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Fourth edition
The 'EU Legislation in Progress' briefings are updated at key stages throughout the legislative procedure. Please note this document has been designed for on-line viewing.

Review of dual-use export controls

Certain goods and technologies have legitimate civilian applications but can also be used for the development of weapons of mass-destruction, terrorist acts and human rights violations; these so-called 'dual-use' goods are subject to the European Union's export control regime. This regime is now being revised, mainly to take account of significant technological developments and to create a more level playing field among EU Member States.

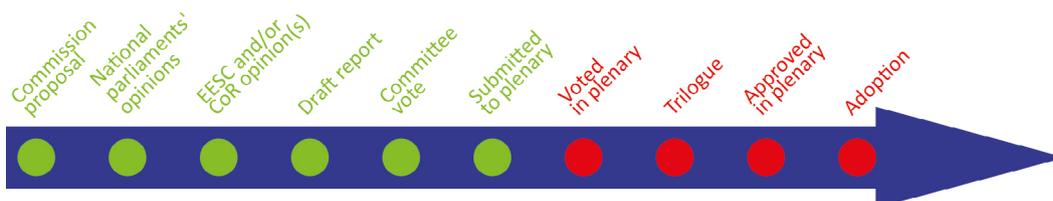
The proposed regulation recasts the regulation in force since 2009. Among other elements, the proposal introduces a controversial new 'human security' dimension to export controls, to prevent the abuse of certain cyber-surveillance technologies by regimes with a questionable human rights record.

Stakeholders are divided over the incorporation of human rights considerations, with the technology industry particularly concerned that it might lose out to non-European competitors. The European Parliament, the Council and the Commission issued a joint statement on the review of the dual-use export control system in 2014 and the European Parliament has since adopted several resolutions related to the issue.

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), with Annexes.

COM(2016) 616, 28.9.2016, 2016/0295(COD), Ordinary legislative procedure (COD) (Parliament and Council on equal footing, formerly 'co-decision')

Committee responsible:	International Trade (INTA)
Rapporteur:	Klaus Buchner (Greens/EFA, Germany)
Shadow rapporteurs:	Christofer Fjellner (EPP, Sweden); Bernd Lange (S&D, Germany); Sander Loones (ECR, Belgium); Marietje Schaake (ALDE, the Netherlands); Anne-Marie Mineur (GUE/NGL, the Netherlands); Tiziana Beghin (EFDD, Italy)
Next steps expected:	First-reading debate in plenary



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Introduction

The high-tech nature of dual-use goods and technologies, and the [sizeable volume of trade in them](#), means that the dual-use sector is a very important part of the EU economy. When controlling exports in these goods and technologies, careful attention needs to be paid to striking the right balance between security considerations and imposing unnecessary restrictions on business activities. This close link between security and trade is at the core of dual-use export controls. It also creates particular challenges for implementation within the European Union. The [proposal](#) for a regulation setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items ('the proposal') (and its [annexes](#)) will replace Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items ([Regulation 428/2009](#)), which came into force in 2009.

The proposal seeks to [modernise export control](#), taking into consideration four main developments and trends. These include (i) rapid scientific and technological developments (e.g. cloud computing and 3-D printing), massive global data networks that are vulnerable to attacks, and the growing availability of cybertools and information and communication technologies (ICTs) that can be used in violation of human rights; (ii) evolving foreign policy considerations and security risks, including growing challenges relating to the proliferation of weapons of mass destruction (WMD) (e.g. Iran and North Korea) and uncontrolled access to biological and chemical weapons materials in conflict zones (Syria and Libya); (iii) the multiplication of complex cross-border trade flows and intangible technology transfers in globalised supply chains, which has led to increased foreign availability of certain dual-use items and technologies and risks undermining EU export controls while at the same time exacerbating the distortion of competition for EU companies that results from a lack of global control standards; and (iv) the lack of uniform application of export controls at EU Member State level, as well as insufficient information exchange and coordination among Member States.

Context

The EU export control system was set up in the 1990s under [Regulation \(EC\) No 3381/94](#) setting up a Community regime for the control of exports of dual-use goods and [Council Decision 94/942/CFSP](#) concerning the control of exports of dual-use goods, and was considerably strengthened with the adoption of [Regulation \(EC\) No 1334/2000](#) setting up a Community regime for the control of exports of dual-use items and technology. Regulation 428/2009 introduced significant improvements to the EU export control regime, in particular in response to the [EU strategy against the proliferation of weapons of mass destruction](#) of December 2003 and in light of reports from exporters and industry. Regulation 428/2009 provides for the free circulation of dual-use items – with some exceptions – within the single market and lays down basic principles and common rules for the control of the export, brokering, transit and transfer of dual-use items, in the framework of the common commercial policy. It also provides for administrative cooperation, and harmonised policies and tools for implementation and enforcement. The regulation is directly applicable to 'exporters' but requires some additional implementing measures by EU Member States under a 'hybrid' system, whereby national competent authorities are responsible for licensing decisions, for instance.

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Existing situation

International level

Regulation 428/2009 implements international commitments under United Nations [Security Council Resolution \(UNSCR\) 1540 \(2004\)](#), international agreements such as the [Chemical Weapons Convention \(CWC\)](#) and the [Nuclear Non-Proliferation Treaty \(NPT\)](#), and multilateral export control regimes such as the [Wassenaar Arrangement](#), the [Nuclear Suppliers Group \(NSG\)](#), [the Australia Group](#) and the [Missile Technology Control Regime \(MTCR\)](#).

European level

The impact assessment that was published alongside the proposal on 28 September 2016 noted that the current EU export control system was not fully adapted to keep up with 'today's evolving and new security risks, rapid technological and scientific developments as well as transformations in trade and economic processes'. The current system is described as not taking clearly into consideration the emerging trade in cyber-surveillance technology and the risks it creates for international security and human rights. From an economic perspective, the system is seen as imposing a heavy administrative burden on industry and authorities alike, and as occasionally lacking legal clarity. It is seen as problematic that divergent interpretations and applications among Member States result in asymmetrical implementation and distort competition within the Single Market. The problem is believed to affect a variety of economic operators across numerous industries, including SMEs.

Comparative elements

Germany is the only EU Member State to have introduced [controls](#) on the export of surveillance technologies. These controls, put in place in July 2015, are more stringent than existing EU laws and mirror the controls on the export of surveillance technologies proposed by the draft regulation. According to amendments to the German Foreign Trade Ordinance introduced on 8 July 2015, companies that sell products that can be used for surveillance are subject to new mandatory export licence requirements. Additional authorisation requirements apply to telephone monitoring and companies' data retention. The measures were introduced to control the export of surveillance technologies to third countries more effectively and to prevent its misuse for [internal repression](#).



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Proposal

Parliament's starting position

There is no official starting position for the European Parliament. However, a series of statements and resolutions, set out below, give an indication of the position the Parliament has taken in the past on the issue of dual-use export control.

European Parliament, Council and Commission joint statement (2014)

In April 2014, the [European Parliament](#), the [Council](#) and the Commission published a [joint statement](#) on the review of the dual-use export control regime, which recognised the importance of 'continuously enhancing the effectiveness and coherence of the EU's strategic export controls regime, while ensuring a high level of security and adequate transparency without impeding competitiveness and legitimate trade in dual-use items'. The three institutions considered that modernisation and further convergence of the system were needed in order to keep up with new threats and rapid technological changes, to reduce distortions and to create a genuine common market for dual-use items. The statement recognised that controls were needed on the export of certain information and communication technologies (ICT) that can be used in connection with human rights violations and to undermine the EU's security.

European Parliament resolution of 17 December 2015 on arms export: implementation of Common Position 2008/944/CFSP

In this [resolution](#), Parliament noted that technological developments make it increasingly difficult to 'distinguish between pure military and pure civilian use' and called on the Commission to pay particular attention to new technologies of strategic importance, such as 'Remotely Piloted Aircraft Systems, applied robotics and surveillance technology'. Parliament recalled that the proliferation of certain surveillance and intrusion technologies around the world could not only be detrimental to human rights but might also pose a 'significant threat to European strategic interests and its digital infrastructure'. In this context, Parliament welcomed the Commission's initiative to modernise EU dual-use export controls and its intention to submit a new legislative proposal on control of exports of dual-use items and technologies. Parliament noted that the 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'.

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

In this [resolution](#), Parliament called on the Commission to 'ensure coherence between the EU's external actions and its internal policies related to ICTs'. Parliament deplored 'the fact that some EU-made information and communication technologies and services are sold, and can be used, in third countries by private individuals, businesses and authorities with the specific intent of violating human rights by means of censorship, mass surveillance, jamming, interception and monitoring, and by tracing and tracking citizens and their activities on (mobile) telephone networks and the internet' and expressed concern 'that some EU-based companies may provide technologies and services that can enable such human rights



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violations'. Parliament further deplored 'the active co-operation of certain European companies, as well as of international companies trading in dual-use technologies, with regimes whose actions violate human rights'. In that context, Parliament called on the Commission to propose effective policies to address 'potentially harmful exports of ICT products and services to third countries'.

European Parliament resolution of 21 May 2015 on the impact of developments in European defence markets on security and defence capabilities in Europe

With regard to dual-use items, Parliament [stressed](#) the importance of ensuring that the control measures applicable to these items did not stand in the way of the free flow of goods and technology within the internal market and of preventing diverging interpretations of EU rules. Parliament called on the Commission to improve the 'coherence, efficiency, transparency and a recognition of human rights impact' of existing dual-use export control legislation as a matter of urgency. According to Parliament, the proposal had to reflect 'the changing nature of security challenges and the speed of technological developments'.

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

In this [resolution](#), Parliament called on Member States 'to pay greater attention to goods which might be used for both civilian and military purposes, such as surveillance technology'. Moreover, Parliament suggested 'exploring the possibility of extending the scope of the ATT to include arms exports-related services and dual-use goods and technology'.

Council starting position

In November 2014, the Council noted in its [Conclusions on the review of export control policy](#) that Member States face a substantial question on how to maintain or enhance the level of control while striking a balance between security and legitimate trade. The Council recognised that the EU export control system had to have a strong capacity to respond to potential threats arising from proliferation risks.

Preparation of the proposal

Green paper

On 30 June 2011, the Commission published a [green paper](#), 'The dual-use export control system of the European Union: ensuring security and competitiveness in a changing world' (COM(2011) 393). The green paper called for the development of a more risk-driven model for EU export controls, with limited resources being used primarily to control the highest-risk items.

Commission staff working document

In response to a stakeholder consultation, the Commission received more than 100 responses, which are summarised in the [Commission staff working document](#) entitled 'Strategic export controls ensuring security and competitiveness in a changing world – a report on the public consultation launched under



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the green paper' (SWD(2013) 7), published on 17 January 2013. Respondents included Member States (including national parliaments and political parties), the European Parliament, industry associations and economic operators (including law firms and consultancies), civil society organisations, and academia.

Report from the Commission to the Council and the European Parliament

The stakeholder consultation process was complemented by the presentation of a [report from the Commission](#) to the Council and the European Parliament on the implementation of Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (COM(2013) 710), published in October 2013. The report was prepared in accordance with Article 25 of Regulation (EC) No 428/2009, which requires the Commission to review and report on the implementation of the regulation regularly.

Communication from the Commission – the review of export control policy

On 24 April 2014, the Commission published a [communication](#) to the European Parliament and the Council, 'The Review of export control policy: ensuring security and competitiveness in a changing world' (COM(2014) 244). In the communication, the Commission set out four priorities for the review of export control policy, namely (a) adjusting to an evolving security environment and enhancing the EU contribution to international security, (b) promoting export control convergence and a global level-playing field, (c) developing an effective and competitive EU export control regime, and (d) supporting effective and consistent export control implementation and enforcement.

Public online consultation

On 15 July 2015, the Commission launched an [open online public consultation](#) with a view to collecting stakeholders' input on the EU export control policy review. Stakeholders were invited to respond to 38 questions covering the range of themes and options outlined in Commission communication COM(2014) 244, including the modernisation of controls, the optimisation of licensing architecture, the harmonisation of controls at EU and global level, controls on technology transfers and the development of a 'human security' approach taking into consideration the links between security and human rights. The Commission received 97 responses to the online public consultation, coming mainly from industry associations and civil society. The results were presented in the [EU export control policy review report](#) published on 23 November 2015.

Commission impact assessment

Together with the proposal, the Commission published an [impact assessment](#). As stated in the [executive summary](#), the Commission is pursuing a number of specific policy objectives with the proposal for a revised regulation. These include adjusting to evolving security risks and threats; adapting to rapid technological and scientific developments; preventing the export of cyber-surveillance technology in violation of human rights; reducing competitive distortions and administrative costs within the Single Market; levelling the global playing field; and ensuring the effective and consistent application of controls in the EU.



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Human security

The draft regulation introduces the new concept of 'human security' to export controls, to prevent the human rights violations associated with certain cyber-surveillance technologies. By introducing this new concept, the Commission is responding to [calls](#) from the European Parliament and Council to address concerns about the proliferation of cyber-surveillance technologies that could be misused in violation of human rights and could threaten the EU's digital infrastructure. In response, the Commission proposes to expand the definition of dual-use items to include cyber-surveillance technologies, 'which can be used for the commission of serious violations of human rights or international humanitarian law, or can pose a threat to international security or the essential security interests of the Union and its Member States' (Article 2(1)(b)). The Commission had initially proposed a list of 10 cyber-surveillance technologies to be covered by this new regulation; however, in the proposal published on 28 September 2016, the list has been reduced to five items, including mobile telecommunications interception equipment; intrusion software; monitoring centres; lawful interception systems and data-retention systems; and digital forensics (Article 2(21) of the proposal). [Three of the above-mentioned surveillance technologies](#) were already covered by internationally agreed dual-use controls and included in the EU's control list (Annex IA). Only two types of surveillance technology – monitoring centres and data retention systems – would be added to the control list by the current proposal (Annex IB). These two types of cyber-surveillance technology are not covered by internationally agreed dual-use controls.

Moreover, the Commission is proposing to add a catch-all provision that would make it obligatory to obtain an authorisation for the export of dual-use items not included in the control list destined 'for use by persons complicit in or responsible for directing or committing serious violations of human rights or international humanitarian law in situations of armed conflict or internal repression in the country of final destination' (Article 4(1)(d)). In October 2012, the European Parliament already [proposed](#) a similar catch-all provision, but this was not reflected in the [final legislative act](#) adopted at the time. In addition, the Commission is proposing to extend this catch-all provision to include items 'for use in connection with acts of terrorism' (Article 4(1)(e)). The obligation to discover whether items are intended for abuse in the manner described above is shared by both the competent authorities and the exporter. The latter's obligation to conduct 'due diligence' is explicitly stated in the proposal (Article 4(2)).

In deciding whether or not to grant an individual or global export authorisation, competent authorities are to take into account 'respect for human rights in the country of final destination, as well as respect by that country of international human rights law', 'the internal situation in the country of final destination', 'preservation of regional peace, security and stability', 'considerations of national foreign and security policy, including security of Member States' and 'considerations about intended end use and the risk of diversion' (Article 14(1)). Fears have been voiced that the above could lead to a higher administrative burden for operators and authorities, both at national and EU level, since a new layer of control is added to the export of such items. It is also likely to give rise to distortions of competition at global level, as it cannot be ensured that other key technology suppliers (China, US) would introduce similar controls.

(For a detailed description of the cyber-surveillance sector, see [Final Report of the Data and information collection for EU dual-use export control policy review](#), prepared by SIPRI and ECORYS for the European Commission in November 2015.)



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Optimisation of the EU licensing architecture

The proposal harmonises licensing processes with the aim of reducing the administrative burden associated with obtaining export licences. Importantly, the draft regulation proposes to introduce new EU general export authorisations (EUGEA) for encryption, low value shipments and intra-company transmissions of software and technology and for 'other dual-use items' on an ad-hoc, as-needed basis. The proposal also introduces a new authorisation for 'large projects', where a single licence would cover export operations related to one project, e.g. the construction of a nuclear power plant, for the entire duration of the project.

Intra EU transfers

In order to take account of technological and commercial developments, the proposal revises the list of items that are subject to control within the EU. Controls are limited to the most sensitive items, in order to minimise the administrative burden and disruption of EU trade.

Enhanced cooperation on implementation and enforcement

In an effort to improve the exchange of information between national authorities and the Commission, the proposal envisages the introduction of electronic licensing systems that are interconnected through the Dual-Use Electronic System (DUeS). The proposal also calls for the setting up of 'technical expert groups' bringing together key industry and government experts to determine the technical parameters for controls.

Catch-all controls

Catch-all controls allow for the control of exports of non-listed dual-use items or technologies in certain situations, where there is evidence that they may be misused. The proposal clarifies and harmonises the definition and scope of catch-all controls to ensure their uniform application across the EU.

Modernisation of existing regulatory provisions

The proposal sets out to improve the regulatory framework, by amending various control provisions. These are intended, on the one hand, to strengthen controls, including those on technology transfers to third countries. On the other hand, they simplify inter-company transfers, especially within the EU

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Views

Advisory committees

The Committee of the Regions and the European Economic and Social Committee are not currently preparing an opinion on the proposal, the legal basis for which does not require their consultation.

National parliaments

[Article 207](#) of the Treaty on the Functioning of the European Union (TFEU) provides that export policy is an integral part of the common commercial policy of the European Union. The common commercial policy is explicitly placed under the exclusive competence of the Union (Article 3 TFEU). This means that the Union alone is able to legislate in this field. Proposals in areas of exclusive EU competence are nevertheless transmitted to the national parliaments of the Member States, as part of the informal political dialogue that the Commission launched in 2006. The [informal political dialogue](#) allows national parliaments to share their opinions on the legislative proposal with the European Parliament and the Commission. To date, the parliaments of five EU Member States have [examined](#) the proposal for a new dual-use export regulation, and three have expressed opinions.

The opinion of the Defence Committee of the Finnish Parliament essentially supports the position of the Finnish government. The Finnish government welcomes many aspects of the proposal, including the fact that the proposal seeks to further harmonise dual-use export control across the EU Member States, introduces new general export licences and places greater emphasis on human rights considerations. At the same time, the government considers that it will be difficult, in practice, to implement the proposed changes to the control of non-listed items and fears that placing greater emphasis on human rights considerations will increase the administrative burden for businesses, and create uncertainty. The government is particularly critical of extending export control beyond the EU's borders. Both houses of the Polish Parliament support the proposal. The lower house (Sejm) takes the view that the proposed regulation will increase the effectiveness and consistency of dual-use export control across the EU. It welcomes the efforts to better control the export of computer surveillance technology, but raises concerns that unregulated non-European competitors will step in to fill any gap. The National Council of Slovakia notes that the existing EU export control of dual-use items works well, and finds that there is a need for fine-tuning, but not for a general overhaul. Slovakia recognises the need for efficient export control given the rapid development of modern technologies. It notes that new measures should not diminish the competitiveness of EU industry.

Stakeholders' views

According to the EU export control policy review report of 23 November 2015, which summarised stakeholders' views on the specific policy proposals set out by the Commission, the large majority of respondents (86 %) agreed that a review of current EU export control rules would improve the export control system, with particular regard to its capacity to address evolving security risks such as WMD proliferation and terrorism (according to 62 % of respondents) and to respond to rapid scientific and technological developments (58 %). According to the majority of respondents, the review would also significantly



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enhance the efficiency of export control administration (55 %) and boost EU companies' competitiveness (49 %). Meanwhile, most participants did not foresee significant environmental or social impacts (including on the job market) stemming from the review (71 % and 80 % of respondents respectively). Some 34 % of respondents suggested that the review could support the prevention of human rights violation in third countries; 25 %, however, disagreed with this statement.

Digital Europe, an association representing the digital technology industry in Europe, has published a [report](#) on the EU's proposed recast of the European Export Control Regime. The report raises several points that the revision of the Commission's proposal ought to address, grouped into three key themes. These include ambiguous definitions and scope (e.g. cyber-surveillance technology, licensing criteria and intangible technology transfers), disproportionate measures (e.g. catch-all controls and technical assistance) and unilateral regimes (e.g. licence validity periods).

The German Industry Association BDI (Bundesverband der Deutschen Industrie) has also published a [report](#) on the Commission proposal. While the Association agrees that a review of European export control is urgently needed, it calls on the European legislator to opt for specific product and country lists instead of catch-all rules to control trade in digital-surveillance technologies. The report also calls for a more precise definition of cyber-surveillance technology.

Academic views

In the context of the dual-use export control policy review, the EU Non-Proliferation Consortium published a paper in March 2016 entitled [Balancing security, trade and academic freedom in a changing world](#). The paper provides a detailed analysis of the review options being discussed and the key considerations that will need to be addressed. According to the authors, the review process ought to achieve five objectives, including (a) enhancing effectiveness and creating convergence in policy implementation; (b) adopting a 'human security approach'; (c) modernising the licensing architecture; (d) engaging with the private sector and other stakeholders; and (e) improving engagement with non-EU states and export control regimes.



Legislative process

The legislative proposal was submitted to the European Parliament on 6 October 2016. The Committee for International Trade (INTA), which is responsible for the file, appointed Klaus Buchner (Greens/EFA, Germany) as rapporteur on 12 October 2016. The rapporteur published his [draft report](#) on 4 April 2017.

The Foreign Affairs Committee (AFET) prepared an [opinion](#), which was adopted on 30 May 2017. The AFET opinion welcomes the European Commission's legislative proposal, and strongly supports the Commission's human security approach. The opinion takes the view that the EU is right to add certain cyber-surveillance technologies to the control list, as dual-use items which can be used to commit human rights violations or undermine EU strategic interests. However, the opinion points out that not all technologies require control, and calls for exports of technologies that actually enhance human rights protection, such as encryption, to be made easier. Moreover, legitimate internet security research should not be hampered by unnecessary burdens for exporters. The opinion welcomes the introduction of a targeted catch-all clause, but notes that more legal certainty is required concerning its application. It underlines the importance of creating an export control system for cyber-surveillance technologies that can adapt to changing political realities and rapid technological change. The opinion calls on Member States to improve information sharing and transparency, including making available all licensing information.

On 23 November 2017, the INTA Committee adopted its [first-reading report](#), by 34 votes to 1, and 2 abstentions. The report calls on the Commission to strengthen the protection of the right to privacy, data and freedom of assembly, by adding clear-cut criteria and definitions to the regulation. It also calls for an obligation on exporters of products not listed in the regulation, but which may be used for human-rights violations, to use OECD-based 'due diligence' guidelines to ensure that their goods cannot fall into the wrong hands. The Commission is asked to publish a handbook before the entry into force of the new rules, to assist EU businesses with the interpretation of the new rules. The report also calls for the swift inclusion, in the regulation, of new risks and technologies. Finally, the report calls for the creation of a level playing field among Member States, by, for example, introducing similar penalties for non-compliance, along with greater transparency of national authorities' export control decisions. MEPs voted to delete encryption technologies from the list of cyber-surveillance products, as they consider these vital for the self-defence of human rights defenders.

The Parliament is due to debate and vote on the INTA report during its January 2018 plenary session. Subsequently, Parliament will vote on a mandate for the opening of interinstitutional negotiations with the Council.

For its part, the Council Working Party on Dual-Use Goods has started to work on the legislative proposal. Records of the working party's deliberations are not publicly available.



References

EP supporting analysis

[Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items: Implementation Appraisal](#), EPRS briefing, Milan Remáč, September 2016

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