls under the war material legislation, as well as explosives and propellants (May 2019).

7 Law of Georgia on the control of Military and Dual-Use Goods (2014).

8 Law on export control (2016).

9 *Idem*, Article 15.

transfer of military items with the same legislation[10]. Azerbaijan has made a slightly different choice, as it has inserted the Munitions List into the dual-use single list as its category 1011. Norway[12], Kosovo[13], Malaysia[14], Singapore[15], Australia[16] and New Zealand[17] apply their overarching legislation indistinctly to two lists, a dual-use one and a military, which generally[18] correspond to the single list and the Munitions List respectively. The provisions, and the regimes they set forth, do not make any distinction between the related items. In the Philippines' legislation[19], the controls apply indistinctly to military, dual-use and nationally-controlled items[20].

A glance at the systems currently in formation also offers interesting, and sometimes contradictory, information about the tendencies.

For instance, preliminary discussions between the national authorities have led the Government of Burkina Faso to consider selecting comprehensive controls on both military and dual-use items for the implementation of their international arms transfers

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10 Law of the Republic of Kazakhstan of 21 July 2007 n° 300-III "on export control", Article 3.

11 Resolution of the Cabinet of Ministers of the Azerbaijan Republic No. 230 about approval of some regulatory legal acts connected to using the Law of the Azerbaijan Republic «About export control".

12 Act of 18 December 1987 relating to Control of the Export of Strategic Goods, Services and Technology, Article 1 and Regulations relating to the export of defence-related products, dual-use items, technology and services (2013).

13 Law on the Trade of Strategic Goods 2013, Article 7.

14 Strategic Trade Act (2010) Section 9 and Strategic Trade Order (2017).

15 Defence Trade Controls Act 2012 and Defence and Strategic Goods List.

16 Customs and Excise Act 2018 and Strategic Goods List October 2017.

17 Australia and New Zealand have inserted the same additional entries into their munitions lists, consisting of 6 extra categories, such as ML909 for "detonators or other equipment, other than those specified by ML4 or 1A007, for the initiation of "energetic materials" specified by ML908".

18 The Munitions Lists of Australia and New Zealand both contain 6 additional categories, such as a category ML 909 for "detonators or other equipment, other than those specified by ML4 or 1A007".

19 Strategic Trade Management Act (2015), Section 10.

20 However, this list of nationally-controlled items, which is Annex 3 of the National Strategic Goods List, does not contain any item currently (May 2019).

obligations[21]. However, most of the examples found by the author emphasize the opposite trend. Thailand[22] and - with the support of their outreach partners[23] - Lao PDR, Morocco and Tunisia are building their control systems by separating the legislation on the international transfer of military and dual-use items.

The Balkan countries also offer a first-choice analysis sample, as the region has seen a wave of reforms of trade control legislations. Kosovo, as presented above, can be classified as a country practicing "comprehensive controls". North Macedonia, on the contrary, has long separated the legal frameworks for dual-use and military items[24]. Interestingly, Albania[25], Bosnia[26], Montenegro[27] and Serbia[28], which had previously adopted comprehensive approaches or controls, opted for the division of their frameworks in the late 2000s and early 2010s in order to separate the two areas of control. The case of the Balkans will eventually spark a debate on the objective and subjective merits of one or the other option - "going comprehensive" or "distinguishing" - but it is also particularly important for investigating the origins of such comprehensive approaches and their effects on the "dual-use" concept.

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21 Information shared by national sources but not supported by specific documentation (4 June 2019).

22 Thailand is currently finalizing the adoption of its dual-use trade control legal framework, the implementation of which is due for January 2020, and which will exist beside long-established and specific military items' international transfer control legislation (4 June 2019).

23 Notably the European Union Partner-to-Partner and the US Export Control and Border Security programmes.

24 Law on export control of dual-use goods and technologies 2005, replaced by the Law on export control of dual-use goods and technologies 2012. See Article 5.

25 Law on State import-export control of military goods and dual-use goods and technology (2007) replaced by the Law on State international transfer control of military goods and dual-use items and technology (2018).

26 Law on control of foreign trade of goods and services of strategic importance for the security of Bosnia and Herzegovina (2009) replaced by the Law on control of foreign trade in dual-use goods (2016).

27 Law on foreign trade in arms, military equipment and dual-use items (2005) replaced by the Law on control of export of dual-use items (2012).

28 Law on foreign trade in arms, military equipment and dual-use items (2005) replaced by the Law on export and import of dual-use items (2013).

1.2. Possible origins and effects of the delineation of "dual-use" items

The selection of comprehensive approaches for controlling trade beyond dual-use items does not appear to take its roots in regional cultures. Even within the European Union (EU), Member States like the United Kingdom have made the choice to apply essentially – though not exactly - the same control mechanisms to dual-use and military items in the national implementing legislation, in spite of the distinction at the Union level with the specific Regulation[29]. In South-East Asia and in the Balkans, both comprehensive and "distinctive" approaches co-exist.

Searching for the origins of "dual-use" items in the absence of a critical mass of national transactions in one or the other trade proves equally unsatisfactory. It could have been a pragmatic choice to avoid increasing the amount of legislative effort for countries with limited international trade capacities in either or both dual-use and military items. However, examples[30] such as Montenegro, on the one hand, and Australia, on the other hand, show that this is not the case.

As for the Balkans specifically, one reason could have been the ambition to join the European Union, a condition of which is to integrate the *acquis communautaire* into the national legal framework prior to entering. The EU has developed its legislation according to the division of competences agreed with the Member States: an EU Regulation setting the principles of dual-use trade control, alongside more exclusive national legislation concerning military items. One explanation, therefore, could be that the candidate countries had to follow this division. This is in fact not the case, as nothing prevents any State from legally applying the same general control regime

29 Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a community regime for the controls of export, transfer, brokering and transit of dual-use items.

30 See for an estimate of the international transfers of strategic items of the country: Cristina Versino, Peter Heine, Julie Carrera, Strategic Trade Atlas 2018. Available: https://ec.europa.eu/jrc/en/publication/strategic-trade-atlas-commodity-based-views.

to both categories of items. This is the approach adopted by the United Kingdom, for instance. As the EU is not competent in this area, the strictness of the controls on the transfer of military items remains the sole decision of the Member States, and by extension of the candidate States.

Although the EU enlargement may not be a decisive factor, geopolitical considerations should not be underestimated. Many of the countries with "comprehensive controls" cited above have been engaged in cooperation partnerships with one or both of the two main international donors in the construction of their trade control legal frameworks. While countries in the Balkans, the Caucasus and South-East Asia originally elaborated their legislation with the technical support of the American Export Control and Border Security (EXBS) Program, many countries have also more recently received offers of accompaniment from the EU "Partner-to-Partner" (P2P) programme. The EU has a distinctive approach and the United States a more comprehensive one – though not reaching the level of comprehensive controls – for themselves. This might have played a conscious or unconscious role in the design of their respective offers of support. But, here again, the full explanation cannot be found in a sort of imperialism-driven form of assistance as, in fact, the EU having no legal competence on arms transfers in principle, it statutorily limits the scope of its offer[31], and the EXBS program has supported the creation or transformation of either distinctive or "comprehensive controls" systems.

Hence, no deterministic factor can be precisely identified to explain the mosaic of systems which can be found at the international level. Notwithstanding, this diversity produces visible effects on the delineation of the "dual-use" concept. The limit between what is encompassed by the term "dual-use" and what is not is both technically and legally difficult to draw. On the one hand,

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31 The European Union developed a separate outreach programme on the implementation of the Arms Trade Treaty. See: Council Decision (CFSP) 2017/915 of 29 May 2017 on Union outreach activities in support of the implementation of the Arms Trade Treaty.

there exists no internationally shared definition that could serve as a reference, while Resolution 1540 (2004) itself does not use the term, which is used only by trade control regimes. In practice, the European definition is widely accepted but it cannot be considered a standard. On the other hand, the listing of dual-use items as a technique is imperfect, as the lists are factually dependent on international negotiations where trade and security are balanced differently from one participating State to another. The "delineation" is the product of both definition and the listing of what is covered under the concept "dual-use". As such, dual-use trade controls as they are commonly accepted, as controlling items which can be used for weapons of mass destruction, their means of delivery and military goods, even go beyond the scope defined by the "root" Resolution 1540 (2004), as this does not cover the latter category. The delineation also establishes the room for manoeuvre the States have in designing their controls, notably regarding the "catch-all" provisions which develop in the space left between the list and the definition.

The observations made by considering "comprehensive approaches" systems give three indications regarding the delineation of the "dual-use" concept. The first indication is that countries using the same definition of the concept may extend its delineation to more items. For instance, Ukraine, Australia and New Zealand have inserted additional items into the list compiling the international regimes' lists. In these specific cases, it is interesting to find that explosives and related items are common "add-ons". The second indication is that countries using the same lists may also extend its delineation to more items. For instance, even the European Union[32], which is currently in the process of amending its Regulation, envisages extending its definition to include items that can be used to jeopardise human security, while it does not

32 See: Proposal for a Regulation 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 (recast) - mandate for negotiations with the European Parliament, 5 June 2019, Annex I.

intend to integrate more items than those in the international lists, not even items used for torture or capital punishment, which it controls through a separate legislation. The third indication is that a non-negligible proportion of "comprehensive controls" countries merge both dual-use and military items' controls in "strategic trade" control systems, where "strategic" shall be understood in the meaning of the World Customs Organization's Strategic Trade Control Enforcement (STCE)[33].

On the basis of these observations, the choice of a comprehensive approach for controlling the trade of dual-use and other items considered to be strategic or sensitive may be explained by a -legitimate – ambition to simplify the controls, or at least their legislation, as a single text may designate different authorities and procedures for different items. However, the choice of "comprehensive controls" is a radical one and challenges the rationale of dual-use trade controls as an area obeying its own principles. What are the pros and cons, if any, of these "comprehensive controls"?

2. PROS AND CONS OF "COMPREHENSIVE CONTROLS"

It is proposed in this section to reflect on the options available to countries on the basis of the observations made above from "distinctive" on the one end, "comprehensive approaches" in the middle, to "comprehensive controls" on the other end. Though one may not expect from this review of pros and cons to identify a universal ideal or factual evidence of the exclusive merit of one or the other approach, it is intended to highlight existing trade control cultures and, potentially, to provide food for thought for the construction of new systems.

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33 World Customs Organization, "Strategic Trade Control Enforcement – Implementation Guide": "Strategic goods are weapons of mass destruction (WMD), conventional weapons and related items involved in the development, production or use of such weapons and their delivery systems".

First of all, from a legal perspective, the existence of similarities and differences between dual-use and military items' trade control regimes sets the foundations for a doctrinal debate. Within the European Union, the division of competences in principle between the European level – regulating the trade of dual-use items– and the national one – regulating the trade of military items – presumably prevents EU countries from adopting comprehensive controls. Should they be willing to do so, the Member States would have to subject arms trade controls to the principles set forth by the strongest legal source in the hierarchy of norms, *i.e.* the dual-use trade Regulation. It does not prevent them from implementing comprehensive approaches, however. Furthermore, it must also be acknowledged that the dual-use Regulation itself prescribes the establishment of bridges in requesting that the criteria set forth in the – though non-legislative - Council Common Position 2008/944/CFSP[34] be considered in the dual-use licensing process.

In terms of international legal provisions, one must take note of global similarities. An obligation of control based on risk-based assessment of the end-use or end-user is foreseen by both Resolution 1540 (2004) and the Arms Trade Treaty, for instance. In practice, a vast majority of countries have effectively translated these requirements into prior authorisation obligations. The scope of controls, in terms of transactions covered, is slightly different. For military items, the Arms Trade Treaty urges the States Parties to control the export, import, transit, transhipment and brokering of arms. For dual-use items, Resolution 1540 (2004) requests that all States control the export, transit, transshipment and services that should be understood as including brokering[35] and financial services. None of these texts, however, prevent the countries from covering more transactions, such as import, and the scope of controls may thus be similar for both areas.

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34 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

35 *Ibid*. United Nations Security Council Resolution 1540 (2004), Paragraph 3(c).

Finally, it must be noted that Resolution 1540 (2004) is less prescriptive than the Arms Trade Treaty regarding the controls themselves. It only contains the principle of these controls, whereas the Treaty establishes objective conditions and subjective criteria for the risk-based assessment leading to the authorisation or prohibition of the transaction. It is equally true that prohibitions in the trade of dual-use items may be found in specific treaties outside the Resolution – e.g. the Non-Proliferation Treaty, the Chemical Weapons Convention, the Biological and Toxins Weapons Convention – but these contain only objective conditions for prohibiting the transaction from taking place. Outside the range of prohibition cases, the consideration in the authorisation process of the factors and implications of a given – non-prohibited – transaction is not governed by these conventions. The Chemical Weapons Convention, for instance, merely states that "each State Party shall adopt the necessary measures to ensure that the transferred chemicals shall only be used for purposes not prohibited under this Convention"[36], thus leaving the actual definition of subjective criteria for the decision to the States. In leaving this effort of definition to the regimes or States themselves, the Resolution appears less prescriptive, hence more permissive, than the Arms Trade Treaty. More formally, the reflection may be extended to the nature of the regulating frames of these specific trades. A consensus, though not a universal one, has been reached for framing arms transfers in the form of a treaty. Would military and dual-use items-related controls be exactly the same, and should we expect a "dual-use items trade treaty" or a "strategic trade treaty" in the foreseeable future?

Furthermore, from a technical perspective, in the sense of the implementation of the controls, comprehensive approaches offer interesting perspectives of rationalisation. In terms of legal architecture, limiting the number of fundamental texts undoubtedly

36 Convention on the Prohibition of Chemical Weapons, Annex on Implementation and Verification, Part VII para. C (schedule 2 chemicals) and Part VII para. C (schedule 3 chemicals).

eases the understanding, and thereby acceptance, of the controls by the stakeholders. In terms of institutional setting, however, the question may legitimately be asked whether, in the event of comprehensive controls, giving decision-making competences for all items to one responsible authority only is the most adequate option a country might chose. The fact that ministries of defence are in charge of controlling the trade of dual-use items or that ministries of trade control the trade of military items can only be interpreted as signals sent by the States to express their policies *vis-à-vis* these items and the balance that is sought and promoted between trade interests and security imperatives. At a minimum, commercial entities are entitled to interpret them as such. Nevertheless, even for comprehensive controls, this first impression may be compensated by the effectiveness of inter-ministerial coordination or co-decision mechanisms in the licensing procedures.

In the course of the process of control itself, the efficiency of comprehensive controls may be questioned. At the stage of technical identification or classification of the items, they are not fundamentally different from the distinctive approach, for instance in the sense that the necessary technical expertise cannot be found in the hands of one organisation or person only, due to the variety of expertise required. At the stage of the assessment of the application, the purposes of the control of military items and the control of dual-use items are not fundamentally divergent: they are intended to evaluate the risk entailed by the end use or end user. It is the nature of the item which drives, or should drive, the review in different directions. The misuse of dual-use items must be considered in light of its potential, but the misuse of military "single-use" items must be considered in light of its likelihood. While a presumption of innocence presides - or at least is taken into consideration - in the assessment of the control of dual-use items, a presumption of guilt drives the assessment of the control of military items. At the enforcement stage, further differences are encountered. The Harmonised System coding, used by a majority of countries for their customs controls and targeting of shipments, facilitates the

identification of military items, while it remains difficult to assign specific codes to dual-use items because of the originality of the "dual-use" characteristics of the goods. As such, at this stage and with this information, the risk is asserted for military items, while only potential is considered for dual-use ones. Taking this into consideration, the STCE shall be seen as a methodological approach to the enforcement of the controls of military and dual-use items rather than a single mechanism of pre- or post-licensing control.

Finally, from a philosophical perspective, conceptual divergences between the controls of military items and dual-use items can be highlighted. In particular, the notion of risk is both an argument in favour of and an objection to comprehensive controls. Although the occurrence of critical proliferation – and use – of weapons of mass destruction[37] as a consequence of diverted trade is reduced but its impact in terms of casualties is extremely significant, the use of weapons transferred is almost certain but its impact is relatively less significant. In this regard, all approaches to trade controls, including "comprehensive controls", are equally legitimate and one should not envisage "de-controlling" the dual-use items.

Notwithstanding, the question of the liberalisation of the trade of dual-use items as a specific form of control is also legitimate. An international consensus appears to have been reached for evading the trade of both dual-use and military items according to the free trade principle: the transfers of items under surveillance are prohibited unless duly authorised. However, the "how" is debatable. The Arms Trade Treaty is prescriptive, whereas Resolution 1540 (2004) only sets the principle of the controls. In the Balkans, the countries that "separated" dual-use and military items-related provisions took this opportunity to liberalise controls on the trade of dual-use items by suppressing import licensing obligations or

37 It is worth considering, however, that most of the "dual-use" items listed by the international regimes, and notably found in the European single list of controls, are not weapons of mass destruction but military-related items.

maintaining the prior registration obligation for entities trading military items only, for instance. Hence, this philosophical choice bears very concrete implications for the industry.

The nature of the items and their end uses shall also be studied from a societal point of view and analysed. As it is crystal clear that military items contribute in no way to the economic or societal development of the end-use country, the idea of development is profoundly anchored in the "dual-use" concept. The items concerned, consisting of material, equipment or technology, are designed to be, or at least can be, used for a greater good for the end-use countries, such as the production of goods or access to the most advanced technologies for feeding innovation. Their potential, which is reinforced by the observation that proliferative intents undoubtedly represent an extremely minor share of exchanges of dual-use items, makes these items contributions to sustainable development, whereas military items tend to be their opposite. This is supported by the important role taken by civil society in debates about arms trade controls: in these cases, it expresses radical opposition in principle to transfers. By contrast, it is absent from debates – of which there are few, if any, examples - about prohibiting the trade of dual-use items.

Finally, a philosophical output of the study of comprehensive controls could lead to a redefinition the scope of these controls. How comprehensive should or could the controls be? How large can the "strategic trade" be in principle if the States are left to decide what is strategic for them and what is not, taking into due consideration international economic competition realities? Indeed, the STCE acceptance of the scope of strategic trade is only one accepted definition of the term, and it does not prevent the extension the concept in principle. Strategic trade should therefore be considered in light of the practices observed, as a snapshot of its time: for instance, in respect of the contents of "nationally-controlled" items. Overall and in theory, if items can be indifferently controlled because of their potential end use, are we likely to see the emergence of "sensitive items comprehensive" control systems, encompassing for example "torture goods", sensitive raw material, cultural goods and diamonds?

The "comprehensive controls" of strategic trade, understood here as controlling indifferently dual-use and military items, offer both advantages and disadvantages to the countries which have opted for this form of controls in comparison with distinctive controls and other comprehensive approaches. Neither from a legal, nor from a technical or a philosophical perspective, can a definitive argument be found in favour of one or the other approach. Elements only, not evidence, can be identified to allow (self-)reflection on the existing control systems or those yet to be elaborated.

3. CONCLUSIONS:

Many countries are merging controls of both dual-use and other items - military ones in the first place – in their legal framework, and their numbers may even increase in the future as new countries initiate the elaboration of their systems. This is translated into different forms of comprehensive approaches – as opposed to distinctive approaches - going from sharing the same fundamental text to applying the exact same authorization processes to make the controls truly "comprehensive". Beyond practical consequences, these comprehensive controls impact the delineation of the "dual-use" concept itself in questioning the relevance of its own identity.

Despite the apparent facilitation offered by comprehensive controls, legal, technical and philosophical reflections on the concept point at the existence of a specificity of dual-use items and the subsequent controls of their trade, which suggests that distinctive and other forms of comprehensive approaches to controls remain, at a minimum, legitimate.

Chapter
06

National Control Lists in Central Asian Countries

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1. INTRODUCTION

The Central Asian region[2] is attractive for the analysis of proliferation risks from several points of view, as it is a region whose countries have the rich nuclear heritage of the Soviet Union and an area with a "beneficial" geographic location. After the dissolution of the Soviet Union, Central Asian states were left with its military-industrial complex, including nuclear reactors, and its elements and items. These unexpected challenges required independent governments to come up with quick and clear-cut solutions for controlling items and technologies. At that time, states incorporated the basic

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2 For more details on former Soviet Union countries in the Central Asia region in terms of export control and non-proliferation after the dissolution of the Soviet Union, see:
- U.S. Congress, Office of Technology Assessment, "Proliferation and the Former Soviet Union", OTA-ISS-605 (Washington, DC: U.S. Government Printing Office, September 1994);
- Keith D. Wolfe, "A Work in Progress: The Development of Export Controls in Kazakhstan" in Bertsch, Gary K., and Suzette R. Grillot, eds. 1998. Arms on the Market: Reducing the Risk of Proliferation in the Former Soviet Union. Routledge, New York, London, pp. 115-136;
- Dastan Eleukenov and Keith D. Wolfe, "Export Controls in the Republic of Kazakstan" in the book "Dangerous weapons, desperate states: Russia, Belarus, Kazakhstan, and Ukraine", ed. Gary K. Bertsch and William C. Potter (New York: Routledge, 1999), pp. 88-99;
- Craft, Cassady B, Suzette R Grillot, and Liam Anderson. 2000. "The Dangerous Ground: Nonproliferation Export-Control Development in the Southern Tier of the Former Soviet Union'. Problems of Post-Communism, 47(6): 39–51.

principles of the export control system. These days, the significance of the system for Central Asian countries is still high because they are exporting and importing strategic commodities[3].

Furthermore, from a geographic standpoint, Central Asia is a sort of connecting link between potential proliferation regions (the Middle East, the Persian Gulf, South Asia, China)[4] and supplier countries in terms of both legal transfers and transfers of illegal goods. From both viewpoints, Central Asia is a region where there is a possible proliferation threat. In addition, some border conflicts can elevate the risks. That is why strategic trade control, its adoption and its effective implementation are vital in Central Asia. In turn, if countries intend to have sufficient strategic trade control, they should strengthen the national control list to meet the challenges of global technology changes and to comply with international requirements.

The initial purpose of this paper is to explore the national control lists of Central Asian countries (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan) as one of the core elements of strategic trade control. The focus is on the legislative framework of the implementation of control lists and the reference model of the national control lists. The national lists will be looked at more closely by taking a rapid glance at the development level of the export control system as a whole in these countries.

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3 For countries' exports and imports of strategic goods as represented in the Strategic Trade Atlas, see:
- Versino, C., P. Heine, J. Carrera. 2018a. Strategic Trade Atlas. Commodity-Based Views;
- Versino, C., P. Heine, J. Carrera. 2018b. Strategic Trade Atlas. Country-Based Views.

4 Craft, Grillot, and Anderson (2000), p.40.

2. STRATEGIC TRADE CONTROL: DETERMINANTS, EFFICIENCY, AND ELEMENTS

Strategic trade control[5] has different determinants, and each of them is crucial. The most important determinants are non-proliferation and security. This includes compliance with international obligations, the prohibition of the transit of dangerous materials, and others. In this context, the question of the importance of STC is axiomatic.

Nevertheless, it is not limited to two determinants. There are other significant determinants, such as the increase of controlled flows of technology transfer, the growing military significance of commercial technologies, the risks of political isolation and economic retaliation (hegemonic stability theory)[6], the prevention of

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5 What is the term "export control" or "strategic trade control"? This question is still open for discussion, and there is currently no consensus among experts. Usually, the two terms are used together and interchangeably, but for the more precise attitude towards the terminology in the expert community, see Dill, Catherine B., and Ian J. Stewart. 2015. "Defining Effective Strategic Trade Controls at the National Level'. *The Strategic Trade Review* 1(1): 4–17, available from http://www.str.ulg.ac.be/wp-content/uploads/2017/11/STR_01.pdf. (Accessed on 29/11/2019). The main difference is the scope of the "activities, items, and actors concerned" in the case of strategic goods. For instance, the Strategic Trade Control Enforcement Implementation Guide notes that "the term "Strategic Trade Control" is used rather than "Export Control" to recognise the importance of controlling strategic goods in various international transactions, including import, export, transit, trans-shipment, other", available from http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/enforcement-and-compliance/tools-and-instruments/stce-implementation-guide/stce-implementation-guide_en.pdf?db=web, p. 8. (Accessed on 29/11/2019). Thus, the analysis of the experience of different countries and international legislation has shown that there is no standard or universally recognised approach to the term "export control." This paper uses "strategic trade control" and its acronym, STC, rather than "export control". However, in references, the original term of the authors is used.

6 "...Hegemonic stability theory portrays international regimes as the result of an exceedingly powerful state finding it in its interest to coerce others into the coordinated provision of an international public good, such as export control", see Lipson, Michael. 1999. "The Reincarnation of COCOM: Explaining Post-Cold War Export Controls'. *Nonproliferation Review* 6(2): 33–51.

shortages of supply, economic success, and so forth[7]. Furthermore, STC should be able to respond to contemporary challenges, such as changing technologies and the intangible nature of certain goods. As such, the rationale of the STC system is essential on both the national (regional) and the global level for supplier-countries of strategic goods, and for transit and importing countries.

From the perspective of the efficacy of STC, there is still not a precise and conventional definition and set of measures whose implementation would enable states to achieve an effective STC system. The principal purpose of STC is to control the transfer of sensitive items and technologies that might be used to create a weapon of mass destruction (WMD). The effectiveness of the export control system is defined in a context where other countries are prevented from buying materials and components for WMD. However, it is difficult to measure how much this occurs. In this context, the effectiveness of the export control system can be meas-

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7 See:
- U.S. Congress, Office of Technology Assessment, Proliferation of Weapons of Mass Destruction: Assessing the Risks. 1993. OTA-ISC-559 (Washington, DC: U.S. Government Printing Office);
- Leigh-Phippard, Helen. 1995. "US Strategic Export Controls and Aid to Britain, 1949–58'. Diplomacy & Statecraft 6(3): 719–52. http://www.tandfonline.com/doi/abs/10.1080/09592299508405984. (Accessed on 29/11/2019);
- Gill, Bates, Kensuke Ebata, and Matthew Stephenson. 1996. "Japan's Export Control Initiatives: Meeting New Nonproliferation Challenges'. The Nonproliferation Review: 30–42;
- Cupitt, Richard T., and Suzette R. Grillot. 1997. "COCOM Is Dead, Long Live COCOM: Persistence and Change in Multilateral Security Institutions'. British Journal of Political Science 27(3): 361–89;
- Rajeswari, P. R. 1999. "Economics of Export Controls: A Study of US Export Control Mechanism'. Strategic Analysis 23(7): 1199–1213;
- Cupitt, Richard T., Suzette Grillot, and Yuzo Murayama. 2001. "The Determinants of Nonproliferation Export Controls: A Membership-Fee Explanation'. The Nonproliferation Review: 69–80;
- Jones, Scott A. 2004. Current and Future Challenges for Asian Nonproliferation Export Controls: A Regional Response. Strategic Studies Institute Home;
- Turpen, Elizabeth. 2009. "Achieving Nonproliferation Goals: Moving From Denial to Technology Governance'. Policy Analysis Brief (June): 1–8;
- Williams, Dominic, and Ian J Stewart. 2016. "The UK's Enforcement of Dual-Use Export'. Strategic Trade Review (March): 297–323;
- Seyoum, Belay. 2017. "Export Controls and International Business : A Study with Special Emphasis on Dual-Use Export Controls and Their Impact on Firms in the US'. 3624.

ured by the effectiveness of each element of the system. Moreover, any missing elements can be considered as a source of the issues and weakness of the global network[8].

Despite the compulsory requirements of international regimes and agreements on the adoption and implementation of STC, there are no widely agreed upon or standard elements for realising effective STCs[9]. The variety of approaches to the standard elements of export control/STC is proven by the literature review. It is beyond argument that despite different views on the elements that make up STC, there is evidence of the similarity of approaches and the importance of the elements for issues of global, regional, and national safety, stability and peace around the world, non-proliferation, and compliance with international agreements. Moreover, the control list is one of the core components of the system.

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8 See:
- Beck, Michael David, Richard T. Cupitt, Seema Galhaut, and Scott A. Jones. 2003. To Supply Or to Deny: Comparing Nonproliferation Export Controls in Five Key Countries. Center for International Trade & Security, The University of Georgia;
- Dill and Stewart (2015).

9 Dill and Stewart (2015).

3. STRATEGIC TRADE CONTROLS IN CENTRAL ASIAN COUNTRIES

An overall picture of the Central Asian countries' STCs and their development can be drawn base on the results of papers that have applied the well-known and frequently used method of assessment of export control systems (the so-called Index method[10]) and the outcomes of the published Peddling Peril Index (PPI)[11] report.

Several papers have used the Index method to analyse Central Asian countries[12], together with other world countries. The last publicly accessible evaluation of export control in Central Asian countries was conducted 18 years ago. This means that the current situation may be different, and only new, updated assessments under

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10 The idea and explanation of the method of evaluation of the export control system and its application were first developed by Cassady Craft and Suzette Grillot with Liam Anderson, Mike Beck, Chris Behan, Scott Jones and Keith Wolfe, "Tools and Methods for Measuring and Comparing Non-proliferation Export Controls," A CITS Occasional Paper (Athens, GA: University of Georgia, October 1996) and Grillot, Suzette, and Cassady Craft. 1996. "How and Why We Evaluate Systems of Export Control'. *The Monitor: Nonproliferation, Demilitarization and Arms Control* 2(4): 11–15. The method has also been described in the Russian language in the Yaderny Kontrol journal [Nuclear Control] 4, 24 (Winter, 1996). Later on, Craft and Grillot analysed the effect of transparency on export control effectiveness based on the same methodology for the assessment of export controls, but with a focus on transparency (information gathering/sharing) and violations in the United Kingdom, France, Germany and the United States. For this, see Craft, Cassady B., and Suzette R. Grillot. 1999. "Transparency and the Effectiveness of Multilateral Nonproliferation Export Control Regimes: Can Wassenaar Work?" *Southeastern Political Review* 27(2): 281–302. The assessment of export control systems has subsequently been undertaken by Bertsch and Grillot (1998). This methodology has further been considered as "a research protocol" for the more recent studies by Cupitt, Grillot, and Murayama (2001), Beck et al. (2003), and Kassenova, Togzhan. 2010. "Strategic Trade Controls in Taiwan'. *Nonproliferation Review* 17(2): 379–401, others.

11 The first report was published in 2017 by the Institute for Science and International Security Press, with a second, updated edition in 2019. See Albright, David, Sarah Burkhard, and Andrea Stricker. 2019. The Peddling Peril Index (PPI): Ranking National Strategic Trade Control Systems. The PPI aims to measure the efficacy of STCs in states applying a set of criteria by examining legal acts, the institutional framework and their implementation in practice. It permits the identification of national STCs' strengths and weaknesses.

12 See:
- Bertsch and Grillot (1998);
- Cupitt, Grillot, and Murayama (2001);
- Beck et al. (2003).

the method can provide information for further interpretation. Coincidentally, this does not mean that there is no recent analysis of STCs, including an assessment of the control list[13]. The subtask of this section is to look back, understand the starting positions and find out the current status of the systems.

The completed studies of the first ten years since the countries' independence show that five countries of Central Asia adopted at least some elements of the export control system. The analysis by the Index method includes ten elements of the system: licensing system; regime adherence; training; customs authority; penalties; control lists; catch-all clause; bureaucratic process; import/export verification; and information gathering/sharing. Additionally, the evaluation also considers subparts:[14] policy and/or legal foundation, institutions, procedures, and implementation[15]. The overall weighted scores of the countries are presented in Table 1.

13 There are more recent evaluations of Central Asian countries in the form of assessments carried out by a donor country regarding a recipient country (between countries helping to improve export control systems and countries accepting their support in the adoption and evolution of the systems), but these are not in the public domain.

14 (1) policies and/or legal framework – the existence of laws and decrees on export control that ensure the legislative framework for controlling strategic goods; (2) institutions and procedures – does a country have responsible institutions and procedures for the development and implementation of its STC legislation? (3) implementation – are export control policies and procedures actually in use?

15 Bertsch and Grillot (1998).

Table 1: OVERALL WEIGHTED SCORES OF EXPORT CONTROL SYSTEMS IN CENTRAL ASIAN COUNTRIES, 1992-2001

Country/Year	1992, score	1994, score	1996, score		1997, % compliance[1]		2000, % compliance		2001, score
1	2	3	4	5**	6	7**	8	9**	10
Kazakhstan	12.35 29.5/100*	16.13 38.6/100*	28.29 67.6/100*		64% (26.76)	(1) 76% (2) 59% (3) 31%	68% (28.43)	(1) 87% (2) 57% (3) 40%	59.26 (24.78)
Kyrgyzstan	-	-	15.30	(1) 31% (2) 15% (3) 15%	36% (15.05)	(1) 29% (2) 21% (3) 4%	30% (12.55)	(1) 24% (2) 15% (3) 4%	30.42 (12.72)
Tajikistan	-	-	4.36		10% (4.18)	(1) 21% (2) 4% (3) 4%	8% (3.34)	(1) 4% (2) 4% (3) 4%	7.89 (3.30)
Turkmenistan	-	-	4.36		10% (4.18)	(1) 21% (2) 4% (3) 4%	11% (4.60)	(1) 7% (2) 4% (3) 4%	10.57 (4.42)
Uzbekistan	-	-	7.14		17% (7.11)	(1) 25% (2) 15% (3) 4%	33% (13.80)	(1) 26% (2) 17% (3) 11%	33.28 (13.92)
Perfect weighted score	Max=41.82				Max=41.82		Max=100		Max=100
Questionnaire	72 items[2]				72 items[3]		93 items[4]		93 items[5]

* The scores reported for Kazakhstan (Lipson, Michael. 2004. "Nonproliferation Export Control and World Order: Globalization, Security, and the State'.)/the ideal score of 100.
** (1) is Policy; (2) is Institutions; (3) is Implementation.
1 The five figures in the column show the percentage compliance. The perfect weighted score is 41.82, which represents 100 per cent compliance with Western common standards. See Bertsch and Grillot (1998), p. 13, p. 29.
2 Grillot and Craft (1996).
3 Bertsch and Grillot (1998). The same results based on Grillot and Craft (1996) have been presented by Bertsch and Potter (1999).
4 Craft, Grillot, and Anderson (2000).
5 Cupitt, Grillot, and Murayama (2001).

To obtain a general picture of export controls in the countries from Table 1, the scores in columns (6), (8) and (10) have been brought into compliance with a maximum score of 41.82 (in parentheses). It is crucial to emphasise that the rounding of the score is very rough, especially in data from 1992-1997 and 2000-2001, because authors applied 72-item and 93-item questionnaires to assess the export control. As such, the comparison is not precise.

In line with the data, the most developed export control system was in Kazakhstan and had strengthened in the period 1992-2001, before remaining more or less stable over the last five years. The highest score can be explained by the aid that Kazakhstan has received to develop its export control system[16]. Uzbekistan improved its scores twofold, Turkmenistan maintained its standardised scores across the period, and Kyrgyzstan's scores decreased slightly. The lowest score was noted in Tajikistan.

The subparts' scores in columns (5), (7) and (9) explicitly demonstrate the gap between export control policy and its implementation. The difference shows that policy adoption alone is not enough for the system to be effective; it is the most natural part of the process. It is more valuable to build up the institutional framework of institutions and procedures and to implement appropriately. All Central Asian countries demonstrate a considerable difference between the enactment of the law on export control and its implementation.

The elements of the export control system have been evaluated by state in two papers[17]. Table 2 represents the scores given to the element "Control list" in Central Asian countries. In order to more correctly interpret the development status of national control lists at that time, scores are given for other elements, such as "Licensing",

16 Kazakhstan received aid from the United States for the adoption of the export control system and expertise, for instance in the framework of the Nunn-Lugar Cooperative Threat Reduction Program.

17 Bertsch and Grillot (1998) and Craft, Grillot, and Anderson (2000).

"Catch-all", "Customs", "Verification" and "Penalties"[18]. The scores in 1997 and 2000 are slightly different, the most significant difference being the "Penalties" score given to Uzbekistan[19]. As such, the elements of the export controls in Central Asia differed between countries: Kazakhstan and Kyrgyzstan had the foundation of the system, as they had developed "Licensing systems" and a "Control list". Meanwhile, Tajikistan, Turkmenistan and Uzbekistan lacked a "Control list". The development of the "Licensing system" can be explained by the intention of the countries to control not only strategic goods, but also the foreign trade of goods (short-supply and smuggling goods). Enforcement procedures were supported mostly by the activity of the customs authorities. The percentages of the element "Customs" were equal to or higher than 50% in all countries. The "Catch-all" element was not developed at all; the "Verification" element aimed to verify the issued licences and was most developed in Kazakhstan, while the other four countries showed zero development.,

Consequently, the evaluation of these elements indicated the lack of most of the necessary elements for the export control system ("Control list", "Catch-all", "Verification"). Other more or less developed elements indicated countries' interest in controlling foreign trade in general without focusing strongly on dual-use and related items[20]. In general terms, it depicts the starting point and the development level of export controls and control lists almost ten years after obtaining independence.

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18 The key pillars of the export control system, in general terms, are the Licensing system, Control lists, Enforcement and Compliance mechanisms and Industry Outreach. The study of control lists does not consider Industry Outreach.

19 As mentioned above, the main reason for this is the different number of items in questionnaires and the tools used in the weighting.

20 Bertsch and Grillot (1998). Other alternative explanations of export control development in Central Asian countries based on four theoretical approaches are set out on pp. 219-225. See also Craft, Grillot, and Anderson (2000), pp. 47-48.

Table 2: SCORES OF SOME ELEMENTS IN THE FRAMEWORK OF ASSESSMENT OF EXPORT CONTROLS IN CENTRAL ASIAN COUNTRIES, PERCENTAGE OF PERFECT WEIGHTED SCORE, 1997 AND 2000

Country/ Element	Licensing		List Regimes		Catch-all		Customs		Verification		Penalties	
	1997*	2000**	1997	2000	1997	2000	1997	2000	1997	2000	1997	2000
Kazakhstan	100	-	83	-	0	-	66	-	33	-	58	-
Kyrgyzstan	66	50	66	66	0	0	58	67	0	0	25	0
Tajikistan	17	0	0	0	0	0	50	50	0	0	25	0
Turkmenistan	17	0	0	0	0	0	50	67	0	0	25	0
Uzbekistan	33	83	0	17	0	0	67	92	0	0	25	0

*The perfect weighted score is 41.82 (Bertsch and Grillot (1998).
**The perfect weighted score is 100 (Craft, Grillot, and Anderson (2000)). The paper did not consider Kazakhstan in the analysis.

Furthermore, the situation of the Central Asian control systems in 2019 (PPI ranks and scores) has changed compared with the positions in 1992-2001[21]. Two countries, Kazakhstan and Kyrgyzstan[22], have the highest ratings and have places in the "Green group". This means that both countries have comprehensive legislation covering the control of conventional weapons and nuclear single- and dual-use items[23], and have catch-all clauses and transit and transhipment controls. The "Green group" countries have chosen the EU dual-use control list and the list of the Wassenaar Arrangement as the reference model for their national control lists. Tajikistan and Uzbekistan are in the "Light Green group", which means that they have at least adopted List 1 of NPG and control of convention weapons. Tajikistan has improved its system in terms of its position relative to Turkmenistan: in 1997 the two countries had almost the same score; in 2000-2001 there was a slight difference; and in 2019 their scores differ markedly. Tajikistan has been on the rise since 2001: at that time, it had the lowest rating among the five countries, while in the 2019 rankings it has overtaken Turkmenistan and Uzbekistan. Turkmenistan[24] had low scores in the past and still has the lowest position in the group of Central Asian countries in 2019, demonstrating the severe shortfalls in its control of dual-use and single-use items.

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21 The comparison of the ranks/scores of STCs and their elements/overarching criteria in 1997-2001 and 2019 is not accurate because the approach and the methodology are different, but some development milestones in can be observed.

22 It is important to emphasise that Kyrgyzstan overtook Kazakhstan in two overarching criteria, namely "Legislation" and "Ability to Prevent Proliferation Financing", in 2019.

23 At least the NSG Parts 1 and 2 lists or similar lists. The NSG Parts 1 and 2 lists are available on https://www.nuclearsuppliersgroup.org/en/news/185-nsg-control-lists-updated. (Accessed on 29/11/2019).

24 Turkmenistan is in the "Orange group", which means that its legislation is insufficient and only controls of conventional weapons under ATT.

4. NATIONAL CONTROL LISTS OF CENTRAL ASIAN COUNTRIES

This section seeks to describe and examine the national control lists of Central Asian countries under the lens of a reference model for the establishment and implementation of national control lists and their legislative framework.

In Kazakhstan, the very first control list was established in Annexes 1 and 2 of the Regulation[25]. This list applied the terms and definitions of the International Atomic Energy Agency (IAEA). Subsequently, the Decree of the Government (March 12, 1996, N 298)[26] created the control lists for the country[27]. At that time, the national control list did not coincide with international lists[28], and included several lists:

- the list of goods exported by permission of the Government of the Republic of Kazakhstan (Appendix 2);
- the list of goods imported with the authorisation of the Government of the Republic of Kazakhstan (Appendix 3);
- the list of products exported under licences (Appendix 4);
- the list of products whose import is carried out under licences (Appendix 5);
- the list of goods exported in accordance with the international obligations of the Republic of Kazakhstan (Appendix 6).

Furthermore, the catch-all clause did not exist in the legislation.

The situation then changed in 2000, when the new list of products subject to export control was introduced by the Decree of

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25 Regulation on the export and import of nuclear materials, technologies, equipment, installations, unique non-nuclear materials, equipment, materials and dual-use technologies, sources of radioactive radiation and isotope products, approved by Cabinet of Ministers of the Republic of Kazakhstan, March 9, 1993, N 183.

26 The Decree of the Government of the Republic of Kazakhstan "About the procedure for export and import of goods (works, services) in the Republic of Kazakhstan", March 12, 1996, N 298 (has expired by the decree of the Government of the Republic of Kazakhstan in June 30, 1997, N 1037).

27 Bertsch and Potter (1999).

28 Bertsch and Grillot (1998), p. 118.

the Government (August 18, 2000, N 1282)[29]. This list was based on the EU dual-use control list[30] and the Common Military list[31], but it was not well structured. The amendments to the legislation on export control[32] added the catch-all clause and import/reimport operations. In 2007, the new Law on Export control was established (June 21, 2007, N 300)[33], and then in 2008 the updated control list was published (February 5, 2008, N 104)[34]. This control list is structured well, and this structure is still in force. The national control list consists of 0-9 categories like in the EU list, plus a tenth category for items which were not covered by previous categories, and the list of the military goods (ML1-ML 22). Each category contains five technical groups of dual-use items[35].

The updating process of the national control list is not automatically related to the updates of the EU list, but instead is maintained permanently. Since 2008, the control list has been updated eight times. The latest amendments were on May 14, 2018. In terms of ease of public access, the national control list is available from any legislative database with detailed information on all amendments. The information is available in the official languages of Kazakhstan.

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29 The Decree of the Government of the Republic of Kazakhstan "On approval of the list of products subject to export control in the Republic of Kazakhstan", August 18, 2000, N 1282.

30 The EU dual-list is based on four multilateral regimes: the Australia Group, the Wassenaar Arrangement, the Nuclear Suppliers Group and the Missile Technology Control Regime. See the website of the European Commission, available from https://ec.europa.eu/trade/import-and-export-rules/export-from-eu/dual-use-controls/. (Accessed on 12/11/2019).

31 The common Military List of the European Union, adopted by the Council on 18 February 2019, available from https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1552381476643&uri=OJ:JOC_2019_095_R_0001. (Accessed on 12/11/2019).

32 The Law the Republic of Kazakhstan on Export control, November 24, 2000, N 105.

33 The Law the Republic of Kazakhstan on Export control, June 21, 2007, N 300.

34 The Decree of the Government of the Republic of Kazakhstan "On approval of the nomenclature (list) of products subject to export control", February 5, 2008, N 104.

35 A – equipment, components and components; B – production and testing equipment; C – materials; D – software; E – technology. The technical group refers to multilateral and unilateral export control regimes: 000-099 – WA; 100-199 – MTCR; 200-299 – NSG; 300-399 – AG; 400-499 – CWC; 500-899 – reserve; 900-999 – One-way product listings controlled within the framework of national security.

In Kyrgyzstan, the legal basis for non-proliferation export control and the national control list is provided by two Decrees of the Government (March 19, 1993, N 121 and February 6, 1996, N 56)[36]. The Decree of 1993 included the list of raw materials, materials, equipment, technologies and services that are used to create WMD and missile delivery vehicles (as well as those with a dual purpose). The list was concise and did not have any classifications, apart from the classification of bacteria and toxins. The next Decree in 1996 had amendments and contained the Regulation on the procedure for the export and import of goods (works and services) (Appendix 1). It also comprised four different lists:

- the list of goods exported by permission of the Government of the Kyrgyz Republic (Appendix 2);
- the list of strategically important goods, whose export contracts are registered (for accounting) (Appendix 3);
- the lists of goods (works and services) whose import is carried out by permission of the Government of the Kyrgyz Republic (Appendix 4);
- the lists of goods exported under international obligations (Appendix 5).

The lists were structured to show the name of the good and its Foreign Economic Activity Commodity Nomenclature, FEACN. Despite these efforts, the composition of the control list failed[37]. In 2003, the country embarked on a new stage of the improvement

36 The Decree of the Government of the Republic of Kyrgyzstan "On issues of export control of raw materials, equipment, technology and services, custom to create weapons of mass destruction and missile delivery vehicles" (March 19, 1993, N 121) and the Decree of the Government of the Republic of Kyrgyzstan "About the procedure for export and import of goods (works and services) in the territory of the Kyrgyz Republic" (February 6, 1996, N 56).

37 Craft, Grillot, and Anderson (2000).

of its export control system and four[38] legal acts were established, including a national control list. Furthermore, the catch-all mechanism was included in the extended explanation.

The national control list is similar to the EU dual-use control list in terms of content, but has a different approach to applying codes and structure. Its structure includes information about custom codes (FEACN of the Eurasian Economic Union[39]), notes and terms with explanations in every list. The list has six detailed lists:

- the list of pathogens of human, animal and plant diseases, pathogens, genetically modified microorganisms, toxins, equipment and technologies;
- the list of chemicals, equipment and technologies that can be used to create chemical weapons;
- the list of nuclear materials, equipment, unique non-nuclear materials and related technologies;
- the list of dual-use equipment and associated materials and technologies used for nuclear purposes;
- the list of equipment, materials and technologies that can be used to create missile weapons;
- the list of dual-use goods and technologies subject to export control that can be used to develop weapons and military equipment.

The latest amendment of the national control list took place in September 2017. The list is not updated automatically; it is usually updated according to changes in the control lists of international export control regimes. The legislation on export control must

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38 (1) the Law of the Kyrgyz Republic "On Export Control", January 23, 2003, N 30; (2) the Decree of the Government of the Kyrgyz Republic "On the Approval of the National Control List of the Kyrgyz Republic of Controlled Products", April 2, 2014, N 197; (3) the Decree of the Government of the Kyrgyz Republic "On measures to introduce a national export control system in the Kyrgyz Republic", May 4, 2004, N 330; (4) the Decree of the Government of the Kyrgyz Republic "On Further Measures to Improve the National Export Control System in the Kyrgyz Republic", October 27, 2010, N 257.

39 It is also essential to remember the Eurasian Economic Union (Kazakhstan and Kyrgyzstan), which supposes the unity of participation of the member states in international agreements and control regimes, the unification of countries' legislation, and the creation a single legal framework as well as the unified control list.

be updated at least once within two years since its last update. The national list is publicly available in two languages without any obstacles: Kyrgyz and Russian.

Tajikistan has made several attempts to establish an export control system, and tried to adopt decrees on the critical goods (aluminium and cotton). Furthermore, it initiated a draft law on procedures for controlling chemical substances and technologies, but by the end of 1997 the law had not been enacted[40]. In 1997, the Law on State control (December 13, 1997, N 521) was implemented,[41] which means that in this period the state had a control list. The list of goods (works, services) whose export, import and transit is carried out by the decision of the Government[42] probably contained items related to dual use.

Finally, a separate law on export control in the country was passed in 2014[43] and updated in 2017[44]. The law includes information about the approval of the list of controlled goods, technologies and software by the Government. None of the information on the list is publicly available; it requires authorisation in a database of legal acts. It is probably available in the Tajik language in full format.

Turkmenistan has built up legislation directed towards the control of general export rather than the control of the export of strategic goods. In July 1992, the country approved the Decree on the prohibition of the export and import of "arms and ammunition, explosives, nuclear materials, and machinery and equipment for producing armaments", but without providing any detailed information. In November 1994, a presidential decree provided the list of goods for licensing for export purposes, although this

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40 Bertsch and Grillot (1998) and Craft, Grillot, and Anderson (2000).

41 The Law of the Republic of Tajikistan "On state control over the export of arms, military equipment and dual-use", December 13, 1997, N 521. This was superseded by the Law of the Republic of Tajikistan, December 31, 2014, N 1168.

42 The Decree of the Government of the Republic of Tajikistan "On measures to improve foreign economic activity in the Republic of Tajikistan", July 16, 2012, N 367.

43 The Law of the Republic of Tajikistan on Export Control, December 31, 2014, N 1168.

44 The Law of the Republic of Tajikistan on Export Control, February 24, 2017, N 1392.

list did not include any reference to strategic commodities and technologies. Until 1998, it was not included in the adoption of the national control list[45].

Furthermore, Article 20 on "Export control"[46] states that "the list of objects of foreign economic activity subject to export control, as well as the procedure for their export or transit, shall be established by the Cabinet of Ministers of Turkmenistan". This means that in Turkmenistan, there is no separate the law on export control. Furthermore, there is no information on the national control list in the public domain.

In Uzbekistan[47], the legal framework on export control is grounded in decrees from April 1994, July 1995[48] and March 1996. Only the second decree covered strategic goods; it included:

- Appendix 4 on specific goods whose export and import are carried out under licences issued by the Ministry of Foreign Economic Relations of the Republic of Uzbekistan on the basis of orders from the Cabinet of Ministers of the Republic of Uzbekistan (armament and military equipment, particular components for their production, uranium and other radioactive substances, products from these substances, waste from radioactive substances, and instruments and equipment using radioactive substances);
- Appendix 6 on specific goods (works, services) whose export and import is carried out under permits issued by authorised bodies of the Republic of Uzbekistan (export of research results, know-how, inventions);

45 Bertsch and Grillot (1998).

46 The Law of the Republic of Turkmenistan on Foreign Economic Activity, August 16, 2014, N 103-V.

47 Bertsch and Grillot (1998) and Craft, Grillot, and Anderson (2000).

48 The Decree of the Cabinet of Ministers of the Republic of Uzbekistan "About measures for further liberalisation and improvement of foreign economic activity", July 25, 1995, N 287 (expired March 31, 1998).

– Appendix 8 on items prohibited for transit through the territory of the Republic of Uzbekistan (items of weapons, ammunition and military equipment, machines and machines intended for the manufacture of weapons, ammunition and aircraft).

In 2004, Uzbekistan enacted the Law on Export control (August 26, 2004, N 658-II), with the latest amendment in 2017. The legal document provides the framework of the export control system, but the Law does not make any reference to the national control list. It is approved by information from the National database of legislation of the Republic of Uzbekistan[49], particularly by the National Action Plan of the Republic of Uzbekistan on the implementation of international documents in the field of providing chemical, biological, radiological and nuclear safety measures for 2018-2021[50]. The National Plan features item 12 on the "Development of a national list of dual-use goods and technologies" as part of the cooperation with the Export Control and Related Border Security (EXBS) Program. The period of implementation is 2018-2019. At this time, Uzbekistan has no national control list. According to information in the news, a national list of dual-use goods and technologies that can be used in both civil and military fields will probably be developed in Uzbekistan by the end of 2020.

5. CONCLUSION

The national control lists of Central Asian countries all have their features and trends in development. In general, each country of the region should continue to improve its national list, as these lists are essential for national and regional security. The current status of the lists indicates the potential for this improvement.

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49 The database is available from http://lex.uz. (Accessed on 12/11/2019).

50 The Decree of the Cabinet of Ministers of the Republic of Uzbekistan, November 27, 2018, N 968.

In terms of reference models, Kazakhstan's national list is based on the EU dual-use control list, while Kyrgyzstan's list has similarities with the EU list. Tajikistan has no information on the national control list in the public domain, but the list and the information do exist. Turkmenistan has severe deficiencies in terms of its control list, while Uzbekistan still does not have a national list.