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WORKING PAPER

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CONTRIBUTION

From:	Various Delegations (list below)
To:	Working Party on Dual-Use Goods
Subject:	EU Export Control – Recast of Regulation 428/2009

On behalf of the Croatian, Czech, French, German, Italian, Polish, Portuguese, Romanian, Slovak, Slovenian, & Spanish Delegations and in view of the 30th January Dual Use meeting under agenda item no. 9 a, delegations will find attached a paper on the EU Export Control - Recast of Regulation 428/2009.

EU Export Control – Recast of Regulation 428/2009

With respect to the European Export Control Policy Review and the proposal presented by the European Commission for a recast of Regulation no. 428/2009 (COM(2016) 616 final), Member States' experts from Croatia, the Czech Republic, France, Germany, Italy, Poland, Portugal, Romania, Slovakia, Slovenia and Spain hereby present the following considerations as food for thought for which the right for further comments is reserved.

The EU currently has a well-functioning Regulation compiling and enforcing the results achieved in the international export control regimes, thus strengthening efforts to prevent non-proliferation of weapons of mass destruction throughout the globe. The Regulation is used by many third countries as a model. Despite its complexity, it provides a tested legal basis for exporters and authorities in the Member States. The Council position should reflect the aim that the outcome of the recast process can be endorsed as an improvement.

The Council has under the recast procedure started its work towards a Council position with a thorough reading and discussion on all provisions of the recast proposal including the annexes in the Dual-use Working Party (DUWP). It has become apparent in the course of this examination, that provisions, the annexes and recitals need detailed work and would better be addressed in specific clusters as they are interlinked and interdependent. In order to enhance efficient deliberations on working level in the DUWP and to facilitate the detailed formulation of amendments to the provisions, we suggest to address the following clusters. In this regard, options raised by Member States in the course of the deliberations are presented in the following in order to find direction and common ground.

I. Cyber-surveillance Controls and the Protection of Human Rights

Provided it does not compromise the primary objective of this Regulation, which is to prevent the proliferation of weapons of mass destruction and their means of delivery as well as destabilizing accumulation of conventional arms, by establishing appropriate controls over related materials, the development of effective EU cyber-surveillance controls for the protection of human rights complementing the international export control regimes could, under certain conditions, be one element in a modernized European export control framework. This could strengthen the EU's human security approach in addition to and in relationship with EU sanctions and the Anti-Torture Regulation. For this, the Regulation itself must provide for legal clarity, foreseeability of controls for stakeholders and enforceability by national authorities. Diligent expert work is required to avoid unintended consequences for legitimate cyber-security industry in the EU. For these items as for the Regulation in general, non-binding guidelines regarding essential regulatory aspects would possibly not be helpful, and in any case not sufficient, as the text of the Regulation itself should be understandable as such.

It should be further noted that the EU and its Member States are important actors, but not the only actors, in this regard. The EU does not work in isolation. The four international export control regimes are - and must remain - the essential fora for the identification and regulation of dual-use items. The regimes bring together government and technical expertise regarding dual use items and provide for more effective and efficient controls in order to avoid gaps and loopholes. In addition they create a level-playing field more globally.

As the proliferation of cyber surveillance technology is a global issue, active and effective European participation in this discourse requires an active and strong EU cyber industry as well. Any EU regulation of cyber industry should thus take into account to promote further growth and strengthening of a responsible and globally oriented European cyber industry in order to further amplify European voices in international decision-making.

However, the EU must at the same time be at the forefront of protecting and promoting human rights. For this, considering the need to counter serious human rights violations in third countries, the possibility to design sanction regimes in an international framework, which ensures harmonization of practices and better effectiveness of sanctions, shall be taken into account. Further, in areas beyond the scope of the regimes, the EU shall act through export control measures if deemed necessary. This is already the case with the Anti-Torture Regulation which is a unilateral EU instrument for which no equivalent international export control regime exists, national measures set on in accordance with article 8 of the Regulation and a significant part of the current EU sanction regimes which establish separate lists of goods related thereto.

Cyber-surveillance items usually cannot be misused to proliferate weapons of mass destruction and in many cases for conventional military uses neither, but when used without consent of the object they can be misused for violations of certain human rights such as the freedom of expression, the freedom of assembly and the right to privacy. Some cyber-surveillance items are already regulated in the Wassenaar regime because of their military relevance. Other cyber-surveillance items are not (yet) regulated at an international level, and therefore are not (yet) listed dual-use items. Ongoing discussions in the relevant fora try to achieve the goal to clarify their status, but it will not occur until later.

The recast of the Regulation must reflect this reality. Further deliberations of the Council should address both but distinctively the internationally established dual-use controls, on one hand, and the new items suggested to be specifically controlled by the EU for human rights reasons, on the other hand. To achieve this, amendments to the proposal are necessary. The existing dual-use definition should remain as it is today, based on the internationally established definition. The distinction between such internationally listed dual-use items (controlled for non-proliferation and military reasons and checked already today for potential human rights violations) and certain additional items to be controlled specifically because they bear the risk to be misused for human rights violations (in particular for cyber-surveillance purposes) should be addressed in the Regulation. For the latter, new “cyber-surveillance controls” could be established in the Regulation¹, as a “third pillar” of European export control, in addition to dual-use export control (1st pillar) and anti-torture controls (2nd pillar), thereby dealing with the specific human rights dimension such as violations of the freedom of expression, right to privacy, and the freedom of association, directly linked to the misuse of cyber-surveillance items.

By doing so, the EU shall avoid deviating from the international standard and, without undermining the international cooperation against proliferation of weapons of mass destruction, at the same time control items which can be misused for repression. Bearing in mind the necessity to reflect the present diversity of views among the Member States, the following proposals should be addressed in the clusters:

1. Dual-use Definition:

- a) The definition of dual-use item should remain in line with the internationally established dual-use definition.
- b) Cyber-surveillance items:

The Council should seek to establish a common EU approach on certain cyber-surveillance items which are not (yet) internationally listed dual-use items or controlled by the EU Anti-Torture Regulation or elsewhere and which raise concerns to be

¹ It has been voiced that ideally, it would be most appropriate to regulate the specific human rights dimension of cyber-surveillance items in an own regulation to be defined, including new sanction regime or to amend the Anti-Torture Regulation in this regard. However, for practical reasons the Council position should be sought within the current negotiation on the proposal of a new Dual-use Regulation.

misused for serious violations of human rights or of international humanitarian law. This would allow the “cyber-surveillance controls” of the EU to be more effective and close potential loopholes.

This could take place in practice as a choice among options such as:

- i. an EU autonomous list
- ii. the extended use of national measures under article 8 of the regulation,
- iii. any other practical solution such as establishing a common EU position for proposing new listings in the Wassenaar Arrangement for certain cyber-surveillance items,
- iv. a specific definition (amending the wording of article 2 and taking into account practical needs on effective network security solutions).

2. With regard to possible list based controls:

- a) Annex IA should continue as a consolidated list of internationally established dual-use items implementing Member States’ obligations under the international export control regimes.
- b) If agreed, there may be unilateral EU controls on certain cyber-surveillance items (by amending Annex IB of the proposal where necessary). It is important to underline that such approach should serve as a bridge to international controls, the same way as national controls are generally intended to be internationalized for level-playing purposes. If an item is later listed in one of the international regimes, it shall be transferred to Annex IA accordingly as stipulated in the international regime (sunset clause).
- c) As alternative to an EU list solution, national measures under article 8 may serve as an instrument to prevent human rights relevant cyber-surveillance transactions in timely manner in the case multilateral controls are not in place yet. Better information among Member States may help adopting similar measures within the EU if relevant.

3. Criteria for listing and amendments:

- a) Annex IA should continue to be amended through delegated act, in order to keep it in line with changes within the international export control regimes.
- b) If agreed, any unilateral EU-controls on certain cyber-surveillance items or any respective control approach should be defined on the basis of clear control criteria similar to the ones used in the international export control regimes (*e.g.* foreign availability of the item, ability to effectively control the export, ability to make a clear and objective specification of the item, avoiding unintended consequences of controls), if the misuse or risk of misuse for serious human rights violations has been confirmed by a technical expert group. If an item is later listed in one of the international regimes, it shall be transferred to Annex IA accordingly as stipulated in the international regime (sunset clause).
- c) Changes in unilateral EU-controls on certain cyber-surveillance items or on the definition of cyber-surveillance items should be made according to regular legislative procedure, but products may be removed or decontrolled in terms of control parameters as technology develops, by a delegated act. In order to have the necessary time to assess whether or not an item should be under EU control list, the national authorities can on the basis of article 8 use administrative tools to prevent a critical transaction of cyber-surveillance items until the final assessment to list such item.

4. **Additional end-use controls:**

- a) The current catch-all controls (article 4) should remain and continue to be applied to internationally established dual-use items.
- b) There is no need for additional catch-all controls. In case of an autonomous list and in the light of the existing national administrative tools, which are most commonly based on article 8, Member States have the means to prevent a critical transaction with potential cyber-surveillance items.

5. **Assessment criteria:**

The distinction between dual-use and cyber-surveillance items also applies to the assessment criteria:

- a) Exports of internationally established dual-use items shall continue to be rigorously assessed in line with internationally established non-proliferation guidelines and, as relevant, with application of the criteria of Common Position 2008/944/CFSP including human rights.
- b) Exports of cyber-surveillance items shall be assessed on the basis of the Common Position 2008/944/CFSP. As these items can be misused for the violation of certain human rights referred to the 2008/944 CFSP, its criteria as well as relevant human rights (such as freedom of expression, right to privacy, the freedom of association) shall be taken into account. A good reference would also be Art. 6 of 1236/2005 Anti-Torture Regulation in order to avoid uncertainties for exporters.

6. **Terrorism catch-all:**

Current art. 8 of the regulation should be extended to allowing Member States to introduce national provisions to apply controls to stop an export that may be used in acts of terrorism.

II. Smart Security Approach & other regulatory aspects

The recast also addresses other important aspects of the dual-use export controls with the objective to provide for an effective, efficient and modern European regulatory framework. Following discussions a non conclusive overview of clusters has been identified for which the right for further comments is reserved.

7. The Regulation should **strengthen the role and tools (including cooperation) of the Member States** in ensuring a global level playing field at the level of standards set by the international export control regimes as well as no undercut rule both in the regimes as well as in the EU.
8. **Brokering and transit controls** are welcomed and shall be focused on listed items. It is welcome that **technical assistance** will be covered, and it needs to be assessed under which circumstances technical assistance which is not part of an export must be controlled. Exemptions from controls are necessary, *e.g.* in case the technical assistance is already part of an export or if the technical assistance is related to technology that is already in the public domain or basic scientific research.
9. **Controls** for brokering and technical assistance **outside EU territory** should only apply to an EU established company or partnership, an EU resident person, or a person not resident in the EU but carrying out such services while in the EU.

10. Facilitations for low-risk transactions and the granting of flexibility for exporters by introducing **new EUGEAs and expanding the geographical scope of the existing ones** are an essential part of any possible recast. They eliminate red-tape and help focusing public resources to the core issues and targets of Dual use controls, including the non-proliferation of weapons of mass destruction and human rights fields. Anyway, as any new language in the Regulation, also any new EUGEA will be examined individually and its design and wording be adjusted. The proposal for a general authorization for intra-company transfers presents potential in improving competitiveness of EU industry but needs to be further analyzed in detail to avoid risk of loophole, in particular undesired technology leakage. Other key proposals are the new EUGEAs for Encryption, for low value items and the one for other dual-use items. They as well will have to be reviewed in detail in the same spirit. The creation of a large project authorization for individual and global export authorizations, covering the duration of a specified project, whose duration exceeds the normal period of validity of a license, is also worth considering.
11. Authorizations shall be valid for a **standard of 2 years** with the possibility for Member States to shorten that period if the character of the export requires that. The proposed mandatory period of only 1 year is too short and will increase compliance costs for companies and administrative burden.
12. The requirement of an **Internal Compliance Program** (ICP) especially for global licenses is generally welcomed, subject to the details of the ICP design and conditions. Smaller companies need to be able to make use of global licenses as well as bigger companies. In order to facilitate these companies, the conditions of the ICP need to be practical and implementable in different sizes of companies. The administrative burden should be proportionate. Already today, ICPs, as appropriate, are in practice in place within the EU in the risk assessment process. Hence, there is no need for additional mandatory requirements but, if used, the term “due diligence” refers to (self-regulating) compliance measures in the form of organizational approaches provided by the companies, *e.g.* in the form of Internal Compliance Programs (ICPs).

III TRANSFERS, INFORMATIONS AND COOPERATION AMONG EU LEVEL

13. **The recast is an opportunity for promoting transparency** managed and guaranteed by Member States, eg by making public certain information regarding granted authorizations and denials, in compliance with the trade-secret and confidential-information protection (cf 15 hereafter).
14. With the introduction of the **obligation to consult** all other MS in case a MS intends to apply a catch-all, the catch-all-mechanism will lose its effectiveness. Since MS are not able to share all information that gives ground to application of the catch-all-clause, the clause will become a theoretical tool. Any mandatory consultation procedure would create an unnecessary administrative burden which will not only delay administrative procedures but also infringes on the MS’ right to assess the case and exercise their export control authority. However, some improvements of the present consultation procedure in case of denied exports of non-listed items could be further assessed.
15. **Reporting requirements** should be carefully considered from the viewpoints of workload and the actual needs and uses for the information in question, and competitiveness issues as well.

16. Mandatory **information exchange** for sensitive information: It is neither necessary nor possible for MS to share this kind of intelligence or enforcement information through export control authorities. Information exchange should keep its voluntary basis and be limited to the amount necessary (*i.e.* item, volume, end-use etc.).
17. With regard to **Annex IV**, a thorough assessment of potential items to be de-listed must be carried out. The proposal for a new Union General Transfer Authorization has to be assessed as to whether it is likely to reduce administrative burden and provide for sufficient safeguards.
18. **Enforcement and penalties:** MS are already obliged to have criminal provisions in place under the Regulation covering the circumvention of controls. Hence, it needs to be assessed whether there is a need for an additional circumvention provision.

IV. Next steps

The above considerations intend to promote the deliberations about the recast of the EU Dual-use Regulation 428/2009. It serves to provide proposals for reflection and for further exchange in order to facilitate a detailed Council position.

As a next step, the considerations above should be assessed in further detail in each cluster.