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Cahier n°26 - International and European commitments to the export control of nuclear dual-use items: Do the European Union Member States have any room for manoeuvre?

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CONCLUSIONS

Although the acquisition and transfer of nuclear weapons and weapons of mass-destruction, in general, has been clearly forbidden by specific treaties, the fight against the indirect acquisition of these weapons lies on a diversity of norms, which are often difficult to interpret.

According to the words of the Article I of the Non-Proliferation Treaty (NPT, 1968), which is the main international legal norm ¹ dealing with the spread of nuclear weapons, "*each nuclear weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices*". One may pragmatically notice, at this stage, that not only the nuclear-weapon States ² are able to contribute to the proliferation of these weapons. Non-nuclear-weapon States may also, depending on their respective technological advances. Therefore, Article II of the NPT embraces this possibility and "locks" a maximum of scenarios, stating that "*each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices*".

If the direct transfers of nuclear weapons are clearly forbidden by these two articles of the Treaty, the challenge thus remains to define the potential situations embraced by their "indirect" transfer or acquisition. A first element of answer is brought by Article III.2 of the NPT, stating that "*each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article*".

A few observations shall be made, at this stage of the reflection. First, this provision concerns all the parties to the Treaty, notwithstanding their status of nuclear (NWS) or non-nuclear weapon States (NNWS). Its vocation is thus universal, in the limits of the universality of the Treaty itself. Then, it deals with sources, materials and equipments that may be considered as direct components of a nuclear weapon. The "indirect" transfer of acquisition of these weapons encompasses, rather logically, its constitutive and necessary components. However, if a central term for the description of

these components is “*especially designed*” for a use in nuclear weapons, the question remains for the elements – which does not apply to materials because they may, by definition, “fuel” both peaceful and non-peaceful activities – that are not primarily designed for the construction of a weapon, that have both peaceful and non-peaceful applications, and which are commonly referred as “dual-use” items. The last observation that shall be made is that the transfers – referred to as “provisions” – of these materials and equipments are not banned by Article III.2. They are only limited by the condition that such items remain under applicable safeguards despite their transfer to another entity. This article of the NPT is important because it submits the trade to controls, aimed at preventing the spread of the weapon. However it allows the emergence of a nuclear trade, which is a *sine qua non* condition of the “democratization” of the benefits of peaceful nuclear applications. As a general requirement, indeed, the application of these controls shall “(...) *avoid hampering the economic or technological development of the Parties or international co-operation in the field of peaceful nuclear activities, including the international exchange of nuclear material and equipment for the processing, use or production of nuclear material for peaceful purposes (...)*”, under the words of Article III.4.

If the NPT, despite the threat represented by the direct components of a nuclear weapon, allows their trade, does that mean that the dual-use items are a less important threat for the proliferation of nuclear weapon and that their trade shall not be constrained? Obviously, the threat represented by the transfer of dual-use items is measured by the intended end-use of these items. Therefore, their trade cannot be defined, neither as a threat nor safe, *a priori*. The NPT itself does not address this dilemma. However, other international legally binding norms have confirmed the feeling that the trade of such politically sensitive items represents a potential threat to global security.

“If for common goods and services, such as textiles, air transports, telecommunications, lifting trade barriers appeared necessary in order to establish an international trading system, it was also acknowledged that other goods and services, notably weapons and dual-use items, could not be considered as ordinary goods and for political reasons had to be submitted to or maintained under the national restrictive measures”³. Therefore, an exception has been introduced in the General Agreement on Tariffs and Trade Round (GATT) adopted in 1948, allowing participating States to maintain or adopt national restrictive measures with respect to certain items or transactions if motivated by the protection of their “*essential security interests*”:

- Specifically in the nuclear area if “relating to fissionable materials or the materials from which they are derived”;
- Less specifically if “relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment”;
- And generally, “to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security”.

The Treaty on the functioning of the European Union (EU), implementing indirectly Article XXI, has included a similar exception allowing Member States to restraint trade exchanges between themselves (Article 36) and toward third States (Article 346). The European Union is, to some extent, an intermediary level between the international and the national ones. Historically, its primary *raison d'être* was economical and the trade policy is its exclusive competence. However, it progressively demonstrated along its construction process its intention to become a true player of worldwide security and now shares some competences in this field with its 27 Member States, which still hold their sovereignty as the source of the Union's influence on the international stage.

Pressed by both their international and European commitments, do the EU Member States still have a room for manoeuvre for the regulation of their nuclear dual-use items' trade? Formulated in an other way, how the Member State can legally conciliate their national economic interests in the worldwide competition with the necessities of a global security?

This reflection will approach this head question through three different stages, corresponding to the three sections of this paper, keeping in mind the picture of Russian dolls, which, hopefully, fit one in the other. This will also be an opportunity for playing with the, rather extensively discussed, concepts of “soft law” and “hard law” and see where the export control of nuclear dual-use goods and technologies may fit in the debate.

The first section will consist in describing the guidelines in this area, provided at the international level, and analysing the forces that are playing inside its borders for – and also against – a greater role of the Union on the international stage. The second one will consist in presenting the concrete

implementation of these commitments and analysing the mutation of the legal strength of these provisions with regard to distinction soft-hard law. The third and final one will consist in going through and analysing the room for manoeuvre left to the EU Member States, notably through an illustration by the French export control system, for conciliating security with economical interests.

I. THE INTERNATIONAL REGULATION OF THE NUCLEAR DUAL-USE ITEMS TRADE: “SOFT LAW”

I.1 THE INTERNATIONAL AMBITIONS OF THE EUROPEAN UNION IN THE AREA:

The European Union is a complex actor in the international society. It is not a State, even though it has its own legal personality since the Lisbon Treaty (Article 47 of the Treaty on the European Union), its own borders and citizenship. It is not a classical international organisation either, since its object is general and encompass all the activities normally dealt with at the level of the States. It is active in economical, social, environmental, justice and foreign affairs, notably, and has the power to constrain its Member States in some of these areas through legal acts that prevail on national legislations. The progressive integration of the policies is pursued in different ways, according to the “sovereign” character of the policies. Since its legitimacy for acting in a certain area is conferred by its Member States, through the fundamental treaties, the Union’s ray of action in classical States’ privileges is more limited. In foreign affairs, including security and defence-related issues, the Union as a body sees its room for manoeuvre constrained by the will of the Member States themselves and the decision-making processes are classically intergovernmental. However, it shall not be made a rule out of this “sovereignty” criteria. Although justice and internal affairs are classical sovereign responsibilities of the States, in the international society, these areas have been progressively “occupied” by the Union and became integrated with the Lisbon Treaty which entered into force in January 2010. The currency also became integrated, since 2020, although classically seen as a sovereign area of the State.

The European Union may be characterised, therefore, as a *sui generis* international organisation in which integration progresses, even in the area of foreign and security policy while a European External Action Service is expected to represent the Union at the international level, but ceases ground to *intergovernmentalism* in specific areas such as those related to the security of the Union and its Member States.

The non-proliferation of weapons of mass-destruction and subsequently the spread of nuclear weapons is, logically, a component of the perception by the European Union of the threats to its security. Even though security and defence are primarily the sovereign responsibilities of the Member States of the Union, as stated above, it is interesting to look at the strategic provisions adopted at the European level in order to get a clear picture of the international commitment of the Union to the non-proliferation of the WMD.

In 2003, the EU, composed by 15 Member States but having already in mind its enlargement to 10 former Warsaw Pact and 2 Mediterranean countries, made an attempt to define and write down the strategic threats it considered as crucial for its security, as a sign of its consensus and a strong signal of its cohesion to be sent to the rest of the world. Even though oppositions existed among the Member States and acceding States about the *bien fondé* of the participation to the invasion of Iraq at this precise time, they managed to get over their differences and agreed, certainly at the most difficult time, on a certain number of threats and their definitions at the Thessaloniki European Council meeting in June 2003. The European Security Strategy (ESS), entitled “A secure Europe in a better world”⁴ as a signal of their ambition to take an active part in the pursuit of the global security, was finally adopted as a common strategy by the heads of States and Governments in December 2003. The document is not legally binding itself since it is a strategy and that it has been drafted by the Institute for Security Studies of the EU⁵, the scientific body of the EU on areas related to security and defence, but the context of its adoption and its scientific origin make it a reliable base for investigating the perception of threats by the Union and, subsequently, its commitment to solving the issue of the proliferation of WMD.

The provisions of the ESS are rather generic, which may be considered as a weakness for the message it aims at spreading to the world but which is usual for a description of threats at a strategic level. The proliferation of WMDs is the second threat⁶ in the list and it is interesting to read that the EU considers it, through this document, as being “potentially the greatest threat to (its) security”. Furthermore, it stressed the fact that “the international treaty regimes and export control arrangements have slowed the spread of WMD and delivery systems”⁷. Within the ESS, therefore, the European Union affirms its commitment as a coherent entity of and in the international society to cope with the proliferation of these weapons at a worldwide level and emphasizes the

adequacy and needs for international coordination as the solution.

The Union even went further on this issue than the single and rather generic approach of the ESS. The same day the latter one has been finalised, the European Council also endorsed a specific strategy named "EU Strategy against proliferation of Weapons of Mass-Destruction" ⁸. It must be noted, at this stage, that it was at this time the only threat, among the five identified by the ESS, for which a specific strategy has been designed and adopted. In this document, the EU develops its vision on this specific challenge and the means for handling it. To this respect, it stresses three key ideas along its text:

- The Union seeks universalisation of the treaties and the provision agreed on by the regimes;
- Actions may be undertaken by the Member States or the Union but always in a multilateral framework;
- The action must be comprehensive and promote stable international and regional environments.

The Strategy also goes more into details regarding the indirect threat posed by the trade of items which might be used for a non-peaceful purpose. The objectives of the Union are: "*strengthening export control policies and practices in co-ordination with partners of the export control regimes; advocating, where applicable, adherence to effective export control criteria by countries outside the existing regimes and arrangements; strengthening suppliers regimes and European co-ordination in this area*" ⁹. Concretely, these objectives are to be pursued in ¹⁰:

- *Making the EU a leading co-operative player in the export control regimes by co-ordinating EU positions within the different regimes, supporting the membership of acceding countries and where appropriate involvement of the Commission, promoting a catch-all clause in the regimes, where it is not already agreed, as well as strengthening the information exchange, in particular with respect to sensitive destinations, sensitive end-users and procurement patterns;*
- *Reinforcing the efficiency of export control in an enlarged Europe, and successfully conducting a Peer Review to disseminate good practices by taking special account of the challenges of the forthcoming enlargement;*
- *Setting up a programme of assistance to States in need of technical knowledge in the field of export control;*
- *Working to ensure that the Nuclear Suppliers Group make the export of controlled nuclear and nuclear related items and technology conditional on ratifying and implementing the Additional Protocol;*
- *Promoting in the regimes reinforced export controls with respect to intangible transfers of dual-use technology, as well as effective measures relating to brokering and transshipment issues;*
- *Enhancing information exchange between Member States. Considering exchange of information between the EU SitCen ¹¹ and like-minded countries.*

The international political commitment of the European Union for the fight against the proliferation of WMDs through the control of the trade of material and dual-use items may thus be characterized as public and strong. However, one may wonder if these intents are followed at the sub-European level, meaning the Member States', as they are the roots of the legitimacy of the Union's actions in the field of international security. Is the European Union a coherent actor in these international instruments established for the fight against proliferation?

First of all, it must be said that the legal status of the EU *vis-à-vis* the international community is a limitation for its ambition as stated in its strategies. As it is not a State, it is not entitled to become of full party to the NPT. In the same way, the EU is not a member of the United-Nations either and, even though the EU has already set provisions for the export control of dual-use items and may be thus considered in compliance with its Paragraph 3, is not comprised at first sight in the scope of application of UN Security Council Resolution 1540(2004) which applies to States only. It is not represented as such in the Security Council Committee for the implementation of the Resolution 1540 ¹² ("1540 Committee") but it undertook to organise technical assistance outreach activities, complementarily to the activities of the Committee. Since 2005, the European Commission has given mandate to the German licensing authority (BAFA) for organising this assistance in the building and implementation of dual-use goods export control systems ¹³.

All EU Member States have ratified or acceded the NPT ¹⁴. Only Spain, in 1987, and France, in 1992, have acceded the NPT after their entry into the Union, notwithstanding the Member States of

the Union which ratified the Treaty at the time of its conclusion. Furthermore, bearing in mind the particularities of France and the United-Kingdom being nuclear weapon States ¹⁵, all the EU Member States have placed their nuclear material and activities under the safeguards established by an Additional Protocol of INFCIRC/540 type ¹⁶. Regarding non-proliferation and non-diversion of its material, the European Union presents then a certain unity, which is reinforced by a regime of common ownership of the nuclear sources under the hat of Euratom ¹⁷. Regarding the export control, and more specifically the export control of dual-use items which may be integrated in the manufacturing of a nuclear weapon, the Union also sets this unity as a principle. All Member States, indeed, participate to the Nuclear Supplier Group (NSG) ¹⁸, the forum where the 46 main international producers and exporters of nuclear dual-use items meet, and the European Commission participates as an observer. If this demonstrates the unity and weight of the Union, the latter has no right of vote. This over-representation of the EU with 28 seats may be in position to create confusion. In 2008, indeed, when the issue of the Indian exception to the application of the guidelines of the NSG came to the suppliers' plenary meeting, two EU Member States, Austrian and Ireland showed remarkable reluctance for adopting the exception that was proposed. As such, the European Union and, seating at the table, the European Commission, were not able to define a common line and to speak from one voice ¹⁹. The representation of each State individually may be seen therefore as a source of confusion but cases like the Indian exception are in position to perpetuate this over-representation as none of the Member States would be willing to see its own position not taken into account in the debate.

Regarding the means of delivery of the weapons, which are completely integrated into the non-proliferation challenge, it must be noted that "only" 19 EU Member States, out of 34 participants ²⁰ are represented at the Missile Technology Control Regime (MTCR) ²¹. The EU, therefore, has the keys for weighing on the decisions adopted by these regimes, but only through its Member States.

I.2 THE INTERNATIONAL PROVISIONS IN THE NUCLEAR DUAL-USE ITEMS EXPORT CONTROL

The Nuclear Supplier Group was set up in 1992, as a continuation of the London Club founded in 1985. Its creation has been motivated by the refusal of France to join the NPT at the date of its conclusion and its subsequent refusal to take part to the Zangger Committee, which aimed at developing lists of items suggested by the words of Article III.2 of the NPT. However, the NSG quickly imposed itself not only as a duplication of the Committee in an other configuration but brought an added value to the fight against the proliferation of nuclear weapons in setting for the first time specific guidelines for the export of nuclear dual-use items. In the framework of this reflection, no specific analysis of the "Trigger List" - *i.e.* nuclear material which "triggers" the application of safeguards according to the NPT - will be made and the focus will be on the dual-use items provisions.

The NSG members agreed on the fundamental principle that their exports of listed nuclear dual-use items shall be submitted to authorisation, in accordance with their national legislation.

The list on which they agreed and which is attached in annex of the guidelines is divided into six sections: "industrial equipment", "materials", "uranium isotope separation equipment and components", "heavy water production plant related equipment", "test and measurement equipment for the development of nuclear explosive devices" and "components for nuclear explosive devices".

Concretely, the decision of the national authorities to grant or deny the export authorisation shall be based on a certain number of conditions, which are objectives requirements that can be verified, and criteria, which are subjective requirements left at the appreciation of the authorities.

As of conditions, the national authorities receiving an application for an export authorisation shall request the following information ²²:

- A statement from the end-user specifying the uses and end-use location of the proposed transfer;
- An assurance explicitly stating that the proposed transfer or any replica thereof will not be used in any nuclear explosive activity or unsafeguarded nuclear fuel-cycle activity.
- An assurance that the prior consent of the export will be asked before any re-export to a third country of the item transferred;

As of criteria, the national authorities receiving an application for an export authorisation shall decide according to the following considerations ²³:

- Whether the recipient state is a party to the Nuclear Non-Proliferation Treaty (NPT) or to the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), or to a similar international legally-binding nuclear non-proliferation agreement, and has an IAEA safeguards agreement in force applicable to all its peaceful nuclear activities (“full-scope safeguards”);
- Whether any recipient state that is not party to the NPT, Treaty of Tlatelolco, or a similar international legally-binding nuclear non-proliferation agreement has any facilities or installations listed above that are operational or being designed or constructed that are not, or will not be, subject to IAEA safeguards;
- Whether the equipment, materials, software, or related technology to be transferred is appropriate for the stated end-use and whether that stated end-use is appropriate for the end-user;
- Whether the equipment, materials, software, or related technology to be transferred is to be used in research on or development, design, manufacture, construction, operation, or maintenance of any reprocessing or enrichment facility;
- Whether governmental actions, statements, and policies of the recipient state are supportive of nuclear non-proliferation and whether the recipient state is in compliance with its international obligations in the field of non-proliferation;
- Whether the recipients have been engaged in clandestine or illegal procurement activities; and
- Whether a transfer has not been authorized to the end-user or whether the end-user has diverted for purposes inconsistent with the Guidelines any transfer previously authorized.
- Whether there is reason to believe that there is a risk of diversion to acts of nuclear terrorism.
- Whether there is a risk of retransfers of equipment, material, software, or related technology identified in the list or of transfers of any replica thereof contrary to the principle of non-diversion of the items from their peaceful intents, as a result of a failure by the recipient State to develop and maintain appropriate, effective national export and transshipment controls, as identified by United-Nations Security Council Resolution 1540.

Additionally, the NSG agreed on an other important provision for the comprehensiveness of its approach, aimed at broadening the spectrum of the control over proliferation risks. The participating States are required to implement according to their domestic legislation a mechanism that “ensures that their national legislation requires an authorisation for the transfer of items not listed if the items in question are or may be intended, in their entirety or in part, for use in connection with a “nuclear explosive activity”²⁴. The participating States are encouraged to share information on the denials issued on the basis of such “catch-all” clause.

The NSG is not an international organisation but a forum of “good will”, sharing best practices and a common understanding of the requirements that shall be imposed on the trade of these sensitive items in order to avoid proliferation. To this regard, the legal strength of the provisions agreed on do not come from the NSG itself but from the implementation that is undertaken by the participating States of these provisions. No legal sanction is attached to the outcomes of these meetings but, on the political level, the participating States may cease their cooperation with one of their partners which undercut the realisation of the objectives of the NSG, for example in granting an authorisation for an export similar to an application denied in an other NSG State. To this end, the NSG decisions may be seen as confidence-building measures for a sound competition between the main producers of nuclear items and, behind them, their industries.

The NSG is not an international export control regime, either. Indeed, it does not meet the three cumulative characteristics of such regime, which are: an authorisation requirement for the trade of these items, a control and verification regime of the non-diversion, and a system of sanctions for the infringement of the rules. In the case of the NSG provisions, they apply only to the States, which voluntarily participate, and the control and verification remain, at the international level, the responsibility of the International Atomic Energy Agency (IAEA, hereunder also referred to as “the Agency”), which is also the only authority able to characterize the infringement triggering potential sanctions. Despite the fact that the NSG communicates the provisions it agreed on to the Agency in order to publish them and ensure predictability for potential recipient States²⁵, the provisions do not produce legal effect for third parties. The only possibility for direct sanctions by NSG participating States is the immediate termination of the trade connections. Therefore, it shall be stated, from the analysis of these guidelines, that the international guidelines for the export control of nuclear dual-use items have the characteristics of soft law for the States to which they apply and, in particular as will be developed in the next section, for the EU, leaving it with a rather important room

for manoeuvre in establishing an export control regime.

II. THE EUROPEAN UNION BY AND FOR ITSELF: “HARDER LAW”

If the guidelines agreed at the NSG level may be characterized as soft law, due to the political rather than legal sanctions attached to the respect of the provisions of INFCIRC/254/Part2, the European provisions for the control of the nuclear dual-use items' trade are undoubtedly “harder” in many respects.

II.1 FORMALLY, “HARDER LAW”

The European regulations, which are the instruments used in this area for legislating, are directly applicable to and in the Member States. It means that, unlike the international “legislation”, such as the treaties, no further enactment in the national legal order is necessary in principle. Article 288 of the Treaty on the Functioning of the European Union (TFEU) states that these acts constrain the European institutions, the Member States as well as the entities they address to, meaning individual and private entities, as soon as their entry into force takes place. Furthermore, the EU regulations are directly enforceable. It means that the national courts are required to rule the cases which they may know of according to the applicable European legislation contained in the regulations and that their appreciation of the law maybe challenged before the European Court of Justice if a party so requires. The capacity of the Court to decide about cases standing before it in the field of nuclear dual-use items' export control is very symbolic of the overall organisation of the European Union and the dilemma of the area itself since the Court is enable to judge on the basis of regulations, which legislate on Community matters (former first pillar of the European Union), but not on the basis of acts taken in the EU foreign security affairs, the second pillar. For the same topic, the competence of the Court of Justice will be determined by the consideration whether the case touches on international security aspects or on trade aspects. However, as introduced in the first section, the European provisions on nuclear dual-use items' export control issued under the foreign affairs umbrella are rather generic and, therefore, limit the risks of contradiction with “Community” provisions.

Even though the regulations are in principle directly applicable and enforceable, which distinguishes them from the European directives, further executive acts may be taken by the Member States if necessary. Indeed, according to their obligation of sincere cooperation and under the words of Article 4 of the Treaty on the European Union (TEU), “*The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union*”. The fact that the European Union has adopted regulations in the area of the nuclear dual-use items' export control, therefore, does not impede the Member States to have individual room for manoeuvre even though it formally restrains it in principle.

The European Union's system lies on two main acts: the Council Regulation 428/2009 of 5 May 2009²⁶ and the Council Joint Action of 22 June 2000²⁷. Since the latter one has a specific approach focused on technical assistance for certain military end-uses and that it has been agreed in the Common Foreign and Security Policy framework, this reflection will not particularly develop this aspect. The Council Regulation 428/2009 is not the first regulation touching on the export control of dual-use items in general. The first one was adopted already in 1994²⁸ by the Council. However, the Commission claimed at this time that the control of the export of dual-use items was primarily the area of the common trade policy and not of security exclusively²⁹. The European Court of Justice comforted the Commission in its opinion and invalidated the Council Regulation. However, the Commission investigated in details the state of the art of the export control systems in the Member States in 1997 and concluded that the coexistence of the different national regimes undermined the application of custom controls³⁰. Therefore, it started preparing a set of measures aimed at coordinating the Member States export control regimes, *i.e.* in harmonizing the different legislation, without standardising them, however. The Council Regulation 1334/2000 setting up a Community regime for the control of export of dual-use items and technology³¹ was therefore drafted and released as the first attempt to harmonize the national provisions. Despite its title, the Regulation was generic, meaning that it did not only limit itself to the definition of dual-use items and technology but included also the material contained for example in the trigger lists of the Zangger Committee and the NSG, to mention only the nuclear area. The approach of the Regulation was thus already generic in 2000. In 2009, this approach went from “generic” to “comprehensive”. The Council Regulation 428/2009, repealing Regulation 1334/2000, intends to set up a Community regime not only for the export of dual-use items and technology, but extends it to their brokering and transit as well. Nuclear dual-use items are thus only a small proportion of the scope of application.

The term of “regime” demonstrates the importance the EU attaches to this harmonisation. However, it may be improperly used in the meaning that the verification of its implementation and the possible sanctions to the infringements do not lie in the hands of the Union itself. Indeed, the European Regulation does not establish any system of sanction. According to Article 24 of Regulation 428/2209, “*each Member State shall take appropriate measures to ensure proper enforcement of all the provisions of this Regulation. In particular, it shall lay down the penalties applicable to infringements of the provisions of this Regulation or of those adopted for its implementation. Those penalties must be effective, proportionate and dissuasive*”. This article is important, at this stage of the reflection because it clearly stresses two ideas:

- The Regulation leaves the Member States with the responsibility of the control and verification of these harmonising measures;
- The Regulation is one of these regulations which need further implementation by the Member States.

As a consequence, the provisions of Regulation 428/2009 do not exactly fit the idea of a European export control regime, but shall rather be seen as essential components of a European export control system.

Formally, the European provisions related to the nuclear dual-use items’ export control do not reach the characteristics of “hard law”, even though they are undoubtedly harder than the international provisions set by the guidelines.

II.2 SUBSTANTIALLY, “HARDER LAW”

In their content, the provisions of Regulation 428/2009 have a level of detail that is close to the concept of “hard law”.

As regards the basic principles that drive the European export control system, a parallel must be drawn with the international guidelines that were presented in the first section. The intent of the European Union in this area, and in the nuclear dual-use especially, is to implement the provisions agreed on at the multilateral level. Nevertheless, the EU brings into the area its own specificity and vision about the challenges derived from the non-proliferation of WMD. The principle of the requirement of an authorisation for dual-use items remain the key concept. Unlike the military items for which the principle is the ban on the export and the exception is the authorisation³², the export of dual-use items are authorised in principle and the ban is the exception. This requirement, like it has been described with the NSG guidelines, is connected with the publication of lists of items. However, in the Regulation 428/2009 - and before that within Regulation 1334/2000 - the European list is an effort of comprehensive compilation of all the lists adopted by the international export control fora: Wassenaar Arrangement (arms), MTCR (ballistic), NSG (nuclear), Australia Group (biological) and Chemical Weapon Convention (CWC, chemical). It must be reminded, at this stage, that some of these lists - owing to the fact that some of the Member States do not participate to all these fora³³ - found thus a way to apply to originally-third States. Despite the title of the Regulation, as it has been briefly introduced earlier, not only the dual-use items lists are integrated into the European list, but also, in the case of the nuclear items, the “trigger lists”³⁴. For these reasons, the European list that provokes the requirement of an authorisation for export is structured in 10 categories, instead of 6 only for the NSG. The list is the Annex I - an integral part therefore - of the European Regulation and, since it is detailed and shall be considered exhaustive, it binds the Member States, which have no room for interpretation: either the considered item is in the list and a licence shall be applied for, either it is not and the principle is that no authorisation is required. In the course of the current reflection, the European inclusion of the international lists is fundamental. The EU Member States are now bound by the lists although they were related only to guidelines, when describing them at the international level. These lists, through the EU intermediary, became hard law for the Member States although they were only soft law, originally.

One of the main improvements of the Regulation 428/2009 compared to Regulation 1334/2000 has been the extension of the scope of application of the controls to movements other than exports, as suggested by their respective titles. In 2000, already, the European Union had introduced the distinction between exports (to third-countries) and transfers (intra-Community) in order to emphasize the importance of the internal area of trust and free trade for the Union. As mentioned earlier the Union had also left in 2000 the idea of including the supply of service or transmission of technology which would involve cross-border movements of person to the responsibility of the Common Foreign and Security Policy, as they must be seen as components of the cooperation between the Union and third-States in the area of security and defence. These aspects, therefore, are regulated by the Council Joint Action of June 2000. In 2009, the Union added also the external

transit of goods and the brokering to this pre-existing ground. Therefore, it is going further beyond the limited scope of the NSG guidelines.

In the Article 2 of Regulation 428/2009, the term “export” includes, apart from its common meaning, also the re-export of the item or technology and, coming to this latter element, the intangible exports, meaning the transmission of technology or software through electronic media, which are more difficult to control in practice. The key principle, under Article 3, is that any export of item listed (in the Annex I) shall be subjected to authorisation, similar to the NSG provisions. The exporter must therefore address his national authority for such authorisation granted in the form of a licence. In the European Regulation, the “catch-all” concept may be also found but it has been developed:

- The EU Member States may impose an authorisation requirement for items not listed if there is a risk that the item to be exported may be diverted to a WMD programme (Article 4.3, similar to the NSG provisions);
- The exporter must notify its authorities if he is aware that his export of not-listed items is intended to serve to a WMD programme (Article 4.4) and the authorities decide whether or not an authorisation is required;
- The Member States may impose an authorisation requirement if the exporter has ground for suspecting that his export of not-listed items may serve to a WMD programme (Article 4.5, also called “suspicion clause”);
- The Member States may prohibit or impose an authorisation requirement for an export of not-listed items if the export may be used in breach with public security or human rights considerations (Article 8.1).

The two latter clauses are only options for the Member States although the two former must be implemented in the national legislations.

The possibility to impose an authorisation requirement or a ban on transit operations, *i.e.* transit through the Union’s territory of a good for a destination located in a third-EU country (Article 2), is the sole responsibility of the Member States. However, only the transit of items listed in Annex I which may contribute to a WMD programme and items not-listed for a military end-use or for an end-use country under subjected to embargo may be submitted to authorisation requirement or ban. The authorisation is only valid in the Member State where the item transits through, unlike the export authorisation which is valid throughout the Union’ territory.

The brokering services, under the Regulation, include the selling, buying, negotiation or arrangement of transaction from the European Union territory of a supply of dual-use items between two EU-third countries (Article 2). The Member States may chose to impose an authorisation requirement for such services, but not for the exercise of such activities. The requirement applies, notwithstanding the “general requirement” position of the State, if the authorities inform the broker that an authorisation is required for listed items or if the broker himself is aware that the listed items may be diverted to a WMD programme (Article 5.1). However, catch-all clause for not-listed items may also apply if the broker has ground for suspecting that the item for which it supplies services may contribute to a WMD programme (“suspicion clause”, Article 5.3).

Regarding intra-community transfers, the requirements are more flexible, owing to the fact that the Union is an area of trust, from a political point of view, and a free-trade area, from a legal point of view. Therefore, the binding effect of Annex I does not take place for these transfers and authorisation are only required for some of the goods, listed in Annex IV. In addition, the Member States may impose an authorisation requirement for transfers of goods not-listed in Annex IV only under certain cumulative conditions set in Article 22 and if the Member State clearly informs the Union and the other Member States that it requires such authorisation for a given category of goods. A certain flexibility for the inner-trade, then, but the observation of the Annex IV shows that most of the NSG items are covered by this authorisation requirement.

Unlike the NSG guidelines, the EU Regulation 428/2009, and before it Regulation 1334/2000, goes more into details with regard to the shape the authorising licences may take in connection with the spirit of harmonisation. It distinguishes four kinds of licences (Article 2) that may be used for all the movements that are controlled, indistinctively (*i.e.* exports, transit and brokering):

- Individual export authorisations: granted to one specific exporter for one end user or consignee in a third country for one or more dual-use items;
- Community General Export Authorisation (CGEA): for exports to certain countries of destination listed in Annex available to all exporters who respects its conditions of use state in Annex II;

- Global export authorisation: granted to one specific exporter in respect of a type or category of dual-use items which may be valid for exports to one or more specified end users and/or in one or more specified third countries³⁵;
- National general export authorisation: granted in accordance with Article 9.4 and defined by national legislation in conformity with Article 9 and Annex IIIc.

These authorisations must be valid, except for the transit as seen earlier, throughout the Union's territory. In annex of the Regulation, models of authorisation application forms are provided in order to harmonise somehow the respective national procedures. It must be noted, also, that only the individual, global (Article 9.5) and CGEA authorisation must be implemented at the national level.

Regarding the conditions and criteria for authorising an export or an other kind of movement, the EU Regulation goes less into details than the NSG guidelines, for example. The reason lies, very likely, in the fact that the EU Regulation is, as stated earlier, generic and comprehensive. It does not make the difference between the areas dealt with by the international export control fora. It would have been certainly too confusing, from a practical point of view, to implement separately the conditions and criteria these fora agreed on in the European Regulation. What makes sense as a condition for the export of nuclear dual-use goods, such as the application of full-scope safeguards of the Agency, does not make for biological products, for example. Conditions and criteria are thus a limitation to the comprehensiveness of the EU Regulation and no mention to "European specific conditions" have been made. Nevertheless, the EU Regulation, in its Article 12, refers to a series of generic criteria, which shall be reviewed by the authorities for any dual-use export application:

- The obligations and commitments of the exporting Member State to international non-proliferation regimes and export control regimes;
- Its obligations related to the sanctions decided by the Union, the OSCE or the UN Security Council;
- Its considerations on national foreign and security policy, including the application of European provisions on the transfer of arms;
- Its consideration about the intended end use and the risk of diversion of its export.

Owing to the fact that the Union, within the Regulation, commits itself to the strict respect of the guidelines issued by the thematic international fora, it may logically be thought that the criteria contained in the Regulation do not replace the internationally agreed criteria but have to be considered additionally to these criteria. Dealing more specifically with nuclear dual-use items, there is no obstacle, whatsoever, while all EU Member States participate to the NSG, thus making soft law "harder" law in an indirect way. However, obstacles may perhaps exist in other area where not all the EU Member States are represented, such as ballistic missiles' items and technologies, for which some of them might be left with no clear set of conditions and criteria. Differences in the conditions and criteria may be, indeed, in position to challenge the sound competition the EU Regulation aims at. Article 13 of the Regulation brings an embryo of solution to this potential issue: the EU Member States, like in the NSG guidelines, are bound by a "no-undercut" principle. If a Member State intends to grant an authorisation having similar characteristics to an authorisation already denied (including on the basis of the application of a catch-all) in another Member State, these two must consult each other. The Member State in which the latest application is reviewed is not legally bound by the opinion of the other State. However. The same consultation and freedom apply if a Member State feels that its "essential security interests" are threatened by an export under review in an other Member State (Article 11.2). The no-undercut principle is completed by a second one which requires from a Member State examining a licence application for an item which is or will be located in an other Member State to consult this State. Even though this requirement applies only to exports of certain categories of items and/or destinations (Article 11.1), the opinion of the consulted State legally binds the State where the licence should be issued.

III. AT THE NATIONAL LEVEL: "HARD LAW"?

III.1 THE ORGANISATIONAL ROOM FOR MANOEUVRE OF THE FRENCH LEGISLATION

Through this section, the reflection will refer to the example of the French "practice" of the nuclear dual-use items' export control. This area, indeed, is particularly important for France and the French use of the guidelines and Regulation is particularly revealing of the challenges a European Union member State might face in its implementation of these provisions. One limit of taking France as an illustrative example is that it is a "big" Member State with a non-negligible power of influence on the

European and international adoption of rules. Nevertheless, it is a fundamental mark of the EU that it is composed of Member States sharing different views, influence and interests with regard to a given issue. No “average” Member State may be taken as an example of a so-called “European” State. All the 27 Member States are European and are integral part of the mosaic the Union is. In addition, when coming to the nuclear dual-use items challenges, France is undoubtedly an excellent illustration of the expectations a State can have with regard to the control of their international trade.

It may be said that France, for its size and weight in the international affairs, is a “heavy weight” actor of the security businesses. It is the fourth world exporter of weapons and war-related equipments, and is among the two first in the estimate per capita. Within the EU, it is the second exporter of such goods, behind the United-Kingdom, and its exports in this area amount around 8 billion euros a year (almost 3% of its total exports). When coming to the other “risky businesses”, France assumes a similar status, notably thanks to industrial flagships such as the world leader in the nuclear area. The well-known worldwide company employs 48,000 people and its annual sales, for 2009, amount 8,5 billion euros (60% of which is realised outside France) for all its activities, which extend on all the nuclear cycle and the energy production ³⁶. It shall not be forgotten that if it is the world leading company, many other French small and medium-size companies are active on the international nuclear market. The export control of nuclear-dual use items, therefore, is not only a topic for concern for France from an economical point of view, but involves also political, diplomatic and social fundamental dimensions for the country.

When coming to the export control, from a practical point of view, the weight of dual-use is also considerable. In 2009, it amounted 20 billion euros ³⁷ and, among the 2,500 to 3,000 licenses granted per year, 17% are issued for items and technologies dealt with by the NSG. Nuclear dual-use items and technologies, therefore, are only a portion of the overall dual-use international trade and the fact that the intra-Union trade does not always require authorisation must be kept in mind.

France is also very committed, politically and legally, to the control of its export which may challenge the non-proliferation of WMD. It is, since 1992, a party to the NPT, as a nuclear-weapon State, and a participating State in the Zangger Committee and the NSG. In the European framework, it has demonstrated commitment to the efforts of harmonisation and has implemented, since the 1994 “failed” attempt, all the regulations in the area. At the internal level, it must be mentioned also that the first French dual-use export control legislation was issued as soon as 1944. France, therefore, has a long-standing culture of the control of the exports of dual-use items, including nuclear ones.

The shape of the French legislation confirms this trend as, until 2010, legislation on weapons’ export control and dual-use export control were modified and enacted in parallel. With the new round of modifications in 2010, dual-use export control rules, contextually, seem to have progressively taken their autonomy from a “sensitive trade” package. Substantially, the texts dealing with dual-use goods are rather short and focus mainly on the organisation of procedures. Principles that drive the export control are barely mentioned. In the French system, the implementing package is not legislative but executive:

- Decree n° 292 of 18 March 2010, relating to the procedures of authorisation of export, transfer, brokering and transit of dual-use goods and technologies and transferring competence from the Direction of Customs to the Direction of Competitiveness, Industry and services ³⁸;
- Decree n° 293 of 18 March 2010, relating to the Direction of Competitiveness, Industry and services ³⁹;
- Decree n° 294, creating an Inter-ministerial Commission of the Dual-Use Goods and Technologies near the Minister of Foreign and European Affairs ⁴⁰;
- Arrêté of 18 March 2010, creating of a national service named “Dual-Use Goods Service” ⁴¹;
- Arrêté of 18 March 2010, relating to the authorisation of export, import and transfer of dual-use goods and technologies ⁴²;
- And a Guide for the exporters ⁴³ which, even though is not a legislative act because issued by the French authority, provides advices directly to the exporters regarding their licences’ applications.

The practice ⁴⁴ showed that the authorisations issued by the French authority rarely concern transit and brokering, are rarely based on catch-all clauses (less than 1% of the licences) and are rarely issued under the form of a global authorisation. Therefore, in the course of this reflection on the possible transformation from European “harder law” to national hard law, one may wonder whether France would use the European Regulation as a toolbox in which it can pick its necessary

elements for its own legislation or if it would implement the whole regulatory package as its own legislation.

In fact, as the titles of the French acts show, the French legislation has a merged approach, more than generic and comprehensive, of the dual-use export control. It does not differentiate the nuclear dual-use items from other dual-use items, in establishing separate legal acts for example. It does not make a particular distinction between export, transit and brokering activities, either. It always refers to “export” only, exception made of the direct mention of the European Regulation as a source of law. However, a closer look at the substance of the French legislation, and in particular the Decree ⁴⁵, which organises the procedure for the issuance of authorisation, leaves no doubt about the application of the procedures also to transit and brokering activities in its Article 1: *“le ministre chargé de l'industrie fixe les modalités selon lesquelles il statue sur les demandes d'autorisation d'exportation prévues aux articles 3 et 4 et au paragraphe 2 de l'article 9 du règlement n° 428/2009 du Conseil du 5 mai 2009(...), sur les demandes d'autorisation de courtage prévues à l'article 5 et au paragraphe 1 de l'article 10 de ce règlement, sur les demandes d'autorisation de transit prévues à l'article 6 de ce règlement ainsi que celles présentées en application de l'article 8 du même règlement”*.

In a general way, the French legislation fully endorses the principles contained in the Regulation, as well as the lists, naturally. As said in the previous section, indeed, a European regulation is by definition directly applicable to an in the Member States. Therefore, France cannot alter the content of the Regulation 428/2009. In the Guide for the exporters, the Decree and the Arrêté constant and regular references are made to the Regulation itself and the application forms for a licence are essentially the same as the model provided in annex to the Regulation. In the context of our reflection and the question that guides it, it is thus possible to answer that a Member State such as France only has room for “organising”, in its most literal understanding, the authorisation procedures: the Decree organises the role and involvement of the national public authorities in the procedure, the Arrêté ⁴⁶ organises the procedures to be followed by the industries and the authorities for issuing a licence and the Guide provides direct information to the industries for being in line with all the requirements. But, how much room does this “organisation” represent for a Member State?

France took the opportunity offered by Article 8 of Regulation 428/2009 to impose export controls on helicopters and their spare parts ⁴⁷ and tear gas and riot control agents ⁴⁸ for destination outside the EU. However, the possibility of these additional controls was foreseen and left free by the Regulation itself. It does not concern any potential “factual occupation” of the French legislation over the field already ruled by the Regulation. The Arrêté organises the different licences and the procedures to be followed for their issuance. Individual and CGEA licences are harmonised at the European level, as described earlier, and France makes only little recourse to global licences. However, the French legislation sets 5 national general export authorisations for items of the following categories:

- Chemical products;
- Some genetically-modified biological products;
- Graphite;
- Industrial items;
- Helicopters and their spare parts and tear gas and riot control agents (also called “licence 02”).

The first four, despite the fact that none of them focuses on nuclear dual-use items, are interesting in the meaning that they correspond to lists of respective items and destinations established especially for this purpose. For example, the lists of authorised destinations for a national general export authorisation include some of the French overseas departments and territories. Geographical and administrative specificities of a Member State may thus be reflected in the dual-use national legislation.

Regarding the creation and organisation of national authorities, the European Regulation left the responsibility to the Member States for setting them according to their internal legislation and structures. In France, the authority was, before 2010, the Ministry in charge of the customs, assisted by a service placed under its authority. In 2010 ⁴⁹, the dual-use items and technology's export control has been placed under the authority of the Ministry responsible for the industry and a new service, the Dual-Use Goods Service (SBDU under its French acronym) has been created under its authority for dealing only with these specific items. The former service remains responsible for the export control of non dual-use items such as weapons and an inter-ministerial commission ⁵⁰ has been created for arbitrating the possible conflicts of competences on items which might be difficult to

categorise as weapons or dual-use, for example.

Therefore, the practical implementation of the European provisions in the national legislation, from an “organisational” point of view, does not leave room to this national legislation for stepping on the substance of the export control of dual-use items and technologies, including nuclear ones. At least, it allows the Member States, notably in France where the source of the authority changed from customs to industry and where Guides for the exporters were issued, to bring these provisions “closer” to the industries.

The French national legislation not only “organises” the European provisions but also completes them in filling some intentional gaps. Regulation 428/2009, indeed, does not deal with import control and so leaves it to unilateral intents. It would have been counterproductive, indeed, for the European “legislator” to provide rules in this area because the Regulation intends to counter proliferation in the EU third countries only and that a Member State would remain free to choose to import not from an EU third-country but from another Member State, for which any application of import measure could be considered as an equivalent measure to the restraint of the freedom of trade. In the international context, however, the fact that a European authority is entitled to issue an International Import Certificate or a delivery verification certificate may be seen not only as a confidence-building measure but may also be a requirement. Therefore, France adopted in its national legislation⁵¹ procedures and forms for issuing these certificates.

Finally, and perhaps most importantly, the French national legislation makes European “harder law” content becoming “hard law” in attaching sanctions to the infringement of the Regulation’s provisions. In the French legislation, which substantially makes a direct connection with the Regulation, the infringement of dual-use export control rules is sanctioned on two different levels. The first one corresponds to a customs offence, for example for exporting without a licence, and the Customs’ Code apply. The offender risks a three-year imprisonment, the seizure of the concerned items, the transport means and the object that serve for hiding the offence and may be fined for an amount from 1 up to 2 times the value of the fraud. However, if the offence becomes criminal, for example if an intention for trafficking is proved, the infringement is sanctioned by the Criminal Code, under the section “Fundamental interests of the Nation” and the exporter risks a 10 up to 30 months imprisonment and a fine from 150 to 450,000 euros.

III.2 THE INCREASED RESPONSIBILITY OF THE PRIVATE SECTOR

The trend in the export control in general, which includes the nuclear dual-use items, it to make the industries more responsible of the export policies and, therefore, to involve them more in the regulation of the sensitive items’ trade. Within the EU Regulation, this trend is witnessed in Article 12.2 in which it is stated that “*when assessing an application for a global export authorisation Member States shall take into consideration the application by the exporter of proportionate and adequate means and procedures to ensure compliance with the provisions and objectives of this Regulation and with the terms and conditions of the authorisation*”. The Regulation thus clearly applies to the sub-national, *i.e.* individual, level. Despite the fact that this requirement is intended for the context of global export authorisation and that the French authority only rarely issue such authorisations, as stated above, the French legislation⁵² established 6 criteria to be followed for an effective internal compliance programme (ICP) and to be verified by the SBDU:

- The internal verification of the nature of the dual-use goods to be exported with regard to the destination;
- The implementation and follow-up of a list of internal personnel responsible for monitoring the respect by the export of the principles of the dual-use export control;
- The implementation of an internal audit programme for checking the respect of the procedures;
- The implementation of a procedure aiming at detecting the customer companies which are prone to infringing the dual-use goods export control;
- The implementation of a training programme for the personnel dealing with the treatment of the orders subjected to global export licence;
- The implementation of a specific system of archives of the reports of the operations and the documentary follow-up of the orders in order to allow the administration obtaining the information about past exchanged if it so desires.

This tendency to increase the involvement of the private sector, and collaterally increase its responsibility, in the regulation of the dual-use items and technology’s trade accurately reveals and

translate into the legal debate the philosophical opposition between security and competitiveness. As presented in the previous section, the EU Regulation aims at harmonizing the national export control rules in order to avoid the possible distortion of competition between a Member State with strict rules “locking” the possibility of spread of WMDs and a Member State being more liberal for the benefit of its own companies. However, in the international society, this distortion may remain and the private sector in the European Union legitimately claims for an increased freedom. However, international security may lose where international competitiveness wins.

The ICPs may be a start of solution in making the private sector more self-responsible of its impact on the international security. The claim that the private sector makes, generally, is that the authorisation procedures take time although the reality of the business is dependant on this time: the longer it takes to obtain the authorisation, the less business perspectives last. Therefore, in assessing the respect of the conditions and criteria for a dual-use items’ export already at the source, *i.e.* within the company, the national authorities are normally expected to issue the licence faster. To this regard, the organisational responsibility of the Member State, always in accordance to the EU Regulation, is fundamental. The Member States, in general, may be expected to use their room for manoeuvre, even though limited, for improving the competitiveness at the sub-national level. As regards the French business reality, in particular and beyond the fact that global export authorisations are rarely issued, the generalisation of the ICP “spirit” may meet one obstacle that will be a major challenge for the newly-established authority: the French dual-use industrial structure is not only formed by big companies but also, and mainly if estimated in numbers, by small and medium size companies. These companies, which often focuses on the production of one flagship product, have for many of them not reached the critical size for dedicating money and personnel for the implementation of these internal measures and may simply, for some of them, be unaware of the risks of their production and exports for the international security. These challenges are taken very seriously by France and the SBDU as received the assignment of spreading the information and the best practices for the dual-use items in general.

More specifically in the nuclear area, France established in April 2008 its Nuclear Policy Council (CPN under its French acronym) ⁵³. The CPN, presided by the President of the Republic, “*defines the main orientations of the nuclear policy and monitor their implementation notably with regard to export and international cooperation (and) industrial policy*” ⁵⁴. As it may hear representatives of the French nuclear industry, it may legitimately be expected that it will be, sooner or later, addressed with the challenge of balancing competitiveness and international security.

CONCLUSIONS

Coming back to the picture of the Russian dolls that was suggested in introduction, the reflection aimed at de-assembling them in order to find the smallest and unbreakable one.

The international guidelines set in the framework of the Nuclear Suppliers Group are the biggest doll which provides the basic principles that drive the export control of the nuclear dual-use items: authorisation before exporting, conditions and criteria on which the decision of the authority must be based. However, they are not sufficient to organise the everyday trade activities because they do not legally constrain the (few) participating States. Figuratively, there is a breach on the doll, which allows spreading its pieces apart. The legitimacy of the NSG for regulating the export control is based on the economical realities but is disconnected from the diplomatic expectations of wide multilateralism. The previous name of the NSG, the “Club”, is rather revealing, to this regard. However, even though the participating States, including all the European Union Member States, are not legally constrained, they are politically expected to legally base their own national rules on the application of these provisions. In the context of the UN Security Council resolution 1540, the prospect for a “hard” implementation of these guidelines became greater since the Resolution calls the States which have already organised their export control on sharing their best practices with States which have not.

The European Regulation 428/2009 is the smaller doll, which not only contains these basic principles set through international coordination but also develops them and hardens them. Its scope of application is wider than the NSG guidelines since it is generic, meaning that it rules the export control of dual-use items, as well as the material in the case of the NSG, in general and not only the nuclear ones. In the same way, it does not only deal with the export *stricto sensu* but also with other activities prone to contribute to the proliferation of WMD in general: the brokering and the transit of dual-use items. Substantially, in making the principles more practically useable, and formally, in making them directly applicable in the EU Member States, the Regulation transforms the guidelines from soft law to “harder law”. One may thus wonder, at this stage, if this doll is not the smallest since it organises the export control of dual-use items for the Member States themselves. However, this

second doll is not a regime itself since it does not provide sanctions for the infringement of the rules. In the European law, this is the responsibility of the Member State. A third and slightly smaller doll is expected, therefore.

The implementation of the Regulation by the EU Member States is the third and smaller doll, which has little room for manoeuvre because the European regulation is substantially detailed. However, this little space left for the design of sanctions and practical implementation of the authorisation procedures is enough to hide the doll of which the parts cannot be separated. At this stage, the provisions, even though they substantially originated in the European Regulation, might be called a dual-use export control regime.

Nevertheless, it is possible today to say that the game does not stop at this stage. The private sector, for reasons linked to the needs of global and modern businesses, claim for its own individuality within the boundaries of the concrete organisation of the export authorisation procedures. Therefore, it may happen that we find in the near future an other doll.

One may wonder, finally, if the European doll is not superfluous while the non-European NSG participants also manage to have an export control regime without this intermediary level, which complicates the overall legal coherency. Apart from the fact that it is purely a specificity of the European States to have an intermediary level between the international and national ones in almost all matters now, it must be said that for an area such as the export control of nuclear dual-use items, pragmatically, it reveals itself an efficient protection. The export control regulation is a constant fight between security and trade necessities. In setting common rules for all the 27 Member States of the Union, the European provisions organises a sound competition within its borders and preserves a proactive position regarding the objective of non-proliferation of WMD. For universalizing this spirit of acceptable conciliation between security and business interests, the Union has a considerable weight thanks to its 27 Member States and it has obviously the ambition to weigh in the international instances such as the NSG. Cohesion remains therefore the internal challenge for external success.

January 2013

Notes de base de page numériques:

- 1 As of November 2010, 189 States are parties to the NPT.
- 2 According to Article IX.3 of the NPT, only China, France, Russia, the United-Kingdom and the United-States of America have the status of nuclear-weapon States.
- 3 Quentin Michel, Maryna Tsukanova, *"Emerging International Standards: If a dream could come True"*, 31st ESARDA meeting, Vilnius, 26-28 May 2009.
- 4 "A Secure Europe in a Better World – European Security Strategy", Brussels, 12 December 2003.
- 5 Institute for Security Studies of the European Union, website: <http://www.iss.europa.eu/>.
- 6 Five threats are defined in the Strategy: terrorism, proliferation of WMD, regional conflicts, State failure and organised crime.
- 7 "A Secure Europe in a Better World – European Security Strategy", op. cit., p.3.
- 8 "EU Strategy against proliferation of Weapons of Mass Destruction", Document 15708/03, Council of the European Union, draft for adoption by the European Council, Brussels, 10 December 2003.
- 9 *Idem*, p.10.
- 10 *Idem*, p.10-11.
- 11 The EU Situation Centre (SitCen) is the centre for intelligence coordination of the European Union.
- 12 For more information: <http://www.un.org/sc/1540/>.
- 13 For more information: http://www.bafa.de/eu_outreach/en/index.html.
- 14 See: <http://disarmament2.un.org/TreatyStatus.nsf>.
- 15 France and the United-Kingdom, however, placed all their peaceful nuclear activities and material under Additional Protocol-kind safeguards.
- 16 For more information on the model Additional Protocol: http://www.iaea.org/Publications/Factsheets/English/sg_overview.html.
- 17 For more information on Euratom: http://ec.europa.eu/energy/nuclear/euratom/euratom_en.htm
- 18 Website: <http://www.nuclearsuppliersgroup.org/Leng/default.htm>.
- 19 See for example "NSG, Congress Approve Nuclear Trade with India", Arms Control Association, October 2008. Available: <http://www.armscontrol.org/print/3381>.
- 20 As of November 2010.

- 21 MTCR website: <http://www.mtcr.info/english/index.html>
- 22 INFCIRC/254/rev7/Part2 (February 2006) paragraphs 6 and 7.
- 23 INFCIRC/254/rev7/Part2 (February 2006) Paragraph 4.
- 24 INFCIRC/254/rev7/Part2 (February 2006) paragraph 5.
- 25 These provisions and the lists attached are published as INFCIRC/254 Part 1 for the trigger list items and Part 2 for dual-use items.
- 26 Council Regulation (EC) No 428/2009 of 5 May 2009 *setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items*, OJ L134, 29 May 2009.
- 27 2000/0401/CFSP: Council Joint Action of 22 June 2000 *concerning the control of technical assistance related to certain military end-uses*, OJ L159, 30 June 2000.
- 28 Council Regulation (EC) No. 3381/94 of 19 December 1994 *setting up a Community regime for the control of exports of dual-use goods*, OJ L367, 31 December 1994.
- 29 Cédric Paulin, "Les exportations et transferts européens de biens et technologies à double usage" in *Fondation pour la Recherche Stratégique, Annuaire stratégique et militaire 2005*, Paris, Odile Jacob, 2005, pp. 233-263.
- 30 *Idem*.
- 31 COUNCIL REGULATION (EC) No 1334/2000 of 22 June 2000 *setting up a Community regime for the control of export of dual-use items and technology*, OJ L159, 30 June 2000.
- 32 Interview conducted at the French Service for Dual-Use Goods, August 2010.
- 33 See first section for MTCR. Cyprus does not participate to the Wassenaar Arrangement.
- 34 Notwithstanding this particularity, the European Union refers to them as "dual-use" items and technologies, and so will it be done in this reflection
- 35 It is a particularity of the European system while it exists independently from the existence of national authorities and that these national authorities, when they grant such authorisation, do it "on behalf" of the European Union which has no proper licensing authority. As a fiction, the European authority is 27 authorities.
- 36 For more information about Areva Group: <http://www.areva.com/>
- 37 Interview conducted at the French Service for Dual-Use Goods, August 2010.
- 38 Décret n° 292 du 18 mars 2010 *relatif aux procédures d'autorisation d'exportation, de transfert, de courtage et de transit de biens et technologies à double usage et portant transfert de compétences de la Direction des douanes et droits indirects à la Direction de la Compétitivité, de l'Industrie et des Services* (JORF du 20 mars 2010).
- 39 Décret n° 293 du 18 mars 2010 modifiant le décret n° 37 du 12 janvier 2009 *relatif à la Direction générale de la Compétitivité, de l'Industrie et des Services*.
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- 43 The Guide is available at the following address: <http://www.industrie.gouv.fr/pratique/bdusage/sbdu-faq.php>
- 44 Interview conducted at the French Service for Dual-Use Goods, August 2010.
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- 46 Arrêté du 18 mars 2010 *relatif aux autorisations d'exportation, d'importation et de transfert de biens et technologies à double usage ?*
- 47 Avis aux exportateurs de certains hélicoptères et de leurs pièces détachées à destination de pays tiers (JORF 18/03/1995)
- 48 Avis aux exportateurs relatif à l'exportation de gaz lacrymogènes et agents anti-émeute vers les pays tiers du 28/06/1995 (JORF 28/06/1995)
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modified by the Arrêté of 18 March 2010.

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54 Décret n°2008-378 du 21 avril 2008 *instituant un conseil de politique nucléaire, Article 1.*

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