



The origin of Annex IV of the Regulation 428/2009

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Peer Review Seminar, Budapest - May 5th, 2011

Before 1994 : When the ECC didn't have a Community export control regime

- **National measures prevailed**

Common market was not yet achieved nor transformed into a Single market

- **The concept of “dual-use items” was not yet commonly used by international regimes**

Appears in 1992 NSG Warsaw Plenary
(INFCIRC254/ Part.2)

- **COCOM concept of “Strategic Goods”**
- **Essentially understood by Member States as falling within the free movement exception established by article 296 EEC (346 TFUE)**

The arms, munitions and war material exception

One exemption to the extensive interpretation of article 346 exception : the Nuclear Common Market established by the Euratom Treaty

Article 2

... by the creation of a common market in specialized materials and equipment, by the free movement of capital for investment in the field of nuclear energy ...;

Article 93

*Member States shall **abolish** between themselves, ..., all customs duties on imports and exports or charges having equivalent effect, and all quantitative restrictions on imports and exports, in respect of:*

- a. products in List A1 and A2 (materials and equipments)*
- b. products in List B (materials)*

But the understanding of the nuclear common market was not homogenous within 12 Member States, especially after the NPT ratification

For some it was **not applicable anymore**, for other it was still...

Lengthy debate concluded on 20 November 1984 by a **Declaration of Common Policy adopted by the foreign ministers of the Community (Dublin Declaration)**

Dublin Declaration

Arrangements related to transfers between Member States of separated plutonium and uranium enriched to more than 20% in the isotopes 235 or 233 and transfers of installations, principal components of crucial importance, reprocessing or enrichment technology or the technology of heavy water

Principle of transfer notification (not authorisation) as regards exchanges between Member States

Before the implementation of the Single market

Three exceptions to the free movement of goods and services within the EC

- **Arms** exception (Article 223 EEC)
- **Nuclear** items exception (Dublin Declaration)
- **Security** exception (article 36 EEC)

Public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property

Implementation of the Single market (January 1993)

- Opens *de facto* (if not *de jure*) **free movement** of dual-use items within the EC
 - Necessity either to harmonise national export control regimes or to adopt a single export control regime
- **No consensus** between MS to consider that dual-use items should be regulated under **133 EC** (Common commercial policy, presently 207 TFEU)
- For certain MS, dual-use items even fall under the three exceptions and in particular under **296 EC**

Member States are competent to define restricting export control principles to third States within the CFSP by Common Action and or Position

Adoption of a dual export control regime of dual-use items

- Council **Regulation** 3381/94 defining the procedure and the principle of free movement of items within the EC
- Council Common **Action** 94/942/CFSP establishing the list of items and criteria
- **Cross reference** between the Council Regulation and Council Common Position

The dual regime includes four exceptions to the free movement of items within the EC

1. The nuclear items exception

Article 21 of the Regulation

*An **authorization** shall be required for **intra-Community** transfers of separated plutonium and uranium enriched to more than 20 %, as well as installations, main components of crucial importance and technology related to reprocessing, to enrichment and to the production of heavy water, under the terms of the Declaration of Common Policy of 20 November 1984*

An Authorization ?

2. The national exception

- Established by Article 20 of the Regulation and Annex V of the Common Action

1. For consignments dispatched from one Member State to another of dual-use goods listed in Annex V to Decision 94/942/CFSP, individual authorizations (including, if appropriate, conditions concerning end-use and/or retransfer) may be required by the Member States as indicated in that Annex.

HEADINGS	DK	D	EL	E	F	I	AT	P	FI	SE	UK
7A115				Xb	Xa						
7A116			Xa	Xb							
7A117	Xa		Xa	Xb	Xa			Xa			
7B001				Xb	Xa						
7B002				Xb							
7B003	Xa			Xb				Xa			
7B102				Xb							
7B103	Xa			Xb	Xa			Xa			
7D001	Xa			Xb	Xa						
7D002				Xb	Xa						
7D003				Xb	Xa						
7D101	Xa			Xb	Xa			Xa			
7D102				Xb	Xa						
7D103				Xb	Xa			Xa			
7E001	Xa			Xb							
7E002-	Xa			Xb							
7E003	Xa			Xa	Xb (9)						
7E004.b.5				Xb	Xa						
7E101	Xa			Xb	Xa (10)			Xa			
7E102				Xb	Xa						
7E104				Xb	Xa						
8A002.o.3 and p					Xa						
8D002					Xa						
8E002.a					Xa						
9A001				Xb							
9A004	Xa			Xb	Xa			Xa			

3. The Community exception : Annex IV

Article 19 and 5 of the Common Action

1. For a transitional period, the following measures shall apply in respect of consignments dispatched from one Member State to another: ...

(b) for dual-use goods listed in Annex IV to Decision 94/942/PESC, authorizations shall be required by all Member States. Those authorizations may not be general authorizations.

Shorter than the current Annex IV

MTCR TECHNOLOGY

9A005	Liquid rocket propulsion systems.
9A007.a	Solid rocket propulsion systems with a total impulse capacity exceeding 1.1 MNs.
9A008.d	Movable nozzle or secondary fluid injection thrust vector control systems, specially designed for solid rocket propulsion systems.
9A009.a	Hybrid rocket propulsion systems with total impulse capacity exceeding 1.1 MNs.
9A108.c	Thrust vector control sub-systems, specially designed for solid rocket propulsion systems.
9A119	Individual rocket stages.
9B115	Specially designed "production equipment" for the systems, sub-systems and components specified in 9A005, 9A007.a, 9A008.d, 9A108.c and 9A119.
9B116	Specially designed "production facilities" for the systems, sub-systems and components specified in 9A005, 9A007.a, 9A008.d, 9A108.c and 9A119.
9D001	"Software" required for the "development" of equipment or "technology" specified in 9A005, 9A007.a, 9A008.d, 9A108.c, 9A119, 9B115 and 9B116.
9D101	"Software" specially designed for the "use" of goods specified in 9B116.
9D103	"Software" specially designed for modelling, simulation or design integration of the systems specified in 9A007.a, 9A108.c or 9A119.
9E001	"Technology" for the "development" of equipment specified in 9A005, 9A007.a, 9A008.d., 9B115, 9B116.
9E002	"Technology" for the "production" of equipment specified in 9A005, 9A007.a, 9A008.d., 9B115 and 9B116.

The national exception (Annex V) and the Community exception (Annex IV) should have been **removed or reviewed** at the end of the **transitional period** of three years (1997)

Article 19

5. The need for the measures provided for by this Article shall be re-examined within three years from the date of entry into force of this Regulation.

Nevertheless, the possibility to use article 36 of EC treaty remains valid

Whereas, pursuant to and within the limits of Article 36 of the Treaty, and pending a greater degree of harmonization, Member States will retain the right, both during and after the transitional period, to carry out controls on dual-use goods in order to safeguard public policy or public security;

4. The re-export exception

Article 19 (not transitional)

*3. (a) A Member State may require an authorization for the transfer of dual-use goods from its territory to another Member State in cases **where at the time of transfer:***

- the operator **knows** that the final destination of the goods concerned is **outside** the Community,*
- export of those goods to that destination is subject to a **licence** pursuant to Articles 3, 4 or 5, and*
- **no processing or working** as defined in Article 24 of the Community Customs Code is to be performed on the goods in the Member State to which they are being transferred.*

(b) The transfer authorization must be applied for in the Member State from which the dual- use goods are transferred.

The dual system (regulation and common action) has been invalidated by two EU Court of Justice cases

- In the **procedure of references for preliminary rulings** a German Court has submitted a question to the Court of Justice about the interpretation of articles 133 and 296 regarding dual-use items
 - Dual-use items should be governed by article **207** (common commercial policy includes export control)
 - Article **346** specifically dedicated to weapons, as defined and listed in Council Decision of 1958

Adoption of a single regulation organising the export control of dual-use items (Council Regulation 1334/2000 as recast by 428/2009)

The four exceptions to the Single market were

- **Included without being amended fundamentally**

The re-export exception (art. 8) and the security exception (36 TFUE and article 4.8)

Debate exists of the possibility for MS to use the security exception

- **Withdrawn and partly included in a new Annex**

Nuclear items exception and National exception

- **Included as an new Annex of the Regulation (not of a Common Action)**

Community exceptions

Annex IV of Council Regulation 1334/2000 as recast by 428/2009 is

- **A compilation** of the former Annex IV, V and the Dublin Declaration
- **Not transitional**
- **EU secondary law**: legally binding for Member States
- Authorisation is required for all items,
could be general for certain items listed (Part I)

Benelux exception (TFEU 350)