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COMMUNICATION FROM THE COMMISSION

**ON THE REVIEW OF THE EC REGIME OF CONTROLS OF EXPORTS OF DUAL-
USE ITEMS AND TECHNOLOGY**

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EXECUTIVE SUMMARY

Context and objective of the proposals

Controls of exports of dual use items and technology play a key role in the fight against the proliferation of weapons of mass destruction (WMD). They are destined to avoid that goods or technologies otherwise used for peaceful purposes (called dual-use items) can reach states that can utilize them for proliferation programmes, or organisations that could use them for terrorist or military purposes.

In the aftermath of the attacks of 11 September 2001, the international community identified controls of dual use goods and technologies as one of the key aspects in the fight against proliferation and intensified work destined to reinforce them. Thus, the UN Security Council adopted Resolution 1540 in 2004, which called for the generalisation of export controls and for introduction of controls on transit and brokerage of dual use items. The EU Action Plan and Strategy against the proliferation of WMD, adopted by the European Council respectively in June and December 2003, called for a series of concrete measures to strengthen controls, including the provision of criminal sanctions for export controls infringements. They also called for a review of the functioning of the controls applied by Member States, which was carried out in 2004 and 2005 and which identified a number of areas where improvements could be introduced; it was followed by intensive discussions with Member States and the consultation of EU industry on possible measures to improve the EU export control regime.

Dual use items comprise a very wide range of goods and technologies, such as chemical or biological products, nuclear technologies, optical and laser and material used in avionics, or certain software. These are high value added goods and technologies, in which EU industry has a competitive edge. The EU policy in this area has to find the right balance between protecting security and avoiding proliferation of WMD on the one hand, and promoting the competitiveness of EU industry and the maintenance and creation in the EU of high technology jobs.

In the light of the preparatory work carried out over the last two years, the Commission is presenting a proposal for a recast of the Council Regulation on controls on exports of dual use goods and technologies (Council Regulation (EC) No 1334/2000), together with a number of proposals for non-legislative action. These proposals have a triple objective:

- to improve security by making export controls more effective, in the context of an enlarged European Union of 25, and soon 27, Member States
- to provide a more friendly regulatory environment for business in order to promote their international competitiveness, by introducing more clarity in the EU export control regime, reducing regulatory burdens in the implementation of controls by EU exporters, ensuring a more consistent and homogeneous application of the EU export control regulation across the EU, and facilitating trade within the internal market

- to promote greater coordination of export controls at international level.

Summary of the proposals

A number of proposals for the amendment of the Dual Use Regulation will increase the effectiveness of controls in order to provide *better security*, such as:

- in compliance with UN Security Council Resolution 1540, certain controls will be applied to goods in transit within the EU, and controls will be introduced on brokerage activities when they concern goods or technologies that can be used in a WMD programme
- Member States shall provide for the application of criminal sanctions for serious export control offences
- improving the exchanges of information among Member States and with the different parts of their Administrations
- providing for adequate review opportunities in case a Member State intends to authorise exports that another Member State considers contrary to its essential security interests or that have been previously refused by another Member States.
- Improving the cooperation among Member States regarding the application of national controls on non-listed items.

Other proposals for amendment to the Dual Use Regulation will result in a *better regulatory environment for EU industry* and both facilitate their activity within the EU and promote their international competitiveness, such as:

- replacement of the current prior authorisation requirements applied on intra-EU transfers of certain items with a prior notification requirement, which would still enable Member States to block undesirable transfers
- clarification of certain provisions of the regulation, such as regarding intangible transfers of technology, which are currently applied in a different way by Member States
- statement of the principle that legal security should be provided to bona fide EU exporters who have carried out exports from the EU in conformity with EU export control regulations, in case such exports are considered illegal by a third country, and call for such situations to be handled via greater cooperation with third countries
- promotion of the use of global licences based on greater reliance on internal controls applied by enterprises, and greater recourse to Community and national general export authorisations
- provision for the establishment by Member States of indicative deadlines for the handling of applications for export authorisation.

It is also proposed to achieve greater consistency in the application of the Regulation by Member States via the adoption of guidelines or best practices for its implementation.

Finally, a number of proposals are destined to *promote greater coordination of export controls at international level*, such as a closer coordination of EU positions in the

international export control regimes, a better involvement of EU industry for the determination of items to be subject to controls, and ensuring membership of all EU Member States in the regimes. The Commission has also set up a programme of technical assistance to help third countries to set up adequate export control regimes. The proposal for the Regulation includes a clause providing for the negotiation of agreements with third countries on the mutual recognition of export controls, and a provision establishing the possibility of adopting ad-hoc export control procedures for EU research programmes and other projects where third countries are involved.

Finally, the Commission proposes the introduction of a regulatory committee in particular for the introduction of amendments to the annexes of the Regulation, which contain the lists of controlled items and other technical provisions. This procedure, according to which the Commission would adopt these amendments after obtaining the favourable opinion of a committee composed of Member States, would enable a speedier update of the list of controlled items, which at present require a Council decision on the basis of a Commission proposal.

Next steps

Although part of the European Community's common commercial policy, export controls of dual use goods and technologies play a role in the EU security policy, and is related to sensitive policies such as the fight against the proliferation of WMD. In this area, the Commission intends to continue working very closely with Member States so that the EU export controls system provides the contribution to European and world security that its citizens expect, and a regulatory environment which is favourable to the development of research and industrial activity that European business needs to prosper.

The Commission calls for a speedy examination of the proposals so that the Council adopts promptly the proposal for recast of the Dual Use Regulation and for action to be taken in the other areas for which no regulatory proposals have been made.

DRAFT COMMISSION COMMUNICATION ON THE REVIEW OF THE EC REGIME OF CONTROLS OF EXPORTS OF DUAL-USE ITEMS AND TECHNOLOGY

I. Introduction – Purpose of the Communication

Controls of exports of dual use items and technology play a key role in the fight against the proliferation of weapons of mass destructions (WMD). They are destined to avoid that goods or technologies can reach states that can use them for proliferation programmes or organisations that could use them for terrorist or military purposes. Although they have a security objective, such controls are carried out by trade policy measures that impose constraints on the activity of EU manufacturers and exporters, that should be limited to the minimum necessary in order to promote their international competitiveness.

The main objective of this communication is to propose measures destined to reinforce the effectiveness of export controls on dual-use items in the enlarged European Union, in pursuance of the Action Plan against WMD adopted by the European Council in June 2003 and the EU Strategy against the Proliferation of Weapons of Mass Destruction (WMD) adopted by the European Council in December 2003. It also aims at introducing more clarity and reducing regulatory burdens in the implementation of controls by EU exporters, and takes account of the need to adapt the legal framework to bring it in conformity with UN Security Council Resolution 1540.

II. Background and context

The proliferation of Weapons of Mass Destruction and their possible use by unscrupulous states or terrorist groups is a security concern of major international importance. The European Security Strategy identifies the proliferation of those weapons and their means of delivery as potentially the greatest threat to Europe's security. It notes explicitly that export controls had a beneficial effect in slowing the spread of WMD. One of the ways that the European Communities contribute to the fight against such proliferation is through its common commercial policy. Following two judgements of the European Court of Justice in 1995, which declared that the export controls of dual-use items falls within the common commercial policy (details in Annex II to this document), the Council adopted Regulation (EC) No 1334/2000 setting up a Community regime for the control of dual-use items and technologies.

Council Regulation (EC) No 1334/2000 establishes a Community export control regime for such dual-use items and technology, imposing an authorisation requirement for their export. The list of controlled items is set out in Annex I to the Regulation and is based on the lists established by the international export control regimes which cover biological and chemical items (the Australia Group), nuclear items (Nuclear Suppliers' Group) missile related (Missile Technology Control Regime) and conventional arms related components (Wassenaar Arrangement). Details on international export control regimes can be found in Annex III.

Although Regulation (EC) No 1334/2000 is directly applicable throughout the EU, its implementation relies on the national administrations of Member States, which are left with a relatively high degree of flexibility especially as regards the possibility to introduce additional national controls.

All the 25 EU Member States are members of the Australia Group (AG) and the Nuclear Suppliers Group (NSG), but Cyprus is not yet a member of the Wassenaar Arrangement, and seven Member States (Cyprus, Estonia, Latvia, Lithuania, Malta, Slovakia and Slovenia) are not yet members of the MTCR and neither is Romania (in the process of acceding to the EU). The European Commission is a member of the Australia Group and an observer in the NSG, but has no status in the MTCR and Wassenaar Arrangement although, since the adoption of the Thessaloniki Action Plan, it can participate in the meetings along with the Council Secretariat as part of the EU Presidency delegation.

Since the terrorist attacks of 11 September 2001, the initial mandates of those regimes, which had the aim of preventing States from acquiring dual-use items for producing WMD or conventional weapons, have been adjusted to prevent also the acquisition by non-State actors of dual-use items that could be used for terrorist attacks (either massive or via conventional means).

Another element of change in the international background is that, due to the intensification of international exchanges and the emergence of new economic actors, these international export control regimes no longer represent all the major suppliers of relevant dual-use technologies for the production of weapons or WMD.

This loophole should partially be closed in the medium term by the implementation of the UN Security Council Resolution 1540, which multilateralizes those controls. Other issues of concern relate to ensuring that the international export control regimes' decisions keep pace with innovation trends, that controls do not affect items widely available outside the membership of international regimes and that the rules are harmonised to the maximum extent among the members of the international regimes.

The threat of terrorist use of WMDs triggered the Thessaloniki Action Plan, which called in particular for strengthened EU export controls, enhanced exchanges of sensitive information, improved interaction with exporters, enhanced role of the EU in international export control regimes and the launch of "peer reviews" of Member States' implementations of the Regulation. The "peer reviews" were coordinated by a Task Force chaired by the Commission, which reported on its conclusions to the Council in November 2004. The General Affairs Council has since then regularly reviewed the progress in implementation of the "peer reviews" (most recently in the statement made in December 2005). In addition, on 17/18 June 2004 the European Council adopted a declaration on criminal sanctions, recalling the commitment expressed by Member States in the European Strategy against the proliferation of WMD, to adopt common policies related to criminal sanctions for illegal export, brokering and smuggling of WMD-related material.

In addition to the security dimension, in economic terms, the production and export of dual-use items and technologies is important because the products and technologies in question are wide-ranging and are of high value-added and technological content, and the EU has a competitive advantage as a major exporter of such items. Even if, due to the nature of dual-use items, the precise statistics are not available, exports of goods in tariff lines including dual-use items amounted to about 128 bn € of EU exports in 2004 and 142 bn € of EU exports in 2005, or 13 % of total EU merchandise exports¹. It is also estimated that there are over

¹ These exports concern all tariff lines covering dual-use goods, and thus include also goods that are strictly speaking not dual-use ones.

5000 companies in the EU exporting such controlled items.

III. Main issues concerning export controls

The main areas for improvement at EU and Member State level identified by the Task Force on the "peer reviews", and noted by the Council in its statement of 13 December 2004, were the following:

- ensure transparency and awareness of legislation implementing the EU system;
- minimise any significant divergence in practices amongst Member States;
- investigate the possibilities for adding controls on transit and transshipment of dual-use items;
- provide assistance in recognition of dual-use items subject to control;
- improve exchanges of information on denials, and consider the creation of a data base to exchange sensitive classified information;
- agree best practices for the enforcement of controls;
- improve transparency to facilitate the coordinated implementation of controls on non-listed items (catch-all/end use control) at EU level;
- enhance interaction with exporters;
- agree best practices for controlling intangible transfers of technology.

UN Security Council Resolution 1540 introduced certain new obligations, including the adoption of adequate provisions in order to prevent illicit smuggling, transit, transshipment, brokering and re-export of dual-use items, and established the principle of imposition of penalties, criminal or administrative, for infringements of export control regulations. As to brokering controls, the Commission understands them as being provision of intermediation services where the actor involved is aware of WMD end uses but nevertheless carries out the transaction.

Concrete experience has also shown that extra-territorial application of export controls by third parties creates difficult situations for EU importers and exporters. In order to avoid administrative or even criminal sanctions for actions that take place within the EU and which are consistent with the EU rules, they are sometimes compelled to apply third countries' restrictions on re-exports of items of non EU origin within the EU or on exports to third countries of non-restricted items produced in the EU if they contain components of non EU origin. The EU nationals may also face requests for their extradition to a third country in cases where their exports are in compliance with the EU rules but considered illegal by a third country. It would be appropriate to reiterate that a comprehensive legal framework for the export of dual use items, technology and related services is provided for by the Dual-Use Regulation, and that it is important to ensure, in respect to differing third country legislation that might consider such exports as criminal offences, legal security for the exporters of dual use items, technology or services subject to the Regulation who act in conformity with its provisions and with those adopted for its implementation in compliance with the Regulation. The best way to address these problems is to enhance cooperation between the EU and the

third countries concerned to promote convergence of controls: for this reason, the Commission has proposed to introduce in the export controls Regulation a provision to promote such cooperation with third countries.

The experience brought by EC-financed projects, such as Galileo, where third countries are involved, have shown that it would be appropriate to put in place ad-hoc procedures to set the detailed EU rules for the release of dual use EU technologies to third parties in the context of those projects.

Finally, regular contacts with industry and the collection of exporters' comments in the context of the impact assessment study (see next section) have shown that among the main industry concerns in this area are:

- the need for greater transparency and predictability of rules;
- an acceleration of the speed of decisions by national administrations on applications for export authorizations including in particular for non-listed items;
- a uniform application of the Dual-Use Regulation throughout the EU in order to avoid distortions of competition, including as regards the interpretation of items under control and the application of national controls on non-listed items ;
- a simplification of the regime by limiting the complexity of the lists of controlled items, notably by providing for regular reviews of the relevance of the lists against the foreign availability of the items and innovation, by moving the focus from the items under controls to targeting the violators and by creating more trade facilitating instruments for reliable exporters;
- reducing multiple layers of regulation (in the Regimes, at EU level, and at national level, in addition to the need for them to respect controls on re-exports applied by third countries);
- the introduction of e-licensing;
- the problems caused by the extraterritorial application of controls by certain third countries;
- the replacement of the current prior authorization requirement for intra-EU transfers currently applied on the most sensitive products with a system of prior notification.

IV. Recommendations and proposals for review of the EU export controls regime and of its contribution to international efforts against proliferation of Weapons of Mass Destruction

Before formulating the specific proposal to the Council, the Commission has taken into account, in addition to Member States' and industry's views, the principle of proportionality so as to ensure that the legislative changes provide added value to security without unduly hurting the ability of EU companies to do business abroad.

Most of the other legislative changes brought, in addition to transit, transshipment and brokering, are justified by the early recognition, confirmed by the "peer reviews" and the impact assessment study, of differences in national practices of implementation of certain

provisions of the Regulation. Such provisions could be strengthened so as to improve the efficiency of the EU system for dual-use export control. Areas which do not require legislative changes but rather administrative measures or the adoption of best practices were identified in the same way.

The key objectives of the Commission recommendations are the following:

- achieving greater clarity, transparency and, where possible, simplicity of the EU dual-use export control system;
- ensuring the consistent application of the Regulation within the EU with greater efficiency and effectiveness of controls and elimination of distortions of competition among exporters within different Member States;
- limiting the regulatory burdens on EU exporters, taking into account the need to avoid that they are put in competitive disadvantage vis-à-vis exporters from third countries;
- reducing obstacles to trade within the EU internal market.

Following discussions with the Member States, the recommendations of the Commission in this communication are divided into five areas:

- a) ***Proposals for the recast of EC Regulation No 1334/2000.*** These are the subject of a separate Commission proposal with full details on the results of the impact assessment study. The areas covered are, among others: the extension of controls to cover transit, transshipment², brokering and re-exports; the clarification of the content of controls of intangible transfers of technology; the establishment of a comitology procedure for the adoption of lists of controlled items; the improvement of sharing of information on national controls on non-listed items according appropriate security standards; the improvement of sharing of information on denials with the possibility to introduce a secure electronic system between the Commission, Member States and the Council; international cooperation with third countries, providing for possibilities of adopting ad-hoc export control rules in the case of specific EC-funded projects involving potential access by third countries to the EU dual use technologies; insertion in the recasted Article 21 of the reference to criminal sanctions at least for serious infringements of the provisions of the Regulation and of the regulations adopted by Member States for its implementation so as to respond to the call in the European Council declaration on criminal sanctions of June 2004, and to the call by UN Security Council Resolution 1540 for the introduction of appropriate civil or criminal penalties for violations of such export control regulations; the replacement of the remaining intra-Community controls by a system consisting of prior-notification of shipments; provision for the establishment by national authorities of indicative deadlines for the processing of applications for export authorisations, and of deadlines for the treatment of requests for information from licensing authorities concerning the application of national controls on non listed items and technologies.
- b) Indication of the areas where ***guidelines and best practices*** could be elaborated. Guidelines and best practices are modalities for implementing certain provisions of the Regulation which could be agreed at the level of the Council Dual-Use Working

² Transshipment is covered partially by the definition of transit

Group and prepared by the experts in the "Coordination Group". They would not be legally binding but provide standards for the application of export controls and, where appropriate, would be made available to the public, as in the case of the best practices for outreach to industry adopted in December 2005. In some cases, those guidelines could consist of an adjustment of the international regimes' guidelines to take account of the EU specificities, in particular the existence of the single market and the common EU borders. The following areas are suggested for best practices and guidelines: controls of intangible transfers of technology including technical assistance and definition of exemptions related to public domain and basic scientific research; global export authorizations; enforcement practices, such as common risk analysis; internal compliance programmes; supporting documents to assess export applications and coordination of national controls on non-listed items.

- c) Indication of the areas where *administrative action* could be sufficient, such as: transparency; improvement of national and EC website providing a common entry point; enhanced use of the pool of experts to ensure consistent and uniform interpretation of Annex I in the EU; elaboration of tools for the identification of dual-use items; and training of licensing and customs officers.
- d) Areas which will be subject of *upcoming Commission proposals*, in particular the creation of additional and new Community General Export Authorizations to facilitate trade of non-sensitive items to non-sensitive destinations which are mainly covered currently by national general export authorizations (see Annex V. for more details).
- e) Finally, there are several issues that go beyond the mechanics of the EU export control regime and which have been underlined by the Council (in particular in the Thessaloniki Action Plan) and confirmed by the "peer reviews", which need to be addressed:

i) Limitations of the international export control regimes

The export control regimes cannot provide for a totally secure system of controls as, amongst other things, their membership is limited and their rules are not legally binding, leaving much room for manoeuvre for national implementation. Generally speaking, regimes do not impose restrictions on exports to countries which have not ratified the relevant non-proliferation treaties. This is a deficiency of the regimes which should ideally be addressed in order to make sure that sensitive exports take place only to countries which are safe and which are not going to use goods or technology in any proliferation activity.

In addition, given the high speed of innovation and the expansion of the dual use sector due also to the changes in defence-strategies and increased reliance on new technologies, the regimes have to face major challenges in their activities of selecting items to submit to controls. This would call for improved interaction with industry.

In the specific case of the Wassenaar Arrangement, a limitation is that there is no rule imposing prior consultation in case one member country intends to grant an export authorisation for an essentially similar transaction to one denied by another member country.

The EU could work towards promoting a tightening of the regimes in this respect.

ii) Membership of all EU Member States in international export control regimes

At the time of the latest enlargement, only three of the new ten EU Member States were members of all international export control regimes. This posed a major problem as non-membership in a regime means that such Member States have, by virtue of the Dual-Use Regulation, to apply controls without participating in the discussions on items to be controlled, or on the enforcement of export controls that take place in the regimes. They also do not have access to crucial sensitive information such as the refusals of export authorisations made by non EU members or the list of sensitive end-users, which are key to implement efficient controls at the national and EU level.

In September 2003, the Commission services proposed to Member States a strategy destined, in conformity with the Thessaloniki Action Plan, to promote the membership of all the new Member States in all the international export control regimes, which was endorsed by the Council's Political and Security Committee. This led to the admission of all new EU Member States in the Australia Group and in the Nuclear Suppliers' Group in May 2004. However, they were not so successful in the MTCR to which seven of the new EU Member States and Romania have not yet acceded, nor in Wassenaar where Cyprus remains a non-member. It is important therefore to continue the active promotion of membership while taking due account of the necessity for the regimes to enlarge to other major suppliers of dual use technologies and maintaining efficient decision-making systems. In the meantime, it is necessary to find also a practical short-term solution (possibly a temporary observer status) to combine the need for new EU MS to get access to all the relevant sensitive information, in particular denials and technical information on items to be controlled.

iii) EC participation in the Regimes and coordination of EU positions

The Thessaloniki Action Plan and the EU Strategy against the proliferation of WMD call for making the EU a leading co-operative player in the export control regimes, among other by ensuring coordinated positions in the regimes and by providing for greater involvement of the Commission in the regimes. The Commission services proposed in 2003 to the Council a policy to that end which has been only partially implemented. One of the reasons of the difficulties for the Commission to enhance the EU coordination has been its lack of appropriate status in the regimes in particular the MTCR and the Wassenaar Arrangement which undermines the Commission's capacity to contribute effectively in areas covered by the Dual Use Regulation.

The Commission therefore recommends that its status in the international regimes be examined with Member States so as to ensure as a first step the access to the e-systems of management of documents by MTCR and Wassenaar Arrangements.

The Commission maintains that the EU coordination and involvement, as underlined in the EU Strategy against the proliferation of WMD, is a political priority for the EU to successfully prepare the sessions and facilitate the negotiation of proposals with third country members; such coordination has proved useful in defending EU interests in particular in the Australia Group at the time of adoption of its guidelines

or in MTCR and the Wassenaar on the issues such as export controls related to technologies that can be used for the Galileo project. Ad hoc meetings of the EU delegates participating in international export control regimes and in relevant Council Groups should be developed further. Enhanced coordination between the different competent Council Groups (CONOP, CODUN, COTER, Atomic Questions, COARM and the Working Party on Dual-Use Goods; cf. glossary of the terms in Annex I) should be maintained and promoted in order to ensure consistency and efficiency of the implementation of the EU strategy against the proliferation of WMDs.

Such improvements would also enable the Commission to contribute to the facilitation of regular dialogue between the EU Member States and the EU industry prior to regimes' examinations of control lists, and ensure that the EU suppliers can contribute to proposals aiming at adjusting the regimes' decisions to the EU capacity of supply and of innovation in dual use sectors.

iv) Technical assistance to third countries and international cooperation

The Commission is well aware that the efforts of the international community to promote strong national export controls and to multilateralize them aim at filling the gaps originating from the increased sources of supply of dual-use items from the countries having less than optimal export control policies and practices. The EU Strategy against the proliferation of WMD articulates a clear commitment to strengthening export control policies and practices within the EU borders and beyond, in coordination with international partners. It identifies the need to set up a programme of assistance to States in need of technical knowledge in the field of export control.

In November 2003, the General Affairs and External Relations Council adopted the text aimed at mainstreaming non-proliferation policies into the EU's wider relations with third countries, inter-alia by introducing a non-proliferation clause in agreements with them. The EU now aims at including provisions of non-proliferation in all the new agreements with third countries as has been done with the ACP Countries in the revised Cotonou Agreement (these countries have agreed to cooperate with the EU in countering the proliferation of WMD through an effective system of national export controls). A key element of the clause sets out that the EU partners must establish an effective system for national export control for the WMD related goods. As a consequence, the EU is now committed to providing greater export control assistance.

The Commission is seeking to do more on export control technical assistance. This is why it has launched, in close cooperation with the Council Secretariat (in particular with the Office of the Special Representative of the High Representative of the European Union for Foreign and Security Policy) and with Member States, a number of activities of technical assistance to the countries such as Croatia, Serbia, Montenegro, Bosnia and Herzegovina, the Russian Federation, China, Ukraine and the United Arab Emirates. This work will underpin a programme of continuing export control assistance to be funded from the new instrument of stability in the 2007-13 period.

The Commission is committed to develop its interaction with other third countries and major trade partners and international organisations based on the experience gained in particular in its cooperation with the IAEA (International Atomic Energy Agency). To this end, it intends to facilitate in particular the adoption of project-specific export control measures so as to facilitate the participation of third countries in the EU financed research and industrial projects on the basis of fruitful experience gained in particular in the Galileo project.

V. Impact assessment of proposals

A collection of exporters' views on the implementation of the Regulation and an impact assessment study were launched in September 2005, in order to assess the consequences of different options for the reform of the export controls. The impact assessment study, which included a public call for expression of views by all interested parties, involved the Member States, exporters and transporters as well as traders. The results were made public in February 2006³ and then discussed with Member States and exporters.

Most of the recommendations and comments made by the interested industry associations have been taken into account, although in certain respects this communication does not include certain suggestions because they would be not politically feasible (for instance, a radical simplification of the lists of controlled items or of the national controls).

Different options were tested and, following the results obtained from the study as well as from Member States and exporters' comments, the Commission has retained the best options in terms of cost-effectiveness. Any changes to the regulatory regime proposed have been considered against the need to limit burdens on manufacturer and exporters as well as on Member States' Administration strictly to the minimum necessary. A more detailed presentation of the impact assessment is contained in the explanatory memorandum of the Communication proposal to amend and recast Council Regulation (EC) No 1334/2000 and in a note annexed to that proposal.

The Commission proposal for *controls of transit and transshipment* will allow the national competent authorities of the Member States to take possession of a dual-use item in transit (as defined in the proposed recast Regulation) when aimed at a third country only if the intelligence gathered by the Member States indicates the intention of using the item for proliferation of weapons of mass destruction in violation of international non-proliferation treaties and arrangements. Not many such cases are expected to occur. The possibility of applying controls to each single transshipment within the EU has been discarded because of the impracticality of doing so.

As regards the *provision of intermediation services* regarding dual-use items (or *brokering*), the impact assessment study found practical difficulties regarding the implementation of a systematic control (authorization) of intermediary activities carried out by EU natural or legal persons as well as the impossibility to apply such controls to EU citizens carrying out their intermediary services abroad. This led the Commission to propose to limit the controls to activities taking place from the EU and to the cases where the broker is aware that the items in question could be used for proliferation purposes.

³ Document available at the following address:
http://ec.europa.eu/comm/trade/issues/sectoral/industry/dualuse/pr230206_en.htm

The impact assessment study has shown the benefit of measures ensuring *enhanced transparency* in the EU and Member States' legislation.

In addition, the study has provided additional elements in favour of further defining and clarifying at the EU level the conditions of use of the *Community general export authorisation* and *national general authorisations*.

The impact assessment study has also stressed the need to *create additional Community general export authorisations* so as to align EU practice with that of other major suppliers and members of international export control regimes. Exporters have made proposals that the Commission intends to follow up, probably at the time for making proposals in 2007 for amendments to Annex I to the Regulation (details provided in Annex V to this document). There is a possible trade-off between the creation of new Community Export Authorisations to certain countries and a tightening of controls of exports to the countries which are not members to the regimes.

The adoption of best practices for the granting of *global export authorisations* should further spread the use of those authorisations so as to avoid distortion of competition between EU exporters.

The impact assessment study has also highlighted the security and trade added value of *harmonising the implementation of national controls on non listed items*. The European Commission has raised Member States' attention to the fact that a growing share of denials cover non listed items which, by definition, are free for export in the other Member States except if those Member States apply the same end use control. The study proposed that national customs would be able to stop any non-listed dual use item subject to a national end use control. It also revealed that without enhanced harmonisation of notification of controls to industry and improved awareness raising, there is a risk that denials for non-listed items are being undercut via export through another Member State.

The introduction of a *"comitology" procedure* should speed up the adoption of updates to the annexes of Regulation No (EC) 1334/2000. An active involvement of the Commission in the international export control regimes will also be required.

The proposals to enter into *negotiations with third countries* so that the single market is not affected by third countries' rules on re-export rules applied within the EU would be of benefit to EU industry as well as to exporters from third countries. Proposals to introduce, as derogations to the current rules established by the Regulation, as necessary and along the example of the Galileo project, a common EU decision making process and possibly also the introduction of a project-specific export control regime for exports of new or sensitive listed dual-use technologies developed in the EU would benefit industrial projects and research projects which are co-financed by the EC and Member States and which are opened to third countries.

Most of the actions envisaged in addition to those described above will bring a better coordination and implementation of export control activities within the EU and greater transparency. They will promote the level playing field needed by EU industry to maintain its competitiveness. Most of the actions proposed will require a better and in some cases a different utilisation of available resources in the Member States.

Increased cooperation between the Member States may require some resources in the Member States who have developed the most advanced capacities but will strengthen the overall efficiency of the EU regime. Some Member States may need to upgrade their export control activities and resources devoted so that they meet high standards of efficiency, and also to meet the exporters' requests for quicker and more efficient systems such as a speedier treatment of applications for export authorisations if possible within given deadlines, risk-based management, industry awareness raising, expansion of internal compliance-based controls, or more support to industry in responding to their enquiries.

VI. Conclusions and next steps

The first priority should be an early adoption by the Council of the necessary amendments to the Regulation contained in the proposal for a recast text.

However, since the improvement of export controls does not in all the instances require regulatory action, the Commission also invites the Council to note all the areas where action has been proposed and to endorse concrete action to be taken within an indicative agreed timeframe, which the Commission suggests could be the end of 2008 for all measures to be in place, and early 2007 for the access by Commission to the WAIS and ePOC (e-systems of distribution of respectively Wassenaar and MTCR regime). The Commission also invites the Council to keep in mind the national implementation of some of the "peer review" recommendations which will be subject of regular reports from the Presidency to the Council, the next one being planned for December 2006.

In its next report⁴ on the implementation of the Regulation, the European Commission will review the implementation of the Regulation and the progress achieved in the areas mentioned in this communication, and will point to areas where further action would be desirable. It will also continue its reflection on the operation of export controls so that they can move in the direction of being more industry-compliance-based as opposed to case by case export authorisation-based.

Annexes

- I. Glossary of basic dual-use terms and acronyms
- II. Jurisprudence of the European Court of Justice on dual-use
- III. Background on the international export control regimes
- IV. Details of the Commission proposal under sections IV. a) and b) of the Communication
- V. Suggestions for the scope of additional Community General Export Authorisations

⁴ Report 2000-2004 available on:
http://ec.europa.eu/comm/trade/issues/sectoral/industry/dualuse/legis/index_en.htm

ANNEX I

Glossary of basic dual-use terms and acronyms

- **AG (Australia Group):** this international export control regime sets up guidelines for export controls of biological and chemical dual-use items and establishes lists of items that each Member commits, at political level, to integrate into its national legislation to the extent that this is compatible with its constitution and other national specificities of its legal and administrative system. Its name derives from the decision of Australia to chair this group. The first meeting of what subsequently became known as the Australia Group took place in Brussels in June 1985. Subsequently the meetings have taken place in Paris, to the exception of the 20th anniversary, in 2005, which was held in Sydney. The number of members including the EC participating in the AG has grown from the original 15 in 1985 to 40⁵ at present. Website: <http://www.australiagroup.net/>.
- **Article 18 Coordination group:** expert meeting chaired by the Commission whose mandate is set by the Article 18 of the Regulation No (EC) 1334/2000. The EU experts (one per Member State) are nominated by the Member States. The Group discusses any implementation issue related to the Regulation. It is opened to exporters on ad hoc basis. It has been opened to custom authorities in 2005 and to specialist technology experts in 2006.
- **Research:** experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles or phenomena or observable facts, not primarily directed towards a specific practical aim or objective.
- **BTWC** – Biological and Toxin Weapons Convention.
- **Catch-all or End Use Control:** ad hoc controls applying to non-listed items and based on the assessment by the exporter and/or the governments of the risk attached to the end use of these items when exported to certain end-users. Those controls can be imposed by Member States at the national level via their notifications to exporters (Articles 4.1 to 4.3 of the Regulation) and rests also on the exporters who must report to national competent authorities if they are aware of certain transactions covering non listed items which may lead to proliferation of weapons of mass destruction or other purposes and cases referred to in Articles 4.1 to 4.5 of the Regulation. In those cases, exporters have to ask national governments if export authorisations are requested prior to the export.
- **COARM** is the EU General Affairs Council's working group dealing with conventional arms.
- **CODUN** is the EU General Affairs Council's Committee on Disarmament in the United Nations.
- **"Comitology"** is established Community shorthand for the work of committees, made up of representatives of Member States and chaired by the Commission, whose function is to assist the Commission in adopting measures implementing Community laws and Community policies.

⁵ The EU MS and the Commission, Australia, Argentina, Bulgaria, Canada, Iceland, Japan, New Zealand, Norway, Republic of Korea, Romania, Switzerland, Turkey, Ukraine, United States.

- **CONOP** is the EU General Affairs Council's Committee on Non-Proliferation.
- **COTER** is the EU General Affairs Council's Terrorism Working Group (second pillar).
- **CWC** – Chemical Weapons Convention. It is a multilateral treaty on the prohibition of chemical weapons (178 Parties) which entered into force 29 April 1997.
- **CGEA** – Community General Export Authorisation established by the Council Regulation (EC) No 1334/2000 for control of exports of Dual-use Items and technology, which allows all exporters who respect its conditions of use set in the Regulation to export listed items (in Annex II of the Regulation) to Australia, Canada, Japan, New Zealand, Norway, Switzerland, United States.
- "**Dual-Use items**" are goods and technology developed for civilian uses, but which can be used for military applications or to produce weapons of mass destruction.
- **End-use** – the particular way, in which a dual-use item can be used
- **End-user** – the final or ultimate user of the item.
- **International Export control regimes** – these regimes have been set up by like minded countries to address proliferation risks as they arose and to facilitate their members' compliance with international non proliferation treaties which encourage international cooperation for legitimate and peaceful purposes. The international regimes include: the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, the Australia Group on chemical and biological weapons materials, the Nuclear Suppliers' Group and the Missile Technology Control Regime. These international export control regimes take decisions by unanimity on the basis of consensus.
- **National General Export Authorisations** are issued by national authorities and published in national official journal. They are valid for all exporters based in the Member State where they are published and who meets the conditions set in the national law, covering one or several specified countries as well as a number of dual-use items defined in the national law.
- **Global export** authorisation: granted to one specific exporter in respect of a type or category of dual-use item which may be valid for exports to one or more specified end users in one or more specified third countries.
- **IAS**: impact assessment study.
- **Individual export authorisation** is granted to one specific exporter for one end user in a third country and covering one or more dual-use items or technologies
- **Items in the public domain**: dual-use items and technologies made available without restrictions upon its further dissemination (copyright restrictions do not remove technology or software from being in the public domain)

- **MTCR** – Missile Technology Control Regime: this international export control regime was set up in 1987. The MTCR now has 34 member countries⁶. MTCR Website: <http://www.mtcr.info>. The aim of the MTCR is to restrict the proliferation of missiles, complete rocket systems, unmanned air vehicles, and related technology for those systems capable of carrying a 500 kilogram payload at least 300 kilometres, as well as systems intended for the delivery of weapons of mass destruction (WMD). The Regime's controls are applicable to certain complete rocket systems (to include ballistic missiles, space launch vehicles (SLVs), and sounding rockets) and unmanned air vehicle (UAV) systems (to include cruise missiles, drones, UAVs, and remotely piloted vehicles [RPVs]). Partners also recognize the importance of controlling the transfer of missile-related technology without disrupting legitimate trade and acknowledge the need to strengthen the objectives of the Regime through cooperation with countries outside the Regime.
- **NPT** – the Treaty on Non proliferation of Nuclear Weapons. The NPT entered into force in 1970, and with 187 parties, it is one of the most widely-adhered to arms agreements in history.
- **NSG** – this international export control regime, the Nuclear Suppliers' Group, which consists of 45 member countries,⁷ seeks to contribute to the non-proliferation of nuclear weapons through the implementation of Guidelines for nuclear exports and nuclear related exports. The NSG was created following the explosion in 1974 of a nuclear device in India, which demonstrated that nuclear technology transferred for peaceful purposes could be misused. Website: <http://www.nuclearsuppliersgroup.org> .
- **PSC** – Political and Security Committee is one of the GAERC preparatory committees and the lynchpin of the CFSP and the ESDP.
- **Report of the Commission services on the implementation of Regulation No (EC) 1334/2000 from 2000 to May 2004:** this report, in conformity with the obligations set in Article 20 of the Regulation, is available on the DG TRADE webpage at the following address:
http://ec.europa.eu/comm/trade/issues/sectoral/industry/dualuse/legis/index_en.htm
- **UNSCR** – United Nations Security Council Resolution.
- The **Wassenaar Arrangement** on Export Controls for Conventional Arms and Dual-Use Goods and Technologies is the successor to "COCOM". It began operations in September 1996. The Wassenaar Arrangement is presently composed of 40 countries⁸. The WA website: www.wassenaar.org. It sets up list of military and dual use items for which exports are to be controlled by the member countries according to the regime's guidelines and in conformity with country's legal and administrative framework. It has been

⁶ Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Rep. of Korea (South Korea), Russia Federation, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States.

⁷ EU 25 Member States. Non EU Member States: Argentina, Australia, Brazil, Bulgaria, Canada, China, Croatia, Japan, Korea, New Zealand, Norway, Russian Federation, South Africa, Switzerland, Turkey, Ukraine, USA.

⁸ Argentina, Australia, 24 EU MS (except Cyprus), Bulgaria, Canada, Croatia, Japan, New Zealand, Norway, Republic of Korea, Romania, Russian Federation, South Africa, Switzerland, Turkey, Ukraine, United States.

established in order to contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations. Participating States seek, through their national policies, to ensure that transfers of these items do not contribute to the development or enhancement of military capabilities which undermine these goals, and are not diverted to support such capabilities. Representatives of Participating States meet regularly in Vienna where the Wassenaar Arrangement's Secretariat is located.

- **WMD** – Weapons of Mass Destruction, which include nuclear, chemical and biological weapons as well as its means of delivery and in particular missile technology.
- **WPDU** – Council Working Party on Dual-Use Goods.

ANNEX II

Jurisprudence of the European Court of Justice on dual-use

Jurisprudence of the European Court of Justice in the area of dual-use goods has established that the rules restricting the exports of these goods to third countries fall within the scope of the common commercial policy, as set out in Article 133 of the EC Treaty.

The ECJ delivered preliminary rulings in the case of "Werner" (Case C-70/94) and "Leifer" (case C-83/94)

In the "*Werner*" (Case C-70/94), the Court stated that "a measure (...) whose effect is to prevent or restrict the export of certain products, cannot be treated as falling outside the scope of the common commercial policy on the ground that it has foreign policy and security objectives".

In the "*Leifer*" (Case C-83/94), the Court stated that "Article 113 (now Article 133) of the EC Treaty is to be interpreted as meaning that rules restricting exports of dual-use goods to non-member countries fall within the scope of that article and that in this matter the Community has exclusive competence, which therefore excludes the competence of the Member States save where the Community grants them specific authorization". It also ruled that the fact that "a trade measure may have non-trade objectives does not alter the trade nature of such measures". The Court also stated that "the fact that the restriction concerns dual-use goods does not affect that conclusion. The nature of those products cannot take them outside the scope of the common commercial policy.

ANNEX III

The international export control regimes

The international export control regimes establish norms and guidelines to control nuclear, chemical, biological, missile-related exports as well as the exports of conventional arms and dual-use technologies. Between the 1970s and the 1980s, four international export control regimes were set up to enable their members to participate in international trade while complying with their obligation to facilitate international cooperation for legitimate purposes. These are: the Nuclear Suppliers' Group (NSG) and Zangger Committee for nuclear items; the Australia Group (AG) for chemical and biological dual-use items; the Missile Technology Control Regime (MTCR) for missile related technologies; and the Wassenaar Regime for dual-use items related to conventional weapons. Comprehensive lists of controlled items were developed in the Regimes as only one international treaty of non-proliferation (the Chemical Weapons Convention) lists the dual-use items and technologies subject to controls, whilst the other treaties or arrangements (Biological and Toxin Weapons Convention, the Non Proliferation Treaty, the Hague Code of Conduct on Missiles) do not list any dual-use technologies that can be used for WMD end uses.

Since the terrorist attacks of 11 September 2001, the initial mandates of those regimes, which were to prevent States to acquire dual-use items for producing WMD or conventional weapons, have been adjusted to prevent also the acquisition by non-State actors of dual-use items that could be used for terrorist attacks (either massive or via conventional means).

The threat of massive terrorist attacks using WMDs has led to increased workload in international export control regimes (in particular in the Australia Group) so as to adjust the criteria and guidelines of the regimes to the particular threats.

Except for the Wassenaar Arrangement, the international regimes have no technical secretariat to manage the meetings. Except for the Australia Group, the regimes have rotating chairs changed every year. The international regimes hold a plenary meeting per year. This meeting which gathers the heads of delegations of each Member decides on all major issues in particular the entry of new members, the changes to the lists, the adoption of amendments to existing guidelines, outreach to non member countries. They adopt a press-release at that occasion. Decisions are taken at unanimity for all issues. Members have the capacity to make proposals on any subject in the mandate of the regime.

The preparation of the plenary meetings is made by technical expert groups. Those groups usually represent 3 different types of expertise: technical experts to prepare the lists of controls, custom and enforcement officers as well as licensing officers who exchange practices, intelligence, expertise where information on sensitive issues regarding proliferation, terrorism and WMD acquisition are exchanged.

All the 25 EU Member States are members in the Australia Group (AG) and the Nuclear Suppliers Group (NSG), but Cyprus is not yet member of the Wassenaar arrangement. Seven new Member States (Cyprus, Estonia, Latvia, Lithuania, Malta, Slovakia and Slovenia) are not yet members of the MTCR nor is Romania (in the process of acceding to the EU). The European Commission is member of the Australia Group and observer in the NSG, but has no status in MTCR and Wassenaar although it can participate in the meetings, along with the Council Secretariat, as part of the EU Presidency delegation since the adoption of the Thessaloniki Action Plan.

Worth noting that the **Chemical Weapons Convention** mentioned in the Communication is not an international export control regime of the same nature as those 4 described. The fundamental difference is that it is a multilateral treaty (178 Parties) which entered into force 29 April 1997 and contains both provisions and a mechanism for inspections so as to verify State Parties' compliance and also lists of items, including dual use items, whose trade must be controlled. It is the only international non-proliferation treaty containing such lists of items.

ANNEX IV

Details of the Commission proposal mentioned in sections IV. a) and b) of the Communication

a) Proposals for amendment of current Regulation:

The following proposals for the amendment of the Regulation are made:

- introduction of certain controls on dual-use items in transit within the EU
- control of brokering of dual-use items if there are grounds to suspect a link to a WMD programme
- clarification and update of controls of intangible transfers of technology including the provision of technical assistance
- introduction of some limited adjustments regarding the application of national controls on items non-listed in the Regulation in order to improve their efficiency and the transparency of their operation, although leaving implementation to best practices
- as to general export authorizations, clarification of the conditions for the use of the Community General Export Authorisation (a notification requirement) and of national general export authorizations, and of the criteria for the granting of global authorizations
- proposals to improve the exchange of information among Member States and with the Commission and to ensure that denials of authorisations by one Member State are properly taken into account by the other MS
- introduction of provisions on relations with third countries, according to which negotiations could be conducted with third countries to improve the coordination of the functioning of export control regulations and facilitate the mutual recognition of such controls
- introduction of procedures for a speedier adoption of amendments to the annexes of the Regulation and for measures necessary to implement the Regulation (a comitology procedure)
- possible introduction of an electronic system for exchanging information on denials as well as other information and improvements of the notifications of denials
- replacement of EU intra-community controls with prior notification and a traceability system within the EU
- provision for the establishment by national authorities of indicative deadlines for the processing of applications for export authorisations, and of deadlines for the treatment of requests for information from licensing authorities concerning the application of national controls.

- introduction of a reference to criminal sanctions to be adopted for the most serious infringements to the Regulation in conformity with reported practices of the Member States.

b) Areas where guidelines/best practices could be elaborated:

Guidelines and best practices are modalities for implementing certain provisions of the Regulation which could be agreed at the level of the Council Dual-Use Working Group and prepared by the experts in the "Coordination Group". They would not be legally binding but provide standards for the application of export controls. In some cases, those guidelines could consist of an adjustment of the international regimes' guidelines to take account of EU specificities, in particular the existence of a single market and common EU borders. In some instances, these guidelines and best practices can be made public for the benefit of exporters, although in other cases their nature would require that they are kept within the relevant administrations as internal guidance. Among the areas where such guidelines and best practices could be prepared are the following:

- implementation and enforcement of controls of intangible transfers of technology including provision of technical assistance
- modalities for the implementation of certain aspects of the controls on non-listed items ("catch all" provision), destined to improve flows of information among Member States and to limit the possibilities of circumvention of controls applied by one Member State via exports through other Member States
- improvement of risk assessment, including possible elements for common risk analysis and enforcement as foreseen by Council Regulation No (EC) 648/2005 on the security amendments to the Customs Code and its implementing provisions to be adopted by the end of 2006
- implementation of global export authorizations (scope, conditions of use and how to check compliance)
- elements used to assess export applications including the compliance capacity of the exporter, supporting documents and end-user certificates
- establishment of target deadlines to decide on applications for authorisations
- internal compliance programmes.

ANNEX V

Suggestions for new Community General Export Authorisations

Areas which have been suggested for the scope of new Community General Export Authorisations:

- some chemical products covered by the Chemical Weapons Convention could benefit from new trade facilitation to a number of Parties to the CWC which are not covered by the Annex II to the Regulation (which defines the Community General Export Authorisation)
- small quantity /value shipments and samples
- Wassenaar non-sensitive items could benefit from the creation of a new Community authorisation covering certain countries which are members of Wassenaar and not listed in Annex II of the Regulation (which defines the Community General Export Authorisation)
- the new Community General Export Authorisations will contain implementing provisions based on those provided in the proposal to amend the Community General Export Authorisation and on those currently in force in the Member States who currently have adopted relatively similar national general export authorisations in their scopes and destinations.