

IV. Developments in EU dual-use and arms trade controls

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The European Union is currently the only region with a common legal basis for controls on the export, brokering, transit and trans-shipment of dual-use goods, software and technology and, to a certain degree, also military items. These efforts have taken place under the Common Foreign and Security Policy; the European Community ‘pillars’ of the EU, as conceived by the 1992 Maastricht Treaty; and the areas of ‘exclusive’, ‘shared’ and ‘supporting’ EU competences, as conceived by the 2009 Lisbon Treaty.¹ This process has generated a range of different policy instruments as well as detailed implementation guidelines for arms exports. The key instruments are the EU arms embargoes, the EU Dual-use Regulation, the EU Common Position on Arms Exports, the Intra-Community Transfers Directive and the anti-Torture Regulation. Developments in EU arms embargoes are discussed in section II of this chapter. Discussions on and implementation of the EU Common Position and the Intra-Community Transfers Directive continued without any ground-breaking developments in 2016. However, major changes are under way in the area of dual-use trade controls. The Commission is moving ahead with the ongoing ‘recast’ of the Regulation, and states have also adopted a revised version of the anti-Torture Regulation.

Dual-use trade controls

The EU Dual-use Regulation, which provides a common legal basis for controlling the export, transit, trans-shipment and brokering of dual-use goods and technology for its 28 member states, is currently undergoing a review.² This process started in 2011 and is unlikely to be completed before 2018. In 2014 a European Commission communication was issued setting out proposals following on from an earlier green paper and stakeholder consultation process.³ In 2015 a public consultation and a data collection and analysis project were conducted on the current and potential impact of the Dual-use Regulation.⁴ These fed into an assessment of the social and economic impact

¹ See ‘Division of competences within the European Union’, EUR-Lex, updated 26 Jan. 2016.

² ‘Council Regulation 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items’, *Official Journal of the European Union*, L134, 29 May 2009.

³ European Commission, ‘Communication from the Commission to the Council and the European Parliament, the review of export control policy: ensuring security and competitiveness in a changing world’, COM(2014) 244 final, 24 Apr. 2014.

⁴ European Commission, ‘EU Export Control Policy Review: online public consultation report’, 23 Nov. 2015; and SIPRI and Ecorys, *Final Report: Data and Information Collection for EU Dual-use Export Control Policy Review* (Brussels: European Commission, 6 Nov. 2015).

of the current regulatory system and the changes that the Commission is proposing.⁵ The Commission presented a draft regulatory proposal in September 2016.⁶ A leaked version of a draft was made public in July and provoked concerns from industry and a number of EU member states (see section V).⁷

The regulatory proposal will undergo a legislative process involving the Council of Ministers and the European Parliament.⁸ The review process could lead to practical changes to reduce inconsistencies between implementation and strengthening enforcement, for example through guidance for companies and reinforced information exchange between governments. The Commission also put forward fundamental changes to the definition of dual-use items and an expansion of the concept to encompass uses in violation of human rights and in connection with terrorism (for a more detailed discussion of these aspects of the proposal see section V). The regulatory proposal includes measures to adapt the Regulation to changes in trading patterns, business routines and technologies, such as increased reliance on intangible technology transfers. It also seeks to reduce the administrative burden of licensing processes on business and authorities by introducing facilitated licensing procedures for intra-company transmission of software and technology, large projects, encrypted products and low-value transactions. These would no longer require individual licence applications, although specific record keeping and other internal compliance conditions would still have to be met. Although these discussions will have direct legal implications only for EU member states and accession states, the repercussions are likely to be substantial. This is not only because changes are under discussion to dual-use concepts that are in use globally, but also because many countries around the globe use the EU control list and other legal provisions as a reference point in their national controls.

⁵ European Commission, Commission Staff Working Document, Impact Assessment, *Report on the EU Export Control Policy Review, Accompanying the document 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) 314 final, 28 Sep. 2016.

⁶ 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)', COM(2016) 616 final, 28 Sep. 2016.

⁷ Stupp, C., 'Commission plans export controls on surveillance technology', EurActiv, 22 July 2016. The leaked proposal is available at <<http://www.euractiv.com/wp-content/uploads/sites/2/2016/07/dual-use-proposal.pdf>>. Stupp, C., 'Tech industry, privacy advocates pressure Commission on export control bill', EurActiv, 3 Aug. 2016; and Stupp, C., 'Juncker postpones controversial export control bill on surveillance technology', EurActiv, 20 Sep. 2016.

⁸ European Parliament, 'Control of trade in dual-use items: Council Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items', Briefing, Implementation appraisal, Sep. 2016; and European Parliament, 'Review of dual-use export controls', Briefing, EU Legislation in Progress, 30 Jan. 2017.

EU Anti-Torture Regulation

In 2005, the EU established a Regulation concerning trade in certain goods that could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (the Anti-Torture Regulation).⁹ The Regulation requires member states to ban the trade in goods that have no other practical purpose beyond execution and torture, and to regulate the trade in items that might be used for these purposes.¹⁰ The European Commission published a set of proposals detailing how the Regulation could be improved in January 2014 and adopted a further expanded list of prohibited and controlled goods in July the same year.¹¹ This was in response to a 2010 European Parliament resolution that called for a review of the EU anti-Torture Regulation.¹² Following a two-year process of negotiations between the European Council, the European Parliament and the European Commission, the EU adopted a revised version of the Regulation in November 2016.¹³ Among the amendments, the document includes a prohibition on the transit, brokering and marketing of banned goods, and on providing technical assistance, issues that non-governmental organizations had highlighted as key gaps in existing controls.¹⁴ During the negotiations, Members of the European Parliament had also called for the inclusion of a catch-all control that would have imposed restrictions on unlisted items that could be used for executions and torture, but this was not included in the final version of

⁹ Council Regulation 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, *Official Journal of the European Union*, L200, 30 July 2005. The Regulation entered into force on 30 July 2006.

¹⁰ Amnesty International, *Grasping the Nettle: Ending Europe's Trade in Execution and Torture Technology* (London: Amnesty International, 28 May 2015).

¹¹ European Commission, 'Commission Implementing Regulation (EU) 775/2014 of 16 July 2014 amending Council Regulation (EC) 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment', *Official Journal of the European Union*, L 2010/1, 17 July 2014; and European Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation 1236/2005 concerning the trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment', COM(2014) 1 final, 2014/0005 (COD), 14 Jan. 2014. The list had previously been expanded in 2011. European Commission, 'Commission Implementing Regulation (EU) 1352/2011 of 20 December 2011 amending Council Regulation (EC) 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment', *Official Journal of the European Union*, L 338/31, 21 Dec. 2011, pp. 31–34.

¹² European Parliament, 'European Parliament resolution of 17 June 2010 on implementation of Council Regulation (EC) 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment'.

¹³ Council of the European Union, 'Torture goods: Council adopts amending regulation', Press release, 14 Nov. 2016.

¹⁴ Amnesty International, *Why the EU Should Ban the Commercial Marketing and Promotion of Inhumane Policing and Prison Equipment*, 9 May 2016.

the revised Regulation.¹⁵ The Commission argued that the proposed catch-all was unnecessary and might be applied differently by individual member states, creating an undue regulatory burden for some EU-based companies.¹⁶ However, an ‘urgency procedure’ to facilitate the addition of new controlled or prohibited items was introduced.

¹⁵ See European Parliament, ‘Anti-torture rules: trade MEPs call for bans on goods marketing and EU transit’, Press release, 22 Sep. 2015, <<http://www.europarl.europa.eu/news/en/news-room/20150922IPR94208/anti-torture-rules-trade-meps-call-for-bans-on-goods-marketing-and-eu-transit>>.

¹⁶ See European Parliament, ‘Fighting trade in tools for torture and executions’, Briefing, EU Legislation in Progress, April 2016, <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580885/EPRS_BRI\(2016\)580885_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580885/EPRS_BRI(2016)580885_EN.pdf)>, p. 9.