

September 2016

Control of trade in dual-use items

Council Regulation [428/2009](#) setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items

This briefing is one in a series of 'Implementation Appraisals' on the operation of existing EU legislation in practice. Each such briefing focuses on a specific EU law, which is likely to be amended or reviewed, as foreseen in the European Commission's Annual Work Programme. Implementation Appraisals aim to provide a succinct overview of material publicly available on the implementation, application and effectiveness of an EU law to date – drawing on available input from the EU institutions and external organisations. They are provided to assist parliamentary committees in their consideration of the new proposals, once tabled.

EP committee responsible at time of adoption of the EU legislation:

– The original legislation was adopted in accordance with [Article 133](#) of the Treaty establishing the European Communities, which did not require any action by the European Parliament. However, since December 2009, common commercial policy is regulated in accordance with the ordinary legislative procedure by the European Parliament and the Council.¹ Presently, competence in the matter lies with the Committee on International Trade (INTA).

Date of adoption of original legislation in plenary:

– The original legislation was not adopted in plenary (see explanation above).

Entry into force of original legislation:

– 27 August 2009 (Article 28, Regulation 428/2009)

Planned date for review of legislation:

– The European Commission is obliged to submit an annual report to the European Parliament on the activities, examinations and consultations of the Dual-Use Coordination Group (Article 23(3), Regulation 428/2009 as amended).

– Every three years, the European Commission has to review the implementation of Regulation 428/2009 and present a report to the European Parliament and the Council on its application, which may include proposals for its amendment (Article 25 (2), Regulation 428/2009).

Timeline for new amending legislation:

– The amendment of Regulation 428/2009 is not included in the [Commission Work Programme 2016](#) (CWP 2016). However according to the [list of planned Commission initiatives](#) (dated 1 September 2016), such an amendment is supposed to be submitted in September 2016 as a follow up to the Commission Work Programme 2015 item 'Trade and Investment Strategy' ([Annex I, item 15](#)).

1. Background

The free movement of goods within the European Union (EU) is one of the fundamental freedoms. However, goods entering and leaving the EU internal market are subject to controls by the Member States.

¹ Also, Regulation 428/2009 has been amended several times since 2009, using the ordinary legislative procedure.

This is also the case for what are known as ‘dual-use objects’, i.e. items which can be used for both, civil and military purposes.

The EU is an important producer and exporter of various dual-use goods and, as such, plays a considerable role in setting export control standards on these items. The obligation to control trade in dual-use items derives from a general international obligation to counter the proliferation of weapons of mass destruction (i.e. nuclear, biological and chemical weapons) and of other items with potential military use. It is enshrined in several documents, including the United Nations Security Council Resolution [1540 \(2004\)](#), the [Chemical Weapons Convention \(1993\)](#) and the [Biological Weapons Resolution \(1972\)](#). Apart from the international treaties, there are also special international regimes; such as the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, [the Nuclear Suppliers Group](#) or [the Australia Group](#). These regimes contribute to the non-proliferation of nuclear, biological or chemical weapons and dual-use items, usually through the harmonisation of the export controls of these items. A requirement to deal with the threat of proliferation of weapons of mass destruction is also included in the European Council’s 2003 [European Security Strategy](#). Here, the European Council claims that ‘proliferation may be contained through export controls’. The EU export control of dual-use items is governed by Council Regulation 428/2009 – the subject of this implementation appraisal.

Established in 1996, the [Wassenaar arrangement](#) aims to contribute to international security and to promote transparency and responsibility in transfers of weapons and dual-use goods and technologies. It is a non-binding international agreement. However, its members agreed to follow the [Guidelines & Procedures, including the Initial Elements](#) to prevent unauthorised transfers of these items. The arrangement contains several [control lists](#) of restricted technologies, including a list of dual-use goods. All EU Member States are members of the arrangement.

Dual-use objects are items, ‘including software and technology, which can be used for both civil and military purposes. These items include all goods, which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices’ (Article 2 (1), Regulation 428/2009).

Dual-use objects are, for example, nuclear materials (e.g. uranium), telecommunications and information security, sensors and lasers, various software, machine tools, chemical manufacturing equipment, etc.

Council Regulation [428/2009](#) setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items

The regulation sets out the key principles of the EU dual-use export control system. Although the regulation is binding in its entirety, it leaves the actual implementation within the competences of the Member States.² It establishes common EU control rules and a common EU control list of dual-use items (see, Annex I).³ Pursuant to the regulation, export of dual-use items outside the EU customs territory generally requires an **export authorisation**. The mandatory export authorisation requirement applies to all dual-use items **included** in Annex I of the Regulation.⁴ The requirement also applies to items **not included** in Annex I, if there is a reasonable belief that these items are, or may be used: ‘in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons’. This so called ‘catch-all clause’ is

² The overview of measures taken by the Member States is published regularly by the European Commission. See, for example, August 2016 [Information note](#): Information on measures adopted by Member States in conformity with Articles 5, 6, 8, 9, 10, 17 and 22 of Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (2016/C 304/03).

³ A list included in Annex I contains approximately 1 869 dual-use items which are divided into 10 categories. Dual-use items relate to approximately 1 000 commodities. It is updated by delegated acts adopted by the European Commission. See, for example, [Commission Delegated Regulation 2015/2420](#).

⁴ Annex I of the regulation implements internationally agreed dual-use control standards including the standards of the Wassenaar arrangement or the Australia Group.

included in Article 4. Furthermore, the Member States may also require the authorisation for items not included in Annex I for reasons of public security or human rights considerations (Article 8). Authorisations are, under certain conditions, required for brokering services in dual-use items included in Annex I. In general, the regulation does not affect inter-Union trade of dual-use items, as these items can be traded freely inside the EU. However, the intra-Union transfers of dual-use items, such as those included in Annex IV of the regulation – for example, various technologies or software – may also require authorisation. The authorisations are valid throughout the European Union. The regulation also sets general rules for custom procedures and requires the Member States to cooperate and exchange information among their national authorities.

The regulation recognises four types of export authorisations; (1) EU general export authorisation, (2) national general export authorisation, (3) global export authorisation and (4) individual licences. The types of authorisations depend on the type of dual-use object or the export destination (see, Scheme 1). The regulation puts several control mechanisms into place, such as keeping records or registers, and requires that the Member States actively ensure that it is properly applied. In this context, administrative cooperation among the Member States is required. The regulation establishes a **Dual-Use Coordination Group (DUCG)**, which brings together representatives from the European Commission and the Member States and examines questions concerning the application of the regulation. With regard to the activities of the DUCG, the Commission is obliged to submit an annual report to the European Parliament.

Scheme 1 – Types of export authorisations according to Regulation 428/2009

EU general export authorisation (6 types)

– Issuing authority: European Commission/European Union

(1) Granted for export to Australia, Canada, Japan, New Zealand, Norway, Switzerland, Liechtenstein and USA (Annex IIa)

(2) Granted for export of certain dual-use items to certain destinations (Annex IIb)

(3) Granted for export after repair/replacement (Annex IIc)

(4) Granted for temporary export for exhibition or fair (Annex II d)

(5) Granted for telecommunications (Annex IIe)

(6) Granted for chemicals (Annex II f)

National general export authorisation

– Issuing authority: national authority.

– Defined by national law or practice. May be used if consistent with general EU export authorisations.

– Conditions are set in national law and in Regulation 428/2009.

– In 2016, some EU Member States issued a general export authorisation; these were Austria, Croatia, France, Germany, Greece, Italy, Finland, the Netherlands, and the UK (See, [Information note](#) on measures adopted by Member States in conformity with Regulation 428/2009).

Global export authorisation

– Issuing authority: national authority.

– Defined by national law.

– Granted to one exporter for a type or a category of dual-use items exported to several third countries or multiple end-users.

Individual (licences) export authorisation

– Issuing authority: national authority.

– Defined by national law.

– Granted to one exporter for one end-user/consignee in a third country for one or more dual-use items.

In 2014, the European Parliament, the Council and the Commission issued a [joint statement](#) on the review of the dual-use export control system attached to Regulation 599/2014. In the joint statement, the three institutions recognised the need for continuous improvements to the EU export controls regime, including

‘ensuring a high level of security and adequate transparency without impeding competitiveness and legitimate trade in dual-use items’. They also noted that there is a constant need to modernise and upgrade the system ‘in order to keep up with new threats and rapid technological changes’ so that a genuine common market for dual-use items can be created. Furthermore, the institutions acknowledged the issues regarding the export of information and communication technologies and made a commitment to develop a ‘catch-all mechanism for dual-use items falling outside Annex I of Regulation 428/2009.

2. EU-level reports, evaluations and studies

2.1 European Commission Implementation reports

By virtue of Article 23 (3) of the regulation, the European Commission is obliged to produce, and submit to Parliament, annual reports on the activities, examinations and consultations of the Dual-Use Coordination Group (DUCG). Additionally, every three years, the European Commission has to review the implementation of Regulation 428/2009 and present a report to the European Parliament and the Council on its application (see Article 25 (2) of the regulation). Presently, the European Commission includes the annual report on the activities of the DUCG into the reports on implementation. Between 2013 and 2016, the European Commission produced three **implementation reports** on Regulation 428/2009, in [2013](#),⁵ [2015](#)⁶ and [2016](#).⁷ All three reports provide data on the functioning of the DUCG, its actions and its activities.⁸ While describing the activities of the group, the reports also provide a list of key data on the dual-use items exports and their value. The 2016 report also states that, with regard to changing Regulation 428/2009, the Commission had already launched an impact assessment in 2014, in order to evaluate the costs and benefits of potential changes under Regulation 428/2009.⁹ All reports note difficulties in data collection and therefore only ‘approximate estimates of exports of dual-use items’ can be established.¹⁰ For example, the 2016 report estimates ‘that [dual-use] export controls apply to items included in an ‘export domain’ representing approximately 20% of total EU exports’. This amount can be estimated at approximately €900 billion.¹¹ Similar estimates are also included in the 2015 and 2013 reports.¹² The reports show that export value of dual-use items is stable since 2012.¹³

The reports give a list of the top destinations for extra-EU export of dual-use items (see table).

Table: Top five extra-EU export destinations for dual-use items, based on their value

	2014	2013	2012
1	USA	USA	USA
2	China	China	China
3	Switzerland	Russia	Russia
4	Russia	Switzerland	Switzerland
5	United Arab Emirates	Turkey	Turkey

Source: Table created by the author, based on the information included in the Commission reports.

⁵ COM(2013) 710 final.

⁶ COM(2015) 331 final.

⁷ COM(2016) 521 final.

⁸ These describe the various activities of the group, including the preparation of additions to non-binding EU guidelines on dual-use export controls, the development of the dual-use e-system (an electronic system hosted by the European Commission) and the provision of advice to Member States. See, for example, Report 2015, pp. 3-5.

⁹ In this context, the Commission asked an external consultant to carry out the research and collect data regarding the dual-use items. See, [Final report on Data and information collection for EU dual-use export control policy review](#), SIPRI and Ecorys, 2015.

¹⁰ See, for example, the 2016 Report, p. 6; the 2015 Report, p. 9 and the 2013 Report, p. 9.

¹¹ *ibid.*, p. 8.

¹² The 2013 Report, p. 9 and the 2015 Report, p. 6.

¹³ See, the 2016 Report, p. 8.

Only the 2013 report also includes a list of the top destinations of the intra-EU exports of dual-use items. Based on the value of the intra-EU dual-use export, the top five destination countries in 2012 were Germany, France, the United Kingdom, the Netherlands and Italy. It should be noted, however, that Regulation 428/2009 only applies to dual-use exports from the EU to a non-EU country, i.e. to items leaving the customs territory of the Union (See, Article 1(1), Regulation 428/2009).

All three reports also provide information about the volume and value of the applications for authorisation, authorised exports of dual-use items and denials of authorisations per year (see the following tables).¹⁴

Number of applications, authorisations and denials (approximate)

	2014	2013	2012
Applications for authorisation	45 000	38 000	41 000
Authorisations (authorised exports)	29 000	26 000	25 000

Value of applications, authorisations and denials (approximate, in € millions)

	2014	2013	2012
Applications for authorisation	59 000	85 000	55 000
Authorisations (authorised exports)	41 000	50 000	45 000
Denials of authorisations	9 000	0	0

Volume of authorisations (authorised export), listed by licence type

	2014	2013	2012
EU General Export Authorisation	10%	8.7%	10%
National General Export Authorisation	3%	3.1%	9%
Global licence	2%	2.3%	1%
Individual licence	75%	76.1%	78%
Other authorisations (e.g. transit)	10%	9.8%	2%

Value of authorisations (authorised export), listed by licence type

	2014	2013	2012
EU General Export Authorisation	6%	5.3%	Data not available
National General Export Authorisation	6%	3.6%	Data not available
Global licence	42%	23.4%	Data not available
Individual licence	39%	56.1%	Data not available
Other authorisations (e.g. transit)	7%	11.6%	Data not available

2.2 Other reports and communications

European Commission [Roadmap](#): Review of the EU dual-use export control regime – Regulation 428/2009 (2015)

According to this roadmap, export controls pursuant to Regulation 428/2009 are trade instruments that form part of EU common commercial policy under Article 207 TFEU. The roadmap considers export controls in dual-use items to be important in the context of EU security and competitiveness. It claims that the potential new initiative regarding Regulation 428/2009 will address the various issues and challenges of the existing export control system. The new legislation should adjust existing rules to changing circumstances; such as (1) evolving foreign policy considerations and security risks, (2) rapid scientific and technological developments, (3) lack of global export control standards and (4) an asymmetric application of the existing

¹⁴ Tables created by the author, based on the information included in the reports.

controls within the EU.¹⁵ Furthermore, the proposal will address issues linked with the [2011](#) amendment of the regulation; which include general EU export authorisation, or the dual-use electronic system. According to the roadmap, the initiative intends to 'strike the balance between trade and security'.¹⁶

European Commission [Communication](#): the review of export control policy: ensuring security and competitiveness in a changing world (2014)

In this communication,¹⁷ the European Commission assesses EU export control policy. At the same time, the Commission maps out several policy options for modernisation and adaptation of the existing export control policy, so that it can react to 'changing technological, economic and political circumstances'. The European Commission notes that 'export control constitutes a key instrument in the counter-proliferation toolbox' which must be kept up to date.¹⁸ The Commission also notes that export control policy faces growing challenges, such as a proliferation of weapons of mass destruction, globalisation, non-state actor activities, the spread of technological advances, information flows, or illicit trade. To deal with these growing challenges, the European Commission sets out four priorities as it intends to 'strike a balance between security and trade'.

The main priorities are: (1) adjusting to an evolving security environment and enhancing the EU contribution to international security, (2) promoting export control convergence and a global level-playing field, (3) developing an effective and competitive EU export control regime, and (4) supporting effective and consistent export control implementation and enforcement. For each priority, the Commission presents several options that should improve and strengthen the export control regime. These include, for example, strengthening the legal basis and upgrading control modalities, the review of national general export authorisations or enhanced cooperation with enforcement agencies. With regard to the need to adjust to most recent developments in the security environment, the Commission intends to take a 'human security approach', which recognises a link between human rights and security.¹⁹ This approach introduces a human rights control criterion as an effective instrument to reduce the misuse of dual-use items to commit human rights violations. The Commission also considers developing a 'smart security approach' that reacts to fresh developments in dual-use items and technologies, including addressing the use of cyber-space or emerging technologies (e.g. 3-D printing). At the same time, the European Commission intends to address the challenges linked with the control of dual-use research, 'while avoiding undue obstacles to the free flow of knowledge'.²⁰ Furthermore, the European Commission announces its intention to assess the costs and benefits associated with various policy options with regard to 'regulatory simplification and burden reduction'.²¹ Before taking any action, however, the European Commission invites the Council and Parliament to consider the approach set out in the communication.

European Commission [Green Paper](#) on the dual-use export control system of the European Union: ensuring security and competitiveness in a changing world (2011)

The goal of this green paper²² was to start 'a broad public debate concerning the functioning of the current EU dual-use export control system'.²³ The green paper invited various stakeholders (civil society, NGOs, academia and Member States) to express their views on different elements of this regime, namely 'the provisions of the current legal framework and a progressive reform of this system'. By this exercise, the European Commission intended to identify the strengths and weaknesses of the existing system. The responses received with regard to the questions raised in the green paper were summarised in the [2013 Staff Working Document: Strategic export controls](#).²⁴ The staff working document noted several

¹⁵ Roadmap, p. 2.

¹⁶ *ibid.*, p. 3.

¹⁷ COM(2014) 244 final.

¹⁸ *ibid.*, pp. 2-3.

¹⁹ *ibid.*, p. 6.

²⁰ *ibid.*, p. 7.

²¹ *ibid.*, p. 11.

²² COM(2011) 393 final.

²³ *ibid.*, p. 3.

²⁴ SWD(2013)7.

shortcomings linked with the functioning of the regulation, such as a need to react to new challenges, but also to licensing delays, lack of transparency, or delays in updating the EU list of dual-use items. The working document shows various different implementations of the regulation by individual Member States. However, this fact is not considered a shortcoming of the existing system.

European Parliament [workshop paper](#) on dual-use export controls (2015)

The paper²⁵ discusses the 'state of play' and the need for reform of dual-use export controls and considers the improvements to the EU dual-use export controls regime. With regard to the 'state of play', the paper comes to the conclusion that Regulation 428/2009 is generally fit for purpose, while it notes that several points can be improved; including strengthening the control powers of Parliament, clarification of the existing definitions, or broadening military end-use control.²⁶ It notes that non-binding guidance may be necessary. The paper states that this system is 'in line with the main export control regimes and is seen as a model for others.'²⁷ Nevertheless, the paper claims that 'there is clearly a need to adjust the EU's dual-use export controls by going beyond the traditional military/civilian dichotomy; the traditional focus on export and exporter; and the focus on tangible goods'.²⁸ The paper makes several recommendations to improve the existing control regime. These include:

- allocating sufficient national resources for licensing and enforcement staff across the EU;
- making common interpretations of the dual-use control list mandatory in the EU;
- establishing a range of human rights and security considerations that Member States should take into account when assessing licences for the export of dual-use goods;
- clarifying current provisions on technical assistance and technology transfer and providing guidance for stakeholders across the EU; or
- considering the adoption of catch-all controls for the export of unlisted cyber-surveillance technologies.²⁹

3. Council

[Council conclusions](#), adopted in 2013 under the Lithuanian Presidency of the EU, highlighted a need for an effective EU policy to deal with challenges linked to the proliferation of weapons of mass destruction. In this regard, the Council called for 'a fully efficient, collective approach to fighting proliferation [of weapons of mass destruction] by the EU'. Furthermore, the Council highlighted the need to protect access to proliferation-sensitive knowledge, including unintended transfers of sensitive technology and know-how. In its November 2015 [Conclusions](#), the Council recognised that 'the EU export control system must have a strong capacity to respond to potential threats arising from proliferation risks'. The Council noted that it is important to strike a balance between security and legitimate trade. In this context, it called on the European Commission to re-evaluate 'intra-EU transfer controls in order to minimise remaining barriers in the single market'. The Council furthermore encouraged cooperation with industry to 'tackle the challenges posed by the emerging technologies'. The control of dual-use research should also be improved. The Council favoured a review of the general export authorisations included in Regulation 428/2009. In 1988, the Council adopted an [EU Code of Conduct on Arms Exports](#), aiming to increase transparency and to harmonise national arms export control policies. [Council Common Position 2008/944/CFSP](#) replaced the Code in 2008.

²⁵ This paper was requested by the European Parliament's Committee on International Trade (INTA) and Sub-Committee on Security and Defence (SEDE).

²⁶ Workshop paper, pp. 35-37.

²⁷ *ibid.*, p. 35.

²⁸ *ibid.*, p. 81.

²⁹ *ibid.*, pp. 82-83.

4. European Parliament position/MEP questions

4.1 European Parliament resolutions³⁰

European Parliament [resolution](#) of 17 December 2015 on arms export: implementation of Common Position 2008/944/CFSP

In this resolution,³¹ Parliament noted that because of technological developments it is difficult to distinguish between pure military and civilian use (para. 43). Parliament welcomed the European Commission's initiative to modernise EU dual-use export controls and its intention to submit a new legislative proposal related to control of exports of dual-use items and technologies. Subsequently, Parliament underlined that this proposal should 'aim to improve the coherence and transparency of the export control regime and fully take into account the changing nature of security challenges and the speed of technological development, especially with regard to surveillance and intrusion software equipment' (para. 50). Furthermore, Parliament called on the Member States 'to make sufficient resources available to effectively implement and enforce dual-use export, brokering and transit controls' (para. 51).

With regard to this resolution, the European Commission decided not to provide any formal response, as the issues raised were comprehensively addressed in plenary on behalf of Vice President/High Representative Federica Mogherini (see plenary [minutes](#)).

European Parliament [resolution](#) of 8 September 2015 on 'Human rights and technology: the impact of intrusion and surveillance systems on human rights in third countries'

Parliament³² noted that the nature of the EU dual-use regime is incomplete, especially with regard to 'the effective and systematic export control of harmful ICT technologies to non-democratic countries' (para. 35). Furthermore, Parliament urged the European Commission to submit a proposal limiting and regulating 'the commercial export of services regarding the implementation and use of so-called dual-use technologies' (para. 36). With regard to the assessment of incidences involving dual-use technologies, Parliament reaffirmed that EU standards, especially the EU Charter of Fundamental rights should prevail (para. 39). Parliament also deplored the active co-operation of certain European and international companies trading in dual-use technologies with regimes whose actions violate human rights (para. 41).

With regard to this resolution, the European Commission decided not to provide any formal response, as the issues raised by the resolution were addressed comprehensively in plenary by the First Vice-President, Frans Timmermans on behalf of Vice President/High Representative Federica Mogherini (see plenary [minutes](#)).

European Parliament [resolution](#) of 21 May 2015 on the impact of developments in European defence markets on the security and defence capabilities in Europe

Parliament³³ stressed that it is necessary to ensure that the control measures applicable to dual-use items do not hinder 'the free flow of goods and technology within the internal market and prevent diverging interpretations of EU rules.' Furthermore, Parliament urged the European Commission to come forward with a new legislative proposal that would improve the 'coherence, efficiency, transparency and a recognition of human rights impact' of the existing dual-use export control legislation. According to Parliament, this proposal must reflect 'the changing nature of security challenges and the speed of technological developments' (point 21). With regard to the fact that dual-use technologies are often

³⁰ As well as the following resolutions, Parliament also adopted several legislative resolutions that were not included in the text of the briefing. See, for example, European Parliament [legislative resolution](#) of 27 September 2011 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology or European Parliament [legislative resolution](#) of 29 March 2012 on the Council position at first reading with a view to the adoption of a regulation of the European Parliament and of the Council amending Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

³¹ P8_TA-PROV(2015)0472.

³² P8_TA(2015)0288.

³³ P8_TA(2015)0215.

produced outside Europe, Parliament asked the European Commission to provide information on ‘the possible risks of growing internationalisation and the possible effects that changes in ownership in the defence sector may have on the security of supply and also the heightened risks for European and national security’ (point 22). Parliament also pointed out that ‘the completion of a European defence market’ calls for broad cooperation. In this regard, it underlined the importance of advances in dual-use research that should ‘guarantee EU independence and ensure the security of supply of critical items’ (point 27).

In its [follow up](#)³⁴ to the Parliament resolution, the European Commission agreed with Parliament that the existing legislation on dual-use export control regimes needed to be updated. The European Commission stated that it was carrying out an impact assessment of options identified in the [2014 Communication](#). As to the security challenges, the European Commission noted that Member States should systematically review foreign investments in this area. The European Commission noted that ‘a change of ownership of a strategic company in one country may also have an impact on the security of supply of other Member States.’ Furthermore, the European Commission intended to reflect on how to take this issue forward.

European Parliament [resolution](#) of 5 February 2014 on the ratification of the Arms Trade Treaty (ATT)

While welcoming the conclusion of the treaty, Parliament³⁵ called on the Member States to ‘pay greater attention to goods which may be used for both civilian and military purposes, such as surveillance technology, and similarly to spare parts and products suitable for use in cyber-warfare or for non-lethal human rights abuses’. Furthermore, it suggested exploring the possibility of ‘extending the scope of the ATT to include arms exports-related services and dual-use goods and technology’ (point 8). Parliament also called on the Commission and the Council to ensure coherence between this treaty and existing European legislation (point 15).

Concerning the points raised by Parliament, the European Commission noted, in its [follow up](#) document,³⁶ that regular reviews of European legislation, including Regulation 428/2009, provide ‘the opportunity to assess the overall coherence of the EU export control framework’.

4.2 Written questions by Members of the European Parliament

[Written question by Marietje Schaake \(ALDE, the Netherlands\), 8 December 2015](#)³⁷

The Member pointed to a trade in which technical items such as sonars and navigation systems were sold to such countries as Iran, Myanmar, Sudan and Syria. The Member noted that these countries are subjects to sanction regimes and the items sold are included in Annex I of Regulation 428/2009. The Member asked whether the Council was aware of these possible violations of EU sanction regimes. Furthermore, she inquired about the action taken to ensure the coherence of infringement procedures and penalties. The Member asked for clarification on determining which penalties are effective, proportionate and dissuasive in line with Regulation 428/2009, and whether there is coherence between penalties and procedures among the Member States.

[Reply from the Council, 11 April 2016](#)

The Council noted that the Member States have some discretion to decide to what extent the export of certain items to the countries concerned is prohibited. Furthermore, the Council claimed that it did not have any powers to investigate how the restrictive measures were applied, as the responsibility for their implementation lies with the Member States. However, the Council highlighted its regular working group meetings to ensure the comprehensive and consistent application of EU restrictive measures in the Member States. With regard to dual-use items, the Council noted that the Commission has set up a secure and encrypted system for the exchange of information about these items between Member States. It also pointed out Member States’ obligations to inform the European Commission about measures regarding the enforcement of Regulation 428/2009.

³⁴ SP(2015)470.

³⁵ P7_TA(2014)0081.

³⁶ SP(2014)414.

³⁷ The Member has asked several other questions raising the issue of ‘dual-use items’. See, for example, [O-000094/2015](#), [E-009898-15](#), [E-015562-15](#), [E-007752/2012](#) or [E-010948/2011](#).

Written question by Kosma Złotowski (ECR, Poland), 17 June 2015

The Member asked whether a contract to supply helicopters to a Russian oil company is, according to [Council Decision 2014/659/CFSP](#), subject to economic sanctions. According to the Member, under Regulation 428/2009 these sanctions also include a ban on selling aviation technology to this company. The Member asked the Commission whether this contract breaches the economic sanctions imposed by the EU on the Russian Federation. Furthermore, he asked whether the seller had authorisation to sell dual-use items before the contract was signed. If such authorisation was given, the Member asked whether it was in line with the wording of Regulation 428/2009. He also inquired whether the Dual-Use Coordination Group discussed this particular contract and if it has taken any decision.

Answer given by Vice-President Mogherini on behalf of the Commission, 24 September 2015

The Vice-President replied that the restrictive measures included in Council Decision 2014/659/CFSP do not prevent 'exports of dual-use goods and technology, including for aeronautics and for the space industry, for non-military use and/or for non-military end-users'. She also claimed that Regulation 428/2009 is not applicable to the supply of helicopters. The Vice-President also stated that the 'implementation and enforcement of prohibitions set out in an EU sanctions regime is primarily the responsibility of the national authorities of the EU Member States'. These authorities assess whether there have been breaches of the law and, if that is indeed the case, they can take appropriate steps and sanctions.

Written question by a group of Members (GUE/NGL, Portugal), 27 November 2014

The Members asked the European Commission whether it intended to propose any changes to the existing rules on the export of dual-use items and what might be the character of these changes. With regard to the dual-use items, the Members asked whether the European Commission had already assessed projects under the EU Research Framework Programme.

Answer given by Commissioner Cecilia Malmström on behalf of the Commission, 14 February 2015

The Commissioner answered that, in its Communication ([COM\(2014\)244 final](#)), the Commission had identified concrete policy options for the modernisation of the existing rules on the export of dual-use items, to adapt them to the changing technological and political circumstances. The Commissioner noted a particular interest in the control of 'dual-use research'. With regard to the EU Research Framework Programme, the Commissioner recalled that, based on [Regulation 1291/2013](#) establishing Horizon 2020, any research motivated by military applications is excluded from this funding. The Commissioner also noted that all proposals undergo several checks on their relevance and exclusive focus on civil applications.

Apart from the above-mentioned questions, Members also posed various questions about arms exports outside the EU (for example, [E-009898/2015](#), [E-000616/2016](#), [E-004177/2016](#)), or exports of various dual-use items (for example, [O-000099/2015](#), [E-009892/2015](#), [E-015562/2015](#), [O-000081/2014](#), [E-008990/2014](#)).

5. European Economic and Social Committee (EESC)

In its [opinion](#) on 'the European Commission Communication: Towards a more competitive and efficient defence and security sector (2013)', the EESC reacted to the need to promote the 'long-term predictability and credibility of European defence'. The Committee noted the need for establishing a link between research and development programmes and defence projects. It called for systematic consideration of dual-use technologies in the Horizon 2020 programme. It also called for closer cooperation with the European Defence Agency. In its 2012 own-initiative [opinion](#) on the need for a European defence industry: industrial, innovative and social aspects, the Committee called on the European Commission to update 'European foreign, security and defence policies' while pointing to a need to adapt to geopolitical challenges. In addition, the Council was called upon to 'work seriously on an EU defence umbrella'. With regard to dual-use items, the EESC noted, that dual-use technology in research and development is a necessity, as it is of 'growing importance for defence applications'. Consequently, the Committee reached a conclusion that it is important to stimulate dual-use research and development.

6. AskEP and citizens' petitions

Several petitions have been submitted to the European Parliament related to the trade in dual-use items, including a call to regulate the EU export of internet surveillance technology to totalitarian regimes (petition 0320/2012), or on military use of the Galileo satellite navigation system (petition 1044/2008). Similarly, European citizens have requested information from the European Parliament on correlations between arms exports, international sanctions, and humanitarian aid.

7. European Commission public consultation

Between July and October 2015, the European Commission carried out a [public online consultation](#) on the export control policy review. According to the Commission, this public consultation is a part of 'an [impact assessment](#)' that the Commission started in 2015. This impact assessment should help the Commission 'to identify the most suitable regulatory and non-regulatory actions and to prepare a proposal for amendment of Regulation 428/2009'. The November 2015 [public consultation report](#) notes that the public consultation received only 97 responses coming from stakeholders, mainly dual-use exporters/manufacturers (55%). A large majority of respondents (86%) call for a review of the existing EU export control rules. The respondents expressed diverging views on the introduction of provisions based on the human security approach, with around 40% of respondents who do not 'deem the inclusion of the human rights control criterion an effective instrument to reduce the misuse of dual-use items to commit human rights violations'. A majority of respondents agrees with the Commission 'smart security' approach, and approximately 70% of them agree with voluntary consultations on dual-use items. Optimisation of the licensing architecture, such as minimising competition distortion, or reducing export control management costs, also received numerous positive responses (both approximately 66%). The report also notes that a majority of respondents agree with actions to promote a greater convergence of catch-all controls.³⁸ Furthermore, a majority of respondents (60%) support a re-evaluation of intra-EU transfer controls. The Commission intends to take these views into account when preparing its impact assessment report.³⁹

8. Conclusions

The system of export controls requires its Member States to comply with general international obligations to counter the proliferation of nuclear, biological, and chemical weapons, and other items with potential military use. The same obligation is also applicable to 'dual-use items', i.e. items which can be used for civil and military purposes. The existing export control system of dual-use items requires an export authorisation if a dual-use item is exported from the EU to a non-EU country. Without an export authorisation, the dual-use items cannot leave EU customs territory. The list of dual-use items requiring this authorisation is included in Annex I of Regulation 428/2009. The regulation also establishes several rules and principles for export, transport, transfer of, and brokering of these items. Although the regulation is binding in its entirety, it gives several broad competences and discretion to the Member States, for example, with regard to sanctions or different types of authorisation. These competences, on the one hand, allow the Member States to implement the regulation in a way that reflects their legal traditions. On the other hand, however, these might influence the process of harmonisation of dual-use export controls negatively, and as a result, limit their effectiveness.

In addition, the most recent technological developments such as 3-D printers, geopolitical changes in the world, a growth of international terrorism and connected security concerns, and a greater concern for human rights, may require an update of the existing European legislation. On several occasions, the

³⁸ *ibid.*, p. 7.

³⁹ A specific [written submission](#) to this public online consultation was also submitted by Marietje Schaake (ALDE, the Netherlands) in which the Member provided an outline of the export control regime with regard to human rights concerns. The Member also provided a list of remedies to shortcomings included in the system created by the present version of Regulation 428/2009.

European Parliament has called on the Commission to update the existing legislation to react to these challenges. Similarly, the Council and the European Economic and Social Committee noted the need to update the existing legislation. Finally, the European Commission itself expressed a willingness to come forward with a new legislative proposal that will update the existing system of export controls of dual-use items.

9. Other sources of reference

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