



EUROPEAN COMMISSION

Directorate-General for External Trade

Directorate F - WTO Affairs, OECD and Food-related Sectors
WTO, OECD and Dual Use

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Trade/F/1/FH D(07) 1072

NOTE FOR THE FILE

Subject: Report of the meeting organised by DG External Trade with dual use exporters - Brussels, 26/01/2007-

Operational conclusions

- The report of the meeting, the list of participants, the power point presentations are circulated to the parties who have participated in the meeting and to the Council. All the documents will be available on the website of DG TRADE.¹

- Exporters are welcomed to send written comments to DG External TRADE on the Recast proposals (document COM 2006 828²) on **transit, brokering and intra-community** pre-notification system by **end of February 2007**.

-**Other** comments on the **Recast** Regulation are welcomed by **mid March 2007**.

-The above comments should be sent to: Francoise.Herbouiller@ec.europa.eu (Tel 003222990629) and Dangis.Verseckas@ec.europa.eu (Tel 003222997633).

- Exporters are welcomed to send to DG External Trade any case of **diverging interpretation** by Member States on the **scope** of **Annex I/Recast Annex V** at any time.

Contact points : Dangis.Verseckas@ec.europa.eu and Domenico.Cagliostro@ec.europa.eu (Tel 003222965164).

- Exporters are welcomed to send to DG External Trade by **mid March 2007** detailed statistics on the **most traded dual use items to destinations not covered by the Community General Export Authorisation** (Annex II) and if possible to give those statistics by item and by individual destination so that the Commission can inform Member States of which items are most traded to certain destinations outside the EU and therefore should be examined from the point of view of their insertion into new Community General Export Authorisations. Please refer to the Annex V of the Communication (document COM 2006 829²) for more details. Any reference as to

¹ http://ec.europa.eu/trade/issues/sectoral/industry/dualuse/index_en.htm

² See below footnote 2.

² Available in all EU languages on EUR LEX website as a "COM" document. Address: <http://eur-lex.europa.eu/en/prep/index.htm>

practices of Member States³/**third countries** in terms of **trade facilitation instruments** to other countries than those covered by the Annex II of EC Regulation is most welcomed. **Contact point:** Dangis.Verseckas@ec.europa.eu

- Exporters are welcomed to give some indication by mid **March 2007** to DG External Trade as to the type of **Global export authorisation** that is granted by the **United States** and that the EU should draw on as well as on any other interesting practice in place in third countries. This information would feed the planned workshops on technical assistance on global export authorisations (as defined in the Regulation) that will take place under EU Presidency. Contact point: Domenico Cagliostro@ec.europa.eu

- Exporters are strongly encouraged to enter into **bilateral contacts with national authorities** in charge of negotiation of the Commission's proposals in the Council to feed them with comments in particular on issues raised also in the Communication (interaction with industry prior to international regimes' decisions).

DETAILS OF THE DISCUSSION

1) The meeting was chaired by Mrs Signe Ratso, director, DG EXTERNAL TRADE, Directorate F.

2) The list of participants is attached to the report (Annex I)

3) The agenda has been addressed as provided for in the invitation published on the website.¹ Under other business, the issue of the implementation of the UN SC Resolution 1737 on sanctions towards **Iran** has been subject of a brief presentation of the state of play based on information released by DG EXTERNAL RELATIONS which is leading Directorate General in the Commission for this issue. Industry called for transparent measures as to controls of items not listed in Regulation 394/2006 preferably in the sanction Regulation rather than to be implemented under article 4-1 of Regulation 1334/2000 at national level as this would create confusion.

4) The director has made an introductory speech in which she has recalled, inter alia, the objectives of the Commission which are that by the end of 2007 all issues addressed in the Communication and the Recast Regulation are discussed so that a new legal framework can be in place in 2008 and a programme of best practices and administrative measures adopted. Regarding the latter, Commission stressed its support of EU Presidency's intentions to start discussion on best practices for global export authorisations. Regarding intangible transfers, Commission indicated that to its view, there was a need to start discussions with Member States on the concrete means of implementation of the exemptions of controls for "basic scientific research" and for issues "in the public domain".

General comments were made. Business Europe (UNICE) representative, M. Lamoureux, expressed regrets that a general reform of the management of export

³ 8 Member States have created "National General export authorisations"; 10 in force in Austria, 3 in force in France, 1 in force in Italy, 5 in force in Germany, more than 10 in UK, 1 in Greece, 10 in Sweden, 1 in Netherlands.

¹ Same as footnote 1

controls is not proposed by the Commission. The Commission commented that it is fully aware of this request (noted in the explanatory memorandum of the Recast Regulation page 4) and kept this objective as a medium term goal as stated in the Communication⁴. It was recalled that, during the Impact Assessment study, no stakeholder could accept to condition the granting of dual-use trade facilitation instruments to the implementation by the exporter of a certification system/an internal compliance programmes ('ICP')⁵. In addition, the Commission informed that discussions with the Council last year proved that Member States are strongly in favour of maintaining trade facilitation instruments (at EU and national level) that are disconnected from any compliance programme implemented by industry. This explained that Commission proposed in Article 8-2 of the Recast Regulation that, when a company has implemented successfully an ICP, its requests for global export authorisations are considered by national authorities with due account of this factor⁶ (our objective is that ICP are positively considered at time of assessing global export authorisations).

Other comments made were of general nature and welcomed Commission's efforts to improve the current situation and create a level playing field for exporters.

5) Communication of the Commission on the review of the EC regime of export controls of dual use items (COM 2006 828).

A presentation has been made by Ms Herbouiller. The power point slides are attached to this report in Annex II.

Below the issues rose by exporters and in *italics* answers provided by DG External Relation.

- o EC Relations with third countries that are important security and trade partners.

DG External TRADE hopes to launch, with the full support of the EU MS, a dialogue with the United States and other important trade and security partners of the EU so as to make the EU regime of export controls understood and to start a process aiming, in a first step, at the recognition of the single market for dual use items. Interventions made supported this goal and were cautious in the sense that that for such recognition of the single market to be made by third countries, MS should first approve Commission's proposals to replace the current transfer authorisation system by the pre-notification system proposed in Article 25.

⁴ Conclusion page 15: "It (the Commission) will also continue its reflection on the operation of export controls so that they can move in the direction of being more industry-compliance based as opposed to case by case export authorisation based".

⁵ Detailed report on the Impact Assessment Study is available on the DG Trade website. The summary of the report is available as document COM (2006) 1696 on the website.

⁶ Exact wording in the New provision in the recast Regulation Article 8-2: "In addition to the criteria set in paragraph 1, when assessing an application for a global export authorisation or for an authorisation for the provision of intermediation services, MS shall take into consideration the application by the exporter of proportionate, adequate means and procedures to ensure compliance with the provisions and objectives of this Regulation and with the terms and conditions of the authorisation."

- Intra-Community Transfers (new Article 25)

Nuclear industry called for facilitation of intra-Community transfers which should also tackle the issue of nuclear safety standards applied by MS.

*The Commission took note of this request and will inform DG TREN (Nuclear Energy in particular) and DG ENTREPRISE. **In order to better ensure follow up, DG TRADE request industry's input on those safety issues.***

- Difficulty for exporters to rate/classify dual-use items

*Difficulties for exporters to apply export controls were reported when the exporter is not the manufacturer of the dual use items. Commission related these difficulties to a possible lack of awareness of the obligation set in Article 21-7 (now in Recast Article 25-7) which states "**the relevant commercial documents relating to intra-Community transfers of dual use items listed in Annex I shall indicate clearly that those items are subject to controls if exported from the Community.** Relevant commercial documents include, in particular, any sales contract, order confirmation, invoice or dispatch note. Therefore, the responsibility for proper enforcement of this clause rests on Member States and is crucial for the implementation of the Regulation as shown during the Peer Review of Member States' implementation of the Regulation.*

- Diverging interpretation of the scope of Annex I controls (current Regulation 394/2006) between MS.

Commission encouraged industry to report cases of diverging interpretation of annex I between Member States so that those difficulties can be addressed first in the EU. Commission clarified that, if following discussion in the Council it appears that those problems originate from the wording adopted in the international regimes, Commission would recommend to Member States to refer back those problems to the relevant international regimes. Commission took note of a problem raised by the nuclear industry regarding the controllability of "pressurisers" and committed to facilitate a discussion based on further detailed input by industry.

- Lack of incentives for companies to abide by EC rules because of insufficient sanctions across the EU and insufficient efforts of awareness to companies on export control legislation.

Commission recalled the European Council decision of June 2004 regarding the encouragement for the EU to adopt criminal sanctions in case of violation of legislation on export control, brokering and also to consider the possibilities for harmonisation. It made the link between this political declaration and Recast Article 21.

*Commission noted the request regarding Commission's need to contribute to outreach to exporters by supporting EU awareness campaigns so as to fill gaps that might exist according to industry. **Commission welcomes more details from exporters on the issue.** Commission informed that to its views which are based on past experience, the Member States seem better placed to do ad hoc awareness as they are in a position to know all potential dual use suppliers.*

Federations of industry could also contribute to awareness raising in relevant sectors.

- Consequences of the non membership of new EU MS in international regimes and solutions to remedy the technical gaps that those countries might have in implementing controls set in those regimes.

Commission replied that this issue has constantly been on the EU's agenda before and following the Thessaloniki action plan

- What is "comitology"?

Commission briefly explained that it is an institutional procedure used in many areas of Community legislation to facilitate speedy implementation. The system would facilitate the implementation of the changes to the EC control list. In the present case, Commission stressed that since the Article 11 of the Regulation is unchanged, the comitology would only replace the heavy institutional system that takes place in the Commission and at EU level by a quicker decision making process. (For memory, Recast Article 11 binds the Commission to integrate in its proposals of changes to Annex I the decisions agreed by MS in international regimes).

- EU should learn from the USA's practices regarding the granting of global export authorisations.

*This was taken note of and **more detailed information from exporters** is welcomed on USA's practices.*

- What is the benefit of EU technical assistance to third countries on export control for EU exporters?

Commission detailed some of the existing programmes and stressed that they presented an opportunity to share practices between relevant licensing and enforcement agencies which should be beneficial for both parties and for exporters in these countries.

- Divergences in MS practices of granting export authorisations for distributors. One exporter indicated that there are different approaches in different MS (request to know end user versus request based on goods exported) which lead to unfair competition among exporters.

Commission noted that this could be a subject to insert into a package of best practices (as proposed in the Communication) as this is already tackled in some international export control regimes.

6) Presentation of the Recast Regulation. The power point presentation presented by Ms Herbouiller is attached in Annex III.

- Definition of Brokering/provision of intermediation services

Commission explained that the definitions in Article 2b iv) and 2f) are based on existing legal texts which define the different modalities for exporting a service. Commission explained that the wording is very explicit in the sense that the exporters

*of the intermediation service as defined in Article 2e) is based in the EU and the service is exported FROM THE EU territory but the **goods concerned** by the intermediation service **are not located in the EU** but in third countries. It is the mode 1 of WTO General Agreement on Trade in Services. The service is exported from the territory of one Member (the EU here) into the territory of any other Member and in our case outside the EU. The WTO website gives illustrations of those different modes of supply of services and in particular for mode 1 states the following:" A user in country A (here in a third country) receives services from abroad (from EU) through its telecommunications or postal infrastructure. Such supplies may include consultancy or market research reports, tele-medical advice, distance training, or architectural drawings".*

- Is financing or transportation covered by the definition on "intermediation services" in Article 2 e)?

Commission answered positively and took note of the concerns raised by some participants as to the scope of potential liabilities of "intermediaries".

- The obligation of the exporter of "intermediation services" if he has "ground for suspecting" that his intermediation service may lead to an illegal WMD programme in a third country.

Industry commented that too much liability is put on the "intermediary" as he has to ask for an export authorisation in case he "has grounds for suspecting" while the exporter of tangible/intangible items, in the case of end use controls, is only bound to ask for an export authorisation if "he is aware" of WMD related programmes. This inconsistency was taken note of by the Commission services who stressed that industry should take into account that about 50% of the Member States have implemented at national level the possibility detailed in Article 4-5 that the exporter is liable to implement article 4-4 of the "end use controls" if is "has grounds for suspecting"...

- Can the provision on transit (Article 3-4) be applied to IT exports (Article 2biii)?

Commission recalled the valid reasons which had led Member States to agree that we should depart from the Custom Code definition for transit.

*Commission noted that an intangible transfer of dual use technology carried out under Article 2biii) cannot fit with the definition of transit provided in the Commission proposal as this definition of transit refers to "**transport..of a dual use item.**" Commission noted that an **intangible technology** like a software, if put on a **tangible support** (a disk or a US B key) can be subject of **transit provisions** if **transported** and **if the provisions of article 3-4 apply** (and in particular if the item enters into the Community with a destination outside the community and the other conditions set in Article 3-4 are met.*

- Can a Member State stop a dual use export from a third country to another third country via the implementation of Article 3-4 if this export is accompanied with a valid export authorisation from that third country?

Commission replied that this is possible if the circumstances detailed in the Article 3-4 fully apply but that it is extremely unlikely.

End use control and article 4.8. Risk of abuse by non responsible exporters of this Article to ask for Member States' licensing authorities to give quick answers as to the rating of dual use items.

*Commission explained that under Article 4, the liability is on the exporter to inform his national authorities if he **has doubts** as to the **end use** (WMD) of a transaction covering a **non listed item** to a third country's destination. In addition, **Article 4-8** can only be applied if the exporter "**presents a complete request**" to the national authorities under **Article 4-4**. This means that **probably** the national authorities will consider that for a request to be complete there should be **evidence** that the **potential end uses** of the non listed item under the **circumstances** the exporter witnesses meet the **criteria of Article 4-1** and justify that the exporter ask under **Article 4-4** the view of national authorities if the transaction requires an export authorisation and be answered by 20 working days (**Article 4-8**).*

- What are the reporting requirements for CGEA and why do some Ms impose regular reporting requirement on use of CGEA and others not?

Commission and the consultancy firm which carried out the Impact Assessment study confirmed the diverging practices of Member States in terms of reporting requirement for CGEA uses. Commission indicated that based on those differences, it had decided not to request any specific reporting under the CGEA than those set in Article 16.

- What is technical assistance covered by Article 2biii)?

*Commission confirmed it is the definition set in the Annex I and drawn from international regimes' decisions. It is **not** the technical assistance occurring through the move of EU persons outside the EU borders as this assistance is covered by Joint Action CFSP 401/2000. The provisions of Joint Action 2000/401/CFSP are only in force in those Member States that have integrated the basic principles of this text into national legislation (text on DG TRADE webpage http://trade.ec.europa.eu/doclib/docs/2003/december/tradoc_114998.pdf).*

- Record keeping for IT transfers (16- 2- iii)

Commission noted exporters' concern about the wording and indicated that the proposal was based on intensive work carried out in 2005 with MS on the issue of IT transfers. Commission noted exporters' wish that "the period during which" that is mentioned in the Article be replaced by "between the date of the first transfer and the date of the last transfer".

- Registration of exporters for CGEA. Any plan for an EU register?

Commission noted that at this stage, the insertion of an obligation for all exporters to register to national authorities when using CGEA was mainly to help MS make the necessary enforcement checks (audit visits) and implement the provisions set in Annex II part 3 (now transferred into Article 6). The current situation is that most of the MS already ask the exporter to register nationally and that MS do not share this information at EU level. The sharing of information with Commission, as proposed in the Recast, could lead in the medium run to the setting up of an EU register but it was to be discussed with Member States.

- Member States' Participation in dual use committee (Article 19)

Institutional rules are such that nominations are made by each MS. (It is already the situation for Article 18 Coordination Group).

- Request for the exporter to supply relevant information to national authorities including on "third parties" so as to apply for an export application (Article 9-1).

Commission took note of the difficult situation created by its proposal which puts de facto the same obligations for the exporter of intermediation services and the exporter of tangible items as to the level of information to supply to national authorities when requesting an export authorisation. Industry indicated that imposing exporters of tangible and intangible items to give information on third parties would ruin exporters' chance to get any export authorisation. Commission corrected that this was not its intention and that its proposal should be corrected to avoid those risks mentioned by exporters. Probably, the best would be to create two different sub paragraphs so as to distinguish into article 9-1 the obligations of exporters of tangible/intangible and the obligations of exporters of intermediation services (who are only liable for asking such authorisations if article 3-3 applies)..

- Deadlines for process of export authorisation applications

Commission took note of the disappointment expressed by exporters that not all MS commit to proceed speedily and that in some cases it takes up to 8 month to get a global authorisation renewed when the circumstances have not changed. Commission referred to Presidency's objectives to start a workshop on global export authorisations and to develop best practices.

- Restrictions on National General Export authorisations

Commission explained that the overall objective of the proposals is to create a level playing field for exporters and in particular to ensure to the maximum possible extent that the same transaction is treated the same way across the EU. It is with this in mind that Commission considered that probably most of the MS would resort to individual export authorisations (as defined in recast proposal) for items which are likely to be similar or essentially identical to denied items (to ensure implementation of Article 9-2 of the Regulation). Commission took note of the concerns raised by exporters and recalled that what mattered was the objective pursued (level playing field, security for EU, fair competition among exporters) and that it was open on wording as long as initial objectives were shared and achieved.

- Use of Custom nomenclature to identify dual use items under control

Commission recalled the statement made on its website as to the use of these correlations and in particular that there is no legal status of this "correlation list" because it is acknowledged that it is an imperfect tool to identify dual use items and can be very misleading. Commission recalled that the responsibility for rating dual use items rests with the exporter.

7) Commission warmly **thanked participants** for having fruitfully contributed to the discussions and confirmed that the report of the meeting, the power point presentations and the recommendations for follow up will be sent to participants and the Council and will be put on the website.

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Annexes:

Annex I: list of participants

Annex II: presentation on the communication

Annex III: presentation on the Recast Proposal