

**Green Paper: The dual-use export control system of
the European Union: Ensuring security and
competitiveness in a changing world**

Contribution of the “Chaudfontaine Group”

Chaudfontaine, 2011

Contributors:

The “*Chaudfontaine Group*”, chaired by Professor Quentin Michel was convened for the first time in 2010 under the auspices of the European Studies Unit of the University of Liège (Belgium). It brings together young European researchers¹ active in the field of sensitive trade and related issues. This Group meets to debate, to exchange information as well as to consider ways and means to regulate the trade of dual-use items and technologies so as to meet the objectives of security and competition in the European Union.

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Introductory remark

The present contribution addresses only a selected number of questions raised by the Green Paper. These questions were chosen bearing in mind that the Chaudfontaine Group could possibly make a specific contribution to the broad public debate launched by the European Commission through the Green Paper.

While preparing the answers, we have set up six informal working groups, each dedicated to one particular element of a Trade Control Regime:

- Extension of the scope of authorisation;
- Common risk assessment and review procedure;
- Catch-all controls;
- Transit and brokering controls;
- Systematic information exchange.

Introduction: A new export control model

The definition of a new export control model for the European Union (EU) would seem to imply that the European Union already benefits from an export control framework. However, considering the nature of the regime established by Regulation 428/2009, it is quite apparent that it does not constitute a proper export control regime, but rather a coordination of the different Member States' regimes. The Regulation did nevertheless establish common principles and elements to be implemented nationally.

Except for the legally binding nature of the Regulation, the level of constraints it imposes upon the Member States is similar to the set of obligations established by the international export control regimes.

Besides that the EU might reach agreement in a near future on the establishment of a single EU regime, a truly common trade control currently appears to be politically unacceptable for the Member States. Therefore, the evolution of the regime could only be strengthened by the adoption of principle(s) that would define the potential architecture of its reform.

The reform will have to find the right balance between the three core elements:

- EU Regulation and national regulations;
- Competitiveness and security;
- Soft law and/or hard law.

Consequently, the following elements of a trade control system could be organised and transferred to the EU level:

- List of controlled items;
- Criteria and potential conditions;
- Catch-all clause principles;
- Authorisation system and categories;
- EU territorial validity of authorisations;
- Certification and ICP constraint;
- Information exchange;
- Intra-EU coordination.

Finally, any attempt to compare the EU regime with that of its main trade competitors will not be accurate, unless such comparison takes into consideration each national regime which might be either more or less constraining or restrictive.

Under any circumstance, seen from the perspective of competition, and of security, the EU regime as well as national regimes of the Member States should impose similar constraints on its industries as those applied by the main competitors of the EU.

Theme: Extending the scope of authorisations?

Answers to questions 10, 43, 44 and 45

Under the current EU regime of export control of dual-use items existing rules provide enough flexibility for Member States to apply appropriate licenses for their national industries and traders. It should be emphasised however that they are not harmonised and vary across the European Union - ranging from tough / high restrictions in some Member States, to broad national facilitation measures and even exemptions in the others. These rules do not adequately address some of the challenges that stem from the new threats to EU security, *i.e.* different definitions of the concept of “security” among the Member States. Thus, 27 interpretations should be overcome and replaced by a common understanding of “security – threat” at least in the dual-use field. Moreover, particular attention should be paid to the rapid technological progress. Therefore, the proposal to include six new EU General Export Authorisations (GEAs) could facilitate the export of dual-use items. Whereas the GEA mechanism is generally welcomed by exporters, its practical relevance is questioned. Therefore, it should be seriously revised in order to ensure effectiveness of the use of the EU GEAs.

Among revision measures, we propose establishment of an ex-post reporting obligation, which might shorten the administrative procedures. In addition, an introduction of common EU general licenses and gradual withdrawal of national general licenses would lead to more clarity for both licensing authorities and industry. Before introducing the new EU GEAs, it would however be important to know how many authorisations or other types of permissions would thereby be replaced so as to remove the administrative burden from the Member States and, to what extent they would be valuable to exporters. Introduction of new EU GEAs could be linked to certain conditions as for example a certification of exporters. A new EU GEA to be considered could be for instance an EU GEA for intra-company transfers, for special projects (*i.e.* building a nuclear power plant) or for EU research programs.

Despite the positive expectations, there are also some concerns that the beneficial effect might not be as important as it is perceived, due to the fact that some EU GEAs would cover similar items and destinations as the existing national GAs. Moreover, certain Member States might also be reluctant to accept GEAs for certain items or destinations in light of national security concerns. Member States may therefore need greater assurances as for example common risk assessment for a given export.

At this stage, it might be legitimate to have both national GAs and EU GEAs rather than phasing out national GAs. EU GEAs contain, indeed, conditions established by consensus which takes a long time to be reached.

Although there is a common definition of the national GA, the understanding of its meaning differs among the 27 Member States. The validity of licenses among the 27 varies widely too. In order to introduce an additional harmonisation, there might be a need to go further in the definition. The elaboration of common understanding however, is crucial.

The EU GEA is an instrument to facilitate trade but it could have negative security implications. The concept of “security”, however, is perceived differently among the 27 Member States. There is thus a need for unification of the interpretation of the concept of security and threats in this field.

Harmonising? Yes, but can it be “one size fits all”?

More outreach as well as enforcement actions are needed towards industry. Audits are one of the most efficient enforcement tools for countries using national GAs; moreover they also raise the awareness of industry. Hence, a number of questions could be raised: having more foreign trade company audits across EU Member States? Would the option of a EU global license be the best possible way forward? Considering that possibility, which body would be in a position to issue such EU global license?

When comparing the EU and the US export control regimes, it should be noted that the US apply extraterritorial controls over their dual-use goods and can thereby better cover their security interests than the EU. This means that the US has the possibility to follow goods after the export has taken place. However, it should be noted that license exceptions in the US are strictly tailored on national economic and security interests. Hence, it will not be at all beneficial for the EU to simply copy these exemptions. A thorough analysis is required to determine how these exceptions could facilitate EU exports and enhance competitiveness and at the same time stimulate EU Member States to analyse their exports in that light. It will allow an appropriate use of all tools already provided by the Regulation in order to achieve the balance of security and trade interests. The EU could also consider the US practice of having a broader scope of application as far as the “privileged countries” are concerned. However, due to the underlying different national control systems this mechanism might be envisaged - only to a limited extent.

A comprehensive detailed comparison of the EU export control system and that of other, notably competitors, countries could serve as a useful tool for further analysis. To take an example: the licensing process in the EU is much stricter as well as slower than that of the US, which tends to weaken the competitiveness of EU companies in third countries. Moreover, because it is difficult to define a common EU “policy” towards sensitive countries, there is much reluctance in issuing export authorisations thereto. This leads to a limitation of such markets for the EU companies. Hence while the EU companies are not allowed to export dual-use items to certain countries, the US and Russia are taking over markets in these regions.

Theme: Common risk assessment and reviews procedures

Answers to questions 8, 9, 26, 27 and 40

Question 8: Have you encountered any problems due to differences in the application of export controls across the EU Member States? What was the nature of these problems?

- a) **Competitiveness:**
Companies that operate in several countries of the EU encounter differences in licensing procedures. This means that the paperwork involved in exporting an item is complicated and may take an unnecessarily long time, due to having to comply with different rules in the different Member States. While comparing companies in the US and the EU, for example, European companies are being disadvantaged due to these difficulties, which drive up costs and prolong the time it takes to export, and therefore hurt competitiveness.
- b) **Security concern:**
There is an intuitive argument that too many strict rules in one country will simply push customers to buy from companies in a country with more flexible rules. If the importer acquires items for peaceful purposes, the hope would be that the rules for the exporters are not so complex that they prevent perfectly “safe” exports. However, if the importer seeks to use the imports for other purposes such as a clandestine nuclear weapons program, the hope would be that rules would not be so lax as to allow for such operation. A balance must be struck - the greater the harmonisation between EU Member States, the less the probability that dubious importers would succeed in acquiring the desired items.
- c) **Common risk assessment:**
An indirectly related obstacle to a common application is the lack of information sharing among Member States. Enhancement of the exchange of information would help preventing that Member States have different outcomes in risk assessments, and would avoid having “weak links” in the chain of European export controls.
- d) **Outreach:**
One must not forget that the EU’s enlargement policy is a powerful tool that should be used to strengthen export controls in countries willing to become Member States, i.e. Balkan States or Turkey. Harmonised export control licensing procedures increases the probability that candidate countries will implement Regulation 428/2009 effectively as well as bring their countries procedures closer to the EU standards.

Question 9: Do you think that the current EU dual-use control framework provides a level playing field for EU exporters? If not, how is any unevenness demonstrated? Please provide examples.

First, it is clear that exports depend on a number of variables that are independent from the EU dual-use export control framework, *e.g.* the strength of the currencies of EU Member States, demand for nuclear energy, political considerations and the nature of the individual exporter (a small company exporting one or two items or multinational firms). However, if it is assumed for the argument, that these specific factors are equal across EU Member States - the only difference being the implementation of the dual-use framework - it is evident that the present framework does not go far enough in providing a level playing field for exporters. The simple reason is that each country implements Regulation 428/2009 differently thus causing unevenness. This is manifest in the differences pertaining to the following factors:

- The time it takes to obtain a license;
- The cost of obtaining a license;
- The open question as to whether a license is eventually granted.

These factors, analyzed more accurately, are due to:

- Differences in the licensing procedures in each country;
- The structure and efficiency of the licensing body;
- Inter-agency review(s);
- Information-sharing (timely, accurate, and availability of relevant information at low cost).

Until these factors are harmonised among EU Member States, the industrial operators' playing field across the EU will remain uneven regardless of applicable dual-use regulation.

Question 26: Do you think that the criteria set out in Article 12 are clear and precise enough or not?

The description of the criteria of Article 12 is quite general. Nevertheless, the point made to the Member States is clear: States need to be vigilant in granting licenses in view of their existing international legal commitments and with special regard to the nature of the end-user.

In order to obtain better harmonisation of license risk assessment, the EU should aim at establishing more precise license assessment criteria. This concerns especially Article 12 c) and d) where reference is made to the Common Position 2008/944/CFSP related to the assessment criteria for military equipment (c) and, intended end-use and risk of diversion (d). The question is whether more detailed specifications should be adopted in the regulation (hard law), or whether the objective could be reached by soft law, *e.g.* by providing a user's guide adapted to the assessment of dual-use items and stipulating how could be assessed the risk of end-users and risk of diversion, by more information sharing, and entrusting the EU with a bigger role in consultation procedures such as on denied licenses.

Experience shows that the adoption of new legislation takes time and does not necessarily always reach better results in terms of harmonisation. Although amendments to Article 12 of the Regulation could be foreseen in the long term (legislation should not be too “restrictive”), the preferred immediate option is to aim at more harmonisation by way of non-legislative initiatives. Member States do not necessarily need new legislation on this matter, but they would benefit from more coordination and exchange of information. Initiatives that prove to be efficient in applying the Regulation could be later introduced in the Regulation (“bottom-up” approach). The role of the Commission could be extended with a view to achieve a more common risk assessment. However, the Commission is principally seen as a facilitating body and has no advisory role when it comes to license-assessment outcomes.

Question 27: Is there a need to harmonize to a greater degree the criteria used by Member States to assess export applications? If so, how?

There is indeed a need for more harmonisation, both for reasons of equal competition and for a better security control. There are several steps that could be taken in this regard:

- a) A common risk-assessment procedure regarding end-use and risk of diversion².
- b) More information sharing. This would not mean only information sharing on denials, but also frequent meetings and good communication between licensing officers of different Member States, thus facilitating an exchange of information on methods, best practices, opinions, interpretation of the law, of the list of dual-use items, etc. Encouraging a greater sense of community between the export control officials of the different Member States will inevitably lead to greater harmonisation. The European Commission has a coordinating role to play in this, notably:
 - By changing the language in the Regulation on the long run³ so as to be clearer and more specific, especially for Article 12 (d), and set up more precise guidelines for the auditing of companies.
 - By adopting a user’s guide adapted to exports of dual-use items in order to assist Member States in a harmonised implementation of Article 12. The user’s guide that already exists for military items could be therefore a source of inspiration.
 - By establishing a ‘facilitating’ role for the Commission in the consultation procedure between Member States in case of denials or sensitive license applications.
 - By entrusting, possibly, SitCen with a role of information sharing on destinations/specific end-users upon request of a Member State.

² See answer to question 40 for more details.

³ See question 26.

- c) The establishment of a list of sensitive countries (“black list”) is not advisable in the EU context. However, clear and specific EU sanctions based, in particular, on United Nations Security Council (UNSC) Resolutions (such as those on Iran or North Korea) contribute to achieving better harmonisation.

Question 40: What are your views concerning the establishment of a common approach to risk assessment, which would be used by all licensing authorities for the purpose of licensing procedures?

The actual assessment will continue to be carried out by Member States’ governments. It is unlikely that a central EU body would be set up in order to take over this governmental task. A decentralized system benefits, however, from closer contacts with industry and improved knowledge of local production.

Nevertheless, a formal technical body could be set up (or one could use the working groups and the pool of experts already in place, and assign them this particular task) to draw a user’s guide for a common risk assessment for dual-use goods⁴. It would be a challenge as to availability of resources, coordination and brainpower to develop an effective method of risk assessment that would yield significant long-term advantages for the dual-use framework. Such a system would require a large amount of accurate and reliable information based not only on practice of denials, but also on other information.

What?: The central question: what is the risk stemming from a particular export?

How?: What elements should be analysed /taken into account?

- Nature of the item involved;
- Importing company;
- Country of importing company;
- Infrastructure; level of development of the company(ies) involved;
- Political/security context of importing country;
- Export controls in importing country.

The technical body would come up with elaborated and detailed description of what should be considered, how it should be done and would set up standards to assess the risks of specific exports.

⁴ See also question 27.

Theme: Intra-EU Controls

Answers to questions 50, 51 and 52

(50) Would you support the idea of replacing license requirements for intra-EU transfers with a post-shipment verification mechanism?

It appears that the post-shipment verification mechanism would be more complicated than the existing licensing system. The operators would be required to register all the intra-EU transfers, prepare reports about the transferred goods and their transactions to the licensing authorities. The commonly perceived lack of trust between the Member States makes such a system difficult to imagine or if introduced, it seems a heavier administrative burden would be imposed onto the companies involved. The post-shipment verification system on the other hand would change the existing licensing regime, and would remove the approval rights, the discretion of the Member States about the transferring transactions. This would certainly improve today's situation. Licensing procedures are the rule in all Member States, but obtaining a license may take considerable time in some Member States as compared to others, thereby hindering the smooth conduct of trade (including the free movement of goods) in the Single Market.

A disadvantage of the post-shipment verification mechanism would be that the administrative burden would not be effectively reduced. Some Member States' authorities are of the opinion that issuing an authorisation is less of a burden to the authority than verifying the shipment after it has taken place. Auditing the companies in the framework of compliance checks might need more resources and skilled staff, than issuing intra-EU transfer licenses. Moreover, such a post-shipment verification method would switch the burden from the transferring to the receiving Member State. So the recipient Member States might face a much bigger administrative burden, due to the fact, that a post-shipment verification mechanism involves the authorities of the receiving Member States' authorities to endorse the arrival of the goods transferred (similarly to the International Import Certificates). Another problem would be the verification of the transactions involving intangible technology, how an endorsement could take place for the authorities. A post-shipment verification model excluding the endorsement of the transactions by the recipient's authorities would be one preferred model. This would entail a great reliance on the transferring companies and give them greater liberty as compared to present system.

Besides further exploring possibilities for a post-shipment mechanism a quick solution would be to liberalize the transfer of non-sensitive goods and to keep the control mechanisms only for the very sensitive "Annex IV" items.

(51) Would you agree with the idea of replacing license requirements for intra-EU transfers with the introduction of certified end-users described above?

In general this would help the operators in conducting their transfers more easily. It could be an additional procedure next to the licensing. The certified company scheme could be used. However, in most cases such a system would still be an administrative burden for most of the certifying national authorities. It requires considerable efforts

and the incurring administrative costs are not negligible, moreover the administrative burden for companies in submitting to the certification procedure might be also considerable (e.g. security aspects, introduction of an ICP).

The main problem is due to the fact that Annex IV contains very diverse items and that the companies involved in their trade are very diverse as well. The system of certified end-users could be however a positive step if applied only for the nuclear sector (and nuclear items). It is not clear if the same regulation would work sufficiently well to cover chemical, biological or other regime items contained in Annex IV. That part of the list should in our view be deleted, as noted above

(52) Would you have any other ideas that would allow for a progressive reduction of intra-EU transfer controls?

- a) As a first step we recommend to reduce the number of items on the list in Annex IV keeping only the sensitive nuclear items. Eventually, the whole list should be deleted.
- b) We would further recommend introducing of EU general license for the remaining Annex IV. Items (validity only for intra-EU transfers) while maintaining the individual licensing scheme for certain very sensitive items, if there is a strong resistance from Member States (this should be eventually deleted). In the EU general authorisation, which should become the rule, a similar mechanism for registration, notification and reporting requirements could be imposed.

Theme: Catch-all controls

Answers to questions 18, 19, 46, 47 and 48

In general, it should be underlined that catch-all control is a flexible, subtle and useful instrument which gives Member States the possibility to put on a “yellow light” for industry. It also provides exporters with some additional time for a careful assessment of the potential export, rather than issuing an immediate denial.

The catch-all control should however not be understood as denial. The language of the relevant provisions of the Council Regulation (EC) No 428/2009 (in particular Articles 4, 8 and 13) is too general and sometimes ambiguous, which leads to major problems regarding equal application across the EU.

A need for a clear and common understanding of catch-all controls

Provisions of Article 4 are subject to various interpretations by Member States (some consider a catch-all requirement as a denial while other see it as a security measure to improve the control). In particular, wording of the Article 4, paragraph 6, on responsibility of other Member States to “give all due consideration” to a catch-all notification does not oblige them clearly enough to actually control the “caught” items. Practice of some Member States shows that when a Member State issues a catch-all notification, it could apply also in another Member State on the basis of a gentlemen’s agreement. However, some other Member States, after analysing the notified catch-all, may decide that they do not perceive the same level of risk and would not consider a need to apply the catch-all against their own exporters. Moreover, according to the Regulation, States do not even have to undertake the consultation procedure as envisaged in Article 13. Thus, there exists an urgent need for a harmonised interpretation of relevant provisions.

Effects of the current situation are that:

- There is no uniform application of catch-all controls across the EU;
- Proliferators may have access to goods and technologies prohibited by one or more Member State(s);
- The result is an uneven playing field for exporters.

This undermines the non-proliferation aims of the Regulation. The most disturbing result being the negative influence on mutual trust among EU Member States and their ensuing unwillingness to further coordinate export control policy.

Specific recommendations

A common understanding of a catch-all clause should undertake following measures:

- A national catch-all control should be valid in all Member States. This should include mandatory information dissemination to custom authorities of all Member States and consultations as envisaged in Article 4(7).

- The procedure of imposing a control on the items caught by another Member State and the consultation mechanism in such case should be clearly set forth (its validity, detailed information in a notification, obligations for other Member States, consultation procedure, dissemination of information to customs and industry).

These aims could be achieved either by amending the wording of the Regulation (hard law) or by including them in the EU Guidelines regarding the Regulation (soft law).

Enhanced role of intelligence and outreach to the industry

General recommendations regarding national practice:

- The above mentioned proposal would mean that a national authority informs its industry in the case a catch-all has been imposed by another Member State on its products. This requires the authority to know the industry, which may be challenging in light of the particular size of the industry. There could be also difficulties in reaching occasional dual-use exporters. However, production of the most sensitive dual-use items usually is, or should be of special interest of the authorities and their intelligence services. Hence it should not be a major difficulty to identify entities concerned.
- The outreach activities aimed at the industry would help the authority to better know its partners and their products. This would also contribute in order to improve cooperation with the authorities on the side of the industry, which is especially important in the context of Articles 4(4) and 4(5).

Enhanced common risk assessment through the use of information contained in the catch-all notifications

There is a need to converge the risk assessment of all Member States. This could be achieved by a thorough analysis of the information contained in the catch-all notifications (exporters, consignees, end-users, end-use purpose).

The information obtained from the catch-all notifications could provide elements for a database with efficient search engines, which would be used by Member States' licensing and intelligence authorities in conducting risk assessment of new application. This would facilitate the dissemination of information and contribute to a decrease of uncertainty in the process of licensing and more convergent results of the risk assessment by the Member States.

One of the EU bodies (SitCen, the Commission, the EEAS or other) could be also tasked to provide the Member States with analyses based on the database concerning end-users, risk profiling, trends in licensing, etc. The analyses would not be binding in any sense and would serve only for informative purposes of the Member State.

Avoid the risk of over-control and strive for less burden on the exporters

Any improvements to the functioning of the catch-all controls in the EU should take into account the question of competitiveness of the European Union industry and should not lead to overregulation. Due attention should be also given to more permissive legal regulations applied to exports by other States.

Since there is no centralised monitoring system for national catch-all authorisations (there is only a database for catch-all denials) a central focal point within the EU could be possibly set up in order to remedy the situation. Such focal point would provide a database of the national catch-all licenses and denials which would serve as a stimulus for the Member State to observe other Member States' catch-all controls and provide a level playing field for the exporters. The focal point would distribute the information to national authorities and keep a database available to them.

Theme: Transit and brokering controls

Answers to question 22

Transit

Two points should be raised here concerning the definition of transit *per se*. The first is a fundamental one and concerns what should be considered transit under the dual-use Regulation. It would seem that the transit definition in Council Regulation 2913/92 or Community Customs Code (CCC) as it is known, differs from the definition set out in the dual-use Regulation. Questions such as when a given transit procedure should be interrupted and replaced by a procedure for re-export must be interpreted homogeneously by all Member States. It is not surprising that for instance in the case of a change of destination of a dual-use good in transit or of a change of means of transport (trans-shipment) there are different perceptions not only among Member States but also - in some cases - between the licensing and the customs authorities⁵. Any misunderstanding originating from different interpretations can be eliminated if a broader definition of transit is introduced at the EU level.

It must also be said that the CCC contains a number of provisions related to transit of Community and non-Community goods and, therefore, some “grey areas” regarding transit provisions of the dual-use Regulation that might or should be interpreted on the basis of the CCC. For instance, Article 36a of the CCC provides that “goods brought into the customs territory of the Community shall be covered by a summary declaration, with the exception of goods carried on means of transport only passing through the territorial waters or the airspace of the customs territory without a stop within this territory”⁶. Moreover, the dual-use Regulation refers itself to the CCC for the definition of other relevant customs procedures such as the export and re-export.

Second, it seems that there is an effort of the legislator to “narrow” the scope of the transit controls of listed items in cases with a primarily WMD application since the transit of dual-use goods may be prohibited “[I]f the items are or may be intended for use in WMD application”. Although such a condition is logical for non-listed items, it is not appropriate for the listed dual-use items, which have by definition a potential military use. However, the scope of the transit controls is rather focused on the most risky cases, *i.e.* WMD application as described in Article 4(1). This fact may reflect the providence of the legislator regarding the acknowledged difficulty of conducting transit controls for a wide range of shipments.

A third remark has to do with the nature of the transit provisions in the current dual-use Regulation. Article 6 “establishes the possibility for Member States to submit on a

⁵ This is also a consequence of the absence of the “on the ground” perception of the enforcement officers in the drafting of the EU and national legislation and of the inadequate in some cases co-operation between different agencies within a Member State.

⁶ Although the Article 36a means that the transit by ship and airplane through the Union’s territory without a stop is not controlled, there are possibilities for Member States to stop the transit if there strong grounds for suspicious transports. The Proliferation Security Initiative (PSI) for instance is a non-legally binding tool which predicts however in exceptional cases the stop/control of a suspicious ship/cargo even in the international waters.

case-by-case basis a transit operation to authorisation” and also provides the opportunity for other national measures (e.g. catch-all possibility) pursuant to effective control of dual-use in transit. Therefore, it does not appear to be possible to achieve a harmonised application of transit provisions considering that transit authorisations or prohibitions are legally binding in the issuing Member State only⁷.

Implementation of controls:

The second step in analysis of the functioning of the current EU transit control system is the examination of the implementation of the legal provisions, which as is the case with almost all provisions of the dual-use Regulation lies in the hands of Member States.

Generally, all items brought into the territory of the EU are subject to customs supervision until assigned a customs treatment or use⁸ (Article 37 of CCC). Since 1st January 2011, an entry/exit summary declaration is mandatory for goods entering and exiting the -territory. This requirement can facilitate transit controls since this summary declaration provides the basic information on the transaction (e.g. country of origin, consignee, HS code, value, destination), which is essential for the electronically automated risk management process. During this process the nature/sort of items, the accompanying documents and especially the end-use, and the end-use destination are controlled and verified and, in case of a suspicious transit further investigation can be made. At this stage a transit or re-export authorisation can be required depending on the nature of the transaction (e.g. a few Member States consider that the transit procedure is interrupted in case of a change of destination and a re-export license should be required with all the ensuing legal consequences). In case of a transit prohibition there are essentially 5 scenarios (release to free circulation, movement to another member-state, re-export to the country of origin, re-export to a non-sensitive country and destruction of the items), which are not all equally applicable, meaning that it rests on the discretion of the competent authorities to decide on the most appropriate solutions. Possible action of the owner or transporter of such items can be as follows: either appeal against the decision, acceptance of the decision, or no response.

The implementation of the transit controls, which are summarily described above, might involve a number of practical problems that should be handled in a common way at EU level. The Commission’s guidelines that are currently being drafted might provide answers to the main challenges involved in the implementation of transit controls.

⁷ See also “The European Union Dual-Use Items Control Regime: Comment of the Legislation: article-by-article”, Pr. Dr. Quentin Michel, Liège, August 2011, Article 6 EU-dual-use Regulation, p. 45.

⁸ “There are generally five possibilities for a “Customs-approved treatment use of goods”:

- (a) the placing of goods under a customs procedure;
- (b) their entry into a free zone or free warehouse;
- (c) their re-exportation from the customs territory of the Community;
- (d) their destruction;
- (e) their abandonment to the Exchequer.”

We tried also to outline the most important problems concerning the implementation of transit controls, namely:

First of all, the detection and the physical inspection of goods in transit present some special difficulties. Any decision to open or unload a shipment in transit must be based on reliable information; otherwise it may cause unjustifiable transaction costs to licit transports or even lead to legal consequences for the customs officers involved. In addition, the extreme amount of cargos trading every day and the peculiarities of transit controls (*e.g.* limited time for the inspection, need for strong back-up from intelligence agencies) can give an idea of the difficulties involved in the detection of an illegal transit. A high level of inter-agency co-operation, a timely access to quality information and an efficient information exchange between Member States can much enhance the effectiveness of transit controls.

Some other controversial issues are:

- Who will be the addressee of a transit authorisation or prohibition?
- What if the addressee of a requirement is established outside the EU?
- Who will bear the cost of storage for intercepted items?
- What about the duration of retention of a shipment?

The CCC can provide some answers to the above questions but a common approach to these issues at the EU level may be far more appropriate for the functioning of a harmonious and reliable EU export controls system.

Conclusion:

Bearing in mind the provisions, the shortfalls and the potential solutions of the EU transit control system it is appropriate to emphasize here some more general conclusions so as to better target the relevant questions of the Commission's Green Paper.

First, it seems that there is no reason to extend the scope of transit controls to cover transactions from the EU to third countries. The dual-use Regulation, the CCC and the national legislation set out by the EU and the Member States respectively, adequately regulate the different transit cases. What could be useful is the amendment of the transit definition in the dual-use Regulation in a way that encompasses the most common transit cases in order to avoid any confusion or conflict with the Community customs law.

However, the transit controls "suffer" from the same problems that are encountered or even characterize the entire EU export control system for dual-use goods. What we mean is that, for instance, the limited territorial validity of transit authorisations and prohibitions can undermine the "no-undercut principle" since a transit cargo may be allowed to be exported from one Member State while a similar case has already been prohibited by another Member State. In some cases it has been noticed that the transit of one cargo may need multiple export authorisations provided by different Member States.

Transit controls as described earlier, allow by their very nature the non-equal appliance of controls at national level. Further bearing in mind that transit controls rely heavily on information exchange and inter-agency co-operation, high quality/level of information exchange (*e.g.* at formal level through the dual-use

exchange system DUES) between Member States and with the Commission is arguably a prerequisite to achieve an optimal functioning of the system. Another relevant domain is that of risk management: the establishment of common criteria and approaches for the assessment of different cases could be particularly useful for the detection of suspicious transit cases.

To conclude, it should be underlined that the limited territorial validity of transit prohibitions is an obstacle in the build up of a harmonious system, as is the case with the “ordinary” catch-all prohibition for the export of dual-use goods. Finally, compliance with the consultation/information procedures referred to in Articles 13 and 19, combined with the establishment of a common risk management process could ensure fruitful results of the efforts undertaken for a more effective and homogeneous export control system for trade in dual-use goods.

Brokering

Currently, there seems to be no need to extend the scope of brokering controls to transactions undertaken from the EU to third countries. The following paragraphs explain in some detail the reasons for this assessment.

Considering a low number of upcoming cases in several Member States, brokering controls are not relevant in practice as compared to the other licensing export control burden. Moreover, Member States that extended the European export control provisions by implementing further national controls, with reference to Article 5 (2) and (3) of the EU Regulation, do not have necessarily more brokering cases for control than countries that have not implemented the extended controls.

The introduction of additional controls for brokering is not considered being necessary since the brokering activity would be already sufficiently covered in the framework of the export control licensing process and by a common export authorisations. A further control could create confusion, if a double licensing authorisation is required. This would be unnecessarily time-consuming for the actors engaged and would increase the administrative burden.

Although, taking into account some reports and discussions with Member States one may conclude that the main objective of brokering controls might be deterrence. It is however evident that the main instrument for deterrence is provided by the existing sanction system. Its implementation remains in the competence of Member States, which should be encouraged to introduce penal provisions in their relevant laws considering that only few countries have implemented such provisions or are currently discussing their introduction.

In addition it is necessary to take into account the difficulties of detection of brokers. The working area of brokers seems to be fairly unknown to most authorities that never follow up corresponding cases. We therefore do recommend the introduction of a register of brokers. Very few countries, such as Bulgaria, have so far introduced

such register⁹. However, it is important to note, that a register does not appear to be useful since even registered brokers can easily act from abroad, outside the EU, which would not be covered by the regulation.

Information exchange is an appropriate instrument to discuss cases and keep Member States with less relevant experience informed about possible developments within the EU. Such exchange of experience even between national authorities concerning their specific challenges in this matter may be sufficient to improve controls.

Finally, key definitions of terms contained in Article 5(1) of the dual-use Regulation such as “being informed” and “being aware” remain unidentified. This leads to different interpretations of these concepts by the individual Member States. Some Member States also ask for a more extensive harmonisation of terms “broker” and “brokering activities” since national legislations adopted in other EU Member States are rather confusing.

⁹ “The European Union Dual-Use Items Control Regime: Comments of the Legislation: article-by-article”, Pr. Dr. Quentin Michel, Liège, August 2011, Article 5 dual-use Regulation, p. 43.

Theme: Information exchange

Answers to questions 41 and 42

The importance of information exchange for the consistency of the EU export control regime is hardly disputable. This issue is essential for almost every aspect of common trade policy and, more particularly, for the harmonised approach thereto.

Hence, the question of information exchange could be analysed in two parts.

Primarily, a scope for general enhancement of information sharing should be analyzed. It should be emphasized that main difficulties stem from the degree of specification of the shared information rather than from its availability. Numerous discussion forums on both international (export control regimes, international organisations) and EU (Dual-Use Working Group, Article 23 Coordination Group) levels are presently available to authorities involved in export control policies. However, there is a clear necessity for better coordination between Member States, which is hardly possible without a common repository of sensitive information.

Recently, the Commission has established a denial database accessible to national licensing authorities and, for the most parts, for the Customs. We are very much in favour of this initiative and would like to propose to enlarge the scope thereof. Indeed, it could be relevant to integrate a new functionality to the aforesaid system, thereby expanding it to catch-all notifications. Actually, the current approach on information sharing mainly focuses on the ex-post analysis. In other words, Member States will share the information on denials, which have already been issued. Therefore, we suggest to add a proactive component and introduce ex-ante information sharing of catch-all.

Moreover, the Member States might also establish various types of watch lists meant to raise the vigilance of national licensing and customs authorities. Accordingly, a watch list of sensitive destinations and that of suspicious end-users could be envisaged. Even if such lists should imperatively be available only for the 27, we are aware of numerous difficulties that this initiative might entail. In particular, a consensus of all Member States on a watch list of sensitive countries would be undoubtedly very hard to achieve. Given that this issue includes considerations related to national external trade and foreign policies, it might be more appropriate to focus on an intra-EU database on suspicious end-users/exporters. In order to increase the added value of this database, national industries should also be involved in the establishment thereof.

As concerns the practical and timely aspects of the enforcement of information sharing mechanisms, we recommend to explore the idea of creating a comprehensive table of the different types of information to be exchanged. Such table would take into account the specificities and priorities of the risks, such as the fight against the WMD proliferation, the counter-terrorism, the essential security interests of one or more Member States, the protection of human rights and the compliance with international humanitarian law.

In addition, in order to settle precisely which categories of data should be shared, a common risk assessment has to be further investigated. However, before going into deeper analysis the main question to be considered is: “what is the risk”. The concept of “risk” is relative and principally stems from national policies of Member States. The risk-assessment exercise may cover different scenarios such as a WMD proliferation, a military end-use or a risk of diversion. The same reality might be assessed as “risk” or “danger” or even “threat”, depending on the level, the predictability of an event or the State that characterises this risk for itself.

While assessing a possible scope of pertinent risk assessment, we have focused on the elements listed in the following, thus completing the model proposed in the Green Paper. Firstly, the actors involved (assessing the “who?”), with particular emphasis on suspicious destinations and dubious end-users, exporters and brokers. Secondly, the technical aspects (assessing the “what?”) in particular as regards the adequacy of the item or technology to be exported correspond with the stated end use. Finally, the contextual factors (assessing the “what for?”), including notably the measures outlined for the verification of the stated end use and the perceived risks of diversion. We consider that the EU information exchange model should imperatively address the aforesaid elements.

Given that the dual-use related matters constitute the exclusive competence of the EU, the role of the European Commission could be further formalised notably in order to reinforce information-sharing mechanisms. The Commission could therefore coordinate a new “task force” that would bring together the stakeholders directly dealing with the implementation of the export controls, such as national licensing and customs authorities and the exporters (since they already participate in IAEA risk-assessment missions). Moreover, we emphasise that, notwithstanding the particular nature of their mission and the absence of formal and legally effective connection to the dual-use trade controls, the intelligence sources are major contributors to any risk-assessment exercise. Hence, SitCen, that currently collects the information from national intelligence services, might feed risk-assessment efforts and discussions undertaken under the legislation and practices of dual-use trade controls, notably by answering questions provided on a case-by-case basis by the Member States and the Commission.

We express the opinion that a consensus on the definition of risks, which is *raison d'être* of information sharing, cannot be reached in practice as long as Member States do not possess or do not access to the same information for conducting their national assessments. Intelligence and commercially sensitive information remain two clear limitations to a harmonised approach of risk analysis. Use must be made, therefore, of any structure aimed at bringing information resources closer, even if these efforts rely on areas of exclusive competences of the Member States. Any effort to link the definition of risks with the objective of better controlling of sensitive trade should combine all relevant cooperation instruments established for either commercial or security purposes.

Concerning information sharing, we propose:

- To expand the scope of the existing information database to include information on catch-all applications;
- Not to consider establishment of a “watch list” of suspicious destinations, but rather to concentrate on exchange of information on dubious end-users and exporters;
- To establish a comprehensive table of major security threats and potential timelines for concrete application of ‘realistic’ information exchange mechanisms;
- To calibrate the information to be shared on the assessment of the risk implied (“who?”, “what?” and “what for?”) by trade of dual-use items or technology;
- To promote and/or create mechanisms for information sharing between the main bodies and stakeholders - both at European and Member States level - which would centralize information related to strategic trade and security.