

Brief analysis of the Council's negotiating position on the proposed recast of the dual-use Regulation

On 5 June 2019, EU ambassadors agreed the Council's negotiating position on a proposed recast of the regulation setting up a regime for the controls of exports, brokering, technical assistance, transit and transfer of dual-use items.

On the basis of this mandate, the Council Presidency will start negotiations with the European Parliament.

In general terms, the Council's position differs largely from the RECAST as proposed by the European Commission and, in particular, as amended by the European Parliament (for the analysis of the RECAST proposal and European Parliament's amendments, please check previous articles available on this website).

On the contrary, it adds only few elements to the current Regulation 428/2009, mainly to be in line with the new Union Customs Code (such as the introduction of re-export declaration and exit summary declaration) and clarifies some concepts through their definitions (e.g. technical assistance and supplier of technical assistance, military end-use, ICP, arms embargo, non-Union dual-use items).

The main novelties, as compared to the current regulation, are the following:

- Broader definition of **re-export**, also when during a transit through the customs territory of the Union, an exit summary declaration has to be lodged because the final destination of the items has been changed;
- Exporter: re-export declaration and exit summary are added as documents as well as the definition of exporter for *any natural person carrying the dual use items to be exported where these dual use items are contained in the person's personal baggage*;
- Introduction of the definitions of "**exit summary declaration**" (the act within the meaning of Article 5(10) of the Union Customs Code) and "**re-export declaration**" (the act within the meaning of Article 5(13) of the Union Customs Code);
- Introduction of the definition of "**technical assistance**": *any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, advice, training, transmission of working knowledge or skills or consulting services, including by electronic means as well as by telephone or any other verbal forms of assistance*;
- Introduction of the definition of "**supplier technical assistance**";
- Wider definition of "military end-use" in art. 4 (catch-all provisions);
- Extension of catch-all provision in art. 8 (for human rights or public security issues) to **acts of terrorism**;

N.B. It is worth to notice that despite the scope of application of article 8 (catch-all clause for reasons of public security and human rights issues) is broadened to acts of terrorism, these are not defined in the Council's position and the definition of "terrorist acts" as proposed in the RECAST proposal is erased.

- **Introduction of the large project authorisation**;
- ICP defined at art. 2, but still not legally binding at the EU-level (it is up to Member States individually to define it in their national legislation).
- Art. 7, introduction of **authorisation for technical assistance** related to dual-use items listed in Annex I **if** the supplier of technical assistance has been informed or is aware of any possible misuse, as listed in art. 4. Exceptions to this rule are established in art. 7, para 3:

countries listed in Part 2 of Section A of Annex II, information in the public domain or basic scientific research, supply by authorities in their official tasks, to armed forces of a Member State, it is cited in the exceptions for items in the MTCR in Annex IV, it is the “minimum necessary” of an authorised exported item).

N.B. Member States have the possibility to extend an authorisation requirement for technical assistance related to non-listed items and to establish an authorisation requirement for technical assistance related to items listed in Annex I also if the supplier of technical assistance has ground for suspecting any possible misuse, as listed in art. 4.

- The validity period for individual and global export authorisation is fixed up to 2 years (unless decided differently by competent authority), while for large project authorisations, the validity period shall be established by the competent national authority but it cannot be longer than 4 years.
- Introduction of a more active role for the Dual-Use Coordination Group which shall, among other tasks, be consulted by the Commission for the update of Annexes.

N.B. Article 17a is added to specify that Annex IV update shall be done in conformity with art. 36 of the Treaty on the Functioning of the European Union, namely the public policy and public security interests of Member States.

- Record-keeping for at least 5 years (instead of 3 years)
- Adding of chapter IX (art. 27) on cooperation with third countries (notably, outreach activities on dual-use items trade controls)