

Au revoir, 428/2009. Bonjour, Recast...



After four years of debates, the review of the EU dual-use Regulation 428/2009 was finally adopted by the EU Parliament and Council on 10 May. It was published in the EU Official Journal on 11 June and will come into force 90 days after that. Quentin Michel and Veronica Vella outline what happens next.

The review process that has culminated in the publication of the new EU dual-use export control regulation took almost a decade to complete. The first call for a review came with a Green Paper published by the European Commission in 2011.¹ Since then, different documents followed (reports, conclusions, communications, etc.) each affirming the need for modernisation, and setting out concrete policy options. The Commission's legislative proposal finally came in 2016,² and the related positions of the Parliament and the Council published in 2018 and 2019 respectively. To reach the agreement, five trialogues were held, the last on 9 November 2020.

As it is a Regulation, the new law will be directly applied, and enforced, by EU Member States and does not require a national act to be implemented. In other words, Member States may adopt complementary provisions but are not allowed to do less than has been established by the Regulation, although they can do more – e.g., extend the scope of their own control lists.

As the new Regulation is a 'Recast', it does not only amend Regulation 428/2009, but it replaces all previous versions. It constitutes a new single legislative act that brings together all the amendments made to the legislative act in question (including annexes), involving also new substantive changes.

The Recast of the dual-use Regulation intends to clarify several grey zones found in past versions, besides introducing new elements and, in particular, strengthening the 'human rights dimension'.



MEMBER STATES AUTONOMY IN THE IMPLEMENTATION OF THE NEW PROVISIONS IS ONE OF THE CHANGES LIKELY TO HAVE THE MOST SIGNIFICANT, FORMAL IMPACT, EVEN IF, IN ACTUALITY, THE NEW PROVISIONS WERE ALREADY PARTLY IMPLEMENTED.

The control of trade in dual-use items is part of the EU common commercial policy, which is an exclusive competence of the EU. Rules are adopted by co-decision of the EU Parliament and Council, whose respective views have necessarily to be aligned and compatible, in particular as regard the human rights dimension. However, even within the Council, Member States do not appear to share a common understanding towards specific issues (e.g., cybersurveillance).

In short, the new provisions of the Regulation could be summarised as follows.

The human rights dimension has been formally and substantially reinforced through the new 'autonomous controls' on cybersurveillance and emerging technologies, as well as through a more impactful consideration of

human rights concerns, while assessing cases.

Terrorism concerns are reflected in the expanded scope of catch-all provisions including human rights and terrorism end-use concerns.

Member States' autonomy in the implementation of the new provisions is one of the changes likely to have the most significant, formal impact, even if, in actuality, the new provisions were already partly implemented.

Member States' authorities will be obliged to inform the Commission of any measures (including authorisation refusal information) and of their national control lists with respect to non-listed items for which an authorisation has been prohibited or imposed for reasons of 'public security, including the prevention of acts of terrorism, or for human rights considerations'.³

They shall then reciprocally recognise the trade restrictions they apply and comply with them as well.

Therefore, the principle of recognition of identical transactions will apply. A compilation of national lists of autonomous controls on emerging technologies will be published by the Commission, as well as an 'EU watch list' of cyber surveillance items.⁴

All things considered, a higher level of harmonisation seems to have been achieved (also brokering, technical assistance and transit controls have been updated and harmonised), together with a higher (mandatory) level of transparency. Member States are indeed required to share detailed information with the Commission, which was previously voluntary.⁵

With the aim of creating a more transparent and efficient system of licensing and of pooling/sharing information, *inter alia*, the Commission has been strongly committed to the digitalisation of its system, calling on Member States to do the same.

Two new EU general export authorisations, for the intra-group export of software and technology, and on encryption, have been added. In recognition of the new reality imposed by Brexit, the UK has been added to EUGEA 001.

A definition of 'large project authorisation' has been introduced, and the time validity of certain export authorisations has been established (e.g., individual export authorisation), while for others, that has been left to the discretion of the competent authority (e.g., large projects authorisations). A definition of internal compliance programme has been included, and particular new attention has been paid to the need to conduct due diligence. Moreover, new provisions have been introduced with respect to foreign nationals in the EU territory, as in case of transit.⁶ This, however, cannot be said to correspond with the US principle of 'deemed export', as the scope is less broad, and it focuses on specific circumstances (e.g., 'temporarily present' in the EU).⁷

Last but not least, there

would appear to be greater consideration of issues particularly relevant to researchers and academia: Recital 8 has been expanded, and EU compliance guidance for research involving dual-use items is expected to be published soon after the publication of the Recast.

Ultimately, it will only be possible to take stock of the Regulation's effectiveness in introducing new principles and instruments to reinforce the EU dual-use trade control

system when those principles and measures have been fully implemented by Member States authorities – almost certainly unlikely to happen before several months have elapsed.

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LINKS AND NOTES

- ¹ European Commission, 'The dual-use export control system of the European Union: ensuring security and competitiveness in a changing world', Green Paper, COM(2011) 393 final, 30.6.2011. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011DC0393>
- ² European Commission, 'Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast)', COM(2016) 616 final, 28.9.2016. Available at: https://trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154976.pdf
- ³ Article 9 of the Recast.
- ⁴ Article 5 of the Recast.
- ⁵ Article 26 (2) and (3) of the Recast.
- ⁶ Article 7 of the Recast.
- ⁷ Article 2 (10) (c) of the Recast.



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