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Control of exports, transfer, brokering, technical assistance and transit of dual-use items

Impact Assessment (SWD (2016) 315, SWD (2016) 314 (summary)) of a Commission proposal for a regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast) (COM (2016) 616)

Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's [impact assessment](#) (IA) accompanying the above [proposal](#), adopted on 28 September 2016 and referred to Parliament's Committee on International Trade. Specific goods and technologies, which can have both civilian and military applications, can contribute to the proliferation of weapons of mass destruction (WMD), terrorist acts and human rights violations. To prevent risks in terms of international security, these dual-use items are subject to the European Union's export control system, governed by Regulation (EC) No 428/2009 ('the regulation'). After an assessment of the export control system, the Commission concluded in 2013 that the system should be revised and modernised to cope with new, rapid, technological developments, as well as political and economic circumstances (IA, p. 4).

In April 2014, when amending the original Council regulation, the European Parliament, the Council and the Commission adopted a [joint statement](#) on the review of the dual-use export control system. This underlined 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'. In a series of resolutions adopted since then, Parliament has noted the emergence of new security threats and welcomed the Commission's initiative to modernise the EU dual-use export controls and its intention to submit a new legislative proposal.¹

Problem definition

The IA defines the multifaceted problem and its drivers, illustrated with useful statistics and examples. While defining the problem, the IA highlights the weaknesses of the existing regulation and identifies seven major problems linked with the current export control regime. The **problems** and their corresponding sub-issues are summarised below:

PROBLEM 1. Risk that controls may not adjust to evolving security threats

- Outdated or insufficient control provisions in the regulation generate potential loopholes
- The regulation lacks dedicated provisions to tackle illicit trafficking of dual-use items
- The regulation does not clearly address the risk of terrorism and misuse of dual-use items by non-state actors.

¹ For more details, see Beatrix Immenkamp, [Review of dual-use export controls](#), EPRS briefing, January 2017.

PROBLEM 2. Risk that controls may not keep pace with rapid technological and scientific developments

- The EU system lacks the flexibility and adaptability to keep pace with technology and ensure timely adjustments of controls.

PROBLEM 3. Lack of control on cyber-surveillance technologies

- The regulation does not fully address the risks associated with the burgeoning trade in cyber-surveillance technologies.
- The regulation does not clearly identify cyber-surveillance technologies as a new category of dual-use items.

PROBLEM 4. Vulnerability of global supply chains and lack of level playing field

- The regulation insufficiently addresses the specificity of intangible technology transfer (ITT).
- The regulation insufficiently covers services such as technical assistance.
- Distortion of competition due to higher compliance costs and delivery delays sometimes put EU operators at disadvantage vis-à-vis foreign competitors.

PROBLEM 5. Excessive administrative burden

- The licensing architecture in the EU appears sub-optimal, with an inherent risk of delay and cost for exporters.
- The divergent application of controls by competent authorities generates costs within the single market, as operators are sometimes faced with accumulated delays and legal uncertainty.

PROBLEM 6. Uneven implementation and enforcement within the EU

- Divergences in the interpretation and application of controls result in different export conditions, as well as a lack of legal transparency and predictability for companies.

PROBLEM 7. Design and implementation dimensions of the problem

- The design of the regulation at times fails to address an issue, or contain provisions that are no longer entirely 'fit for purpose'.
- Uneven implementation of the regulation within the EU.

The IA identifies several **problem drivers**:

1. Evolving and new security threats

The proliferation of WMD – nuclear programmes, chemical and biological weapons, missile technology – is considered a major security threat for the EU. WMD proliferation risks are no longer limited to states; non-state actors (e.g. criminal networks) are more and more involved via illegal procurement programmes. Cybersecurity, which has become a key issue, poses international security threats and a risk to human rights (IA, pp. 9-10). This problem driver relates to problems 1 and 3.

2. Rapid technological and scientific development

Technological and scientific developments represent a challenge in many areas of control (e.g. nuclear, chemical, biological or aerospace). The emergence of new and advanced technologies (e.g. additive manufacturing/3D printing, cloud computing, nanotechnology, graphene research) increases the complexity of strategic control (IA, p.11). This problem driver relates to problems 2 and 3.

3. Transformation in global economic activity

With the expansion of global trade and interconnected data networks, the opportunities for state and non-state actors to acquire dual-use items increase. Another consequence of global trade expansion is that the volume of dual-use items shipped via third countries is increasing, as well as the risk of dual item diversion to countries of concern. As exports are more and more transmitted in the form of electronic data instead of transported, anyone can act as a broker in a dual-item export deal, using online trading platforms. In addition, 'the greater diffusion of dual-use knowledge offers easier acquisition pathways', sensitive information being easy to transfer

(IA, p. 12). Finally, the increasing importance of emerging economies, multinationals and industrial processes within global trade, expand foreign availability of dual-use goods (IA, pp. 11-12). This problem driver relates to problem 4.

4. Asymmetric implementation of controls within the EU

The flexibility of the EU system, in terms of implementation and enforcement, results in diverging interpretation and application of controls within the EU as regards licensing conditions and requirements and the application of catch-all controls of non-listed items. There are differences between Member States with regard the cost of controls and the resources allocated to export control. With respect to economic operators, the administrative burden related to export controls concerns mainly compliance costs, licensing delays and legal uncertainty (IA, pp. 12-13). This problem driver relates to problems 5 and 6.

The IA presents a problem tree that tries to point out the links between problems and problem drivers (IA, p. 14), but these links are not explicitly described in the text of the IA. No driver is identified for problem 7, which could be seen as overlapping with all the other problems.

The IA identifies different **stakeholders** affected by the problem. These include **industry** stakeholders of various sectors; a large number of **SMEs**; **service providers** involved in dual-use trade (brokers, consultants providing technical assistance or resellers) and **researchers** (e.g. the internet security research community); **government stakeholders**; and **civil society stakeholders** (NGOs interested in the positive impact of export controls on human rights, the wider public in the EU benefiting from increased security and competitiveness, people in third countries exposed to fundamental rights threats) (IA, pp. 15-17). Annex 3 clearly outlines the categories of stakeholders involved and how each category would be affected by each action composing the chosen policy options (IA, pp. 57-61).

Objectives of the legislative proposal

The *general* objective of the Commission proposal is to contribute to peace and security, to free trade and the protection of human rights, supporting the overall policy objectives of the EU (Article 3 TEU). The *specific* objectives of the initiative are to:

- 'ensure that EU export controls adjust to evolving security risks and threats
- ensure that controls adjust to rapid technological and scientific developments
- prevent the export of cyber-surveillance technology misused in violation of human rights
- reduce the distortions of competition and administrative burden associated with controls
- promote a global level playing field
- support effective and consistent application of controls in the EU' (IA, pp. 21 -22).

Range of options considered

The IA identifies five options to address the identified problems.

Table 1: Policy options

Actions	Measures
Option 1 - Baseline: no change	
Option 2 - Implementation and enforcement support	
Development of an EU export control network	Enhanced information exchange between competent authorities
	Development of security export controls synergies
	Enhanced cooperation with Member States enforcement agencies
	Development of an EU capacity-building programme
Transparency and partnership with the private sector	Transparency measures
	Development of tools for operators
	Development of 'smart-security' mechanisms
Export control dialogue with third countries	
Option 3 - EU system upgrade	
Modernisation of existing control provisions (including technical assistance, brokering controls, transit controls)	Clarification of key export control notions
	Legal clarification of intangible technology transfers (ITT) controls
	Tackling illicit trade
	Strengthening of brokering controls
	Consistency of transit controls
Optimisation of EU licensing architecture	Harmonisation of licensing processes
	Shift towards open licensing
Convergence of catch-all controls	Clarification and harmonisation of the definition and scope of catch-all controls
	EU-wide application and validity of catch-all decisions
	Regular exchange of information
Re-evaluation of intra-EU transfers	Review Annex IV (updated list of most sensitive items)
	European General Export Authorisations (EUGEA) for intra-EU transfers
Option 4 - EU system modernisation	
Review of the general approach to 'dual-use'	Review of the definition of dual-use items
	Review of the control criteria
Initiative to control exports of cyber-surveillance technologies	Due diligence for companies
	EU autonomous list of cyber-surveillance technologies
	Catch-all control
Option 5 - EU system overhaul (discarded)	

Source: Commission IA (pp. 22-28); the author

Due to the technical complexity of the issues discussed, a clearer presentation of the functioning of the *current* system would have been useful to gain a better grasp of the actions and measures proposed by the initiative.

The preferred option identified by the IA is the **combination of option 3 and option 4**. In the chapter dedicated to the comparison of policy options, the IA indicates that **option 3** offers maximum potential for a reduction of the administrative burden for exporters and authorities; it could also help reduce distortions of competition with operators from third countries. However, option 3 would not address the problems associated with the emergence of new types of cyber-surveillance technologies, and the possible misuses of these technologies in terms of human rights violations or international security threats. **Option 4** could result in a higher

administrative burden for operators and authorities; it also involves a risk of distortion of competition at global level. Nevertheless, it is considered that option 4 would have a positive impact on security and human rights (IA, p. 39).

Option 2, combining soft-law and non-regulatory actions, which would optimise the functioning of the system and bring long-term benefits for administrations and operators, would have significant administrative costs in the short term. However, given the positive expected impacts, for example as regards adaptation to rapid technological and scientific developments, reduction of distortions of competition, and effective and consistent application of controls in the EU, the IA suggests the possibility of a gradual implementation of some actions defined under option 2 (IA, pp.39-40).

The IA stresses the fact that options 2, 3 and 4 include complementary actions (IA, p. 28). However, it could have made a clearer distinction between those elements of the different policy options that are complementary, and those that are alternative. In addition, the IA could have been clearer about which of the actions defined as part of option 2 might be chosen for a possible gradual implementation.

Option 5, comprising a full centralisation and harmonisation of controls, trying to establish an EU central licensing agency, was discarded because of high costs and opposition from stakeholders. Member States and some industry associations and companies strongly opposed this option, considering it important to preserve an 'optimal equilibrium' between the EU and national levels of the system (IA, p. 28).

Even if Annex 6 (IA, p. 66) is dedicated to outlining the intervention logic, a clearer explanation of the direct and indirect links between problems and their drivers, the objectives of this legislative proposal and the options considered would have strengthened the IA.

Scope of the impact assessment

Options 2, 3 and 4 are compared to the baseline scenario (option 1). The Commission states that social impacts concern mainly security and human rights. It notes no direct environmental impacts. Therefore, the impact analysis of the review options concentrates on the economic, security and human rights impacts. These aspects of the various measures and actions are analysed individually and then brought together to represent the impact of the different options. The IA presents a very useful table, indicating potential direct and indirect impacts (IA, pp. 29-30).

Instead of comparing the options according to their efficiency, coherence and effectiveness, policy options 1 to 4² are compared in a table (IA, p. 40) according to nine 'assessment criteria', which are not previously presented or explained in the IA. Annex 7 also makes a detailed presentation of the assessment of impacts of the options, actions and measures included under each option in a table. This assessment uses thirteen 'impact indicators', which, again, are not previously explained. The table in the body of the text (IA, p. 40), summarising the impacts of the policy options, seems to be the result of the detailed analysis of impacts by review option and actions presented in the table in Annex 7. However, no explanation of the link between the two tables is provided in the IA. In addition, the IA does not point out any link between the 'assessment criteria' used in the table of the IA and the 'impact indicators' in Annex 7. A clarification of these methodological aspects would have strengthened the analysis and comparison of the options presented.

The IA seems to lack consistency concerning the degree of change needed for the EU export control system. On the one hand, the Commission presents the current system as being ill adapted to deal with new security threats, the rapid technological and scientific developments and cyber-surveillance technologies. The Commission concludes that the system 'must be upgraded in order to face new challenges and generate the modern control capabilities the EU needs for the coming decade and beyond' (IA, p. 4). Moreover, it proposes

² The impacts of option 5 are not assessed, this option being immediately discarded after its presentation.

overhauling the system in option 5, although, as mentioned earlier, the IA discards this option and its impacts are not considered.

On the other hand, the IA stresses that this review 'is not about setting up a new regulatory system, but rather suggests changes to an existing system, review options can only produce a marginal impact' (IA, p. 29). Therefore, the reader may wonder whether the selected options are sufficiently robust to generate the 'modern control capabilities the EU needs for the coming decade and beyond', as pointed out above.

An assessment of option 5, and a comparison of policy options including this option, instead of discarding it after having introduced it, could perhaps have brought additional value to the IA.

Subsidiarity / proportionality

The IA states that 'dual-use export controls form an integral part of the Common Commercial Policy' under Article 207 TFEU. The EU has the exclusive right to act in this field, according to Article 3 TFEU. The IA indicates that EU intervention is necessary to:

- achieve the security objectives, for which a collective action is necessary
- address the distortions of competition within the single market
- promote the level playing field globally through dialogue with key trade partners
- 'protect fundamental rights in light of the Charter of Fundamental Rights' (IA, p.21).

As this is a proposal in an area of exclusive EU competence, it is transmitted to the national parliaments of the Member States, as part of the informal political dialogue.

As regards the principle of proportionality, the IA mentions that the options identified 'are limited to what is necessary in order to attain the objectives' (IA, p. 21) but does not delve any further in this issue.

Budgetary or public finance implications

To amend lists of dual-use items and general export authorisations by delegated acts, the Commission estimates that it would require about 50 % of a Full Time Expert (FTE). For cyber-surveillance controls, some additional administrative staff (1 FTE) would be needed for administrations, both at national and EU level (explanatory memorandum of the Commission proposal, p. 6).

When dealing with the impacts of policy options, the IA tries to present some estimates of budgetary impacts for each action and measure. As these budgetary implications are scattered through the text, a summary of the impacts for each policy option at the level of the EU and national administrations would have been useful.

SME test / Competitiveness

The IA indicates that a large number of SMEs are included among dual-use item industry stakeholders (IA, p.16). It takes the example of the EU defence industry, where the majority of firms are SMEs employing less than 10 employees, and for which statistics of 2012 are provided. The IA executive summary sheet indicates that 'the majority of respondents to the public consultation agree that the export control policy review would likely facilitate dual-use exports by SMEs'. However, it seems that no SME test was conducted, and the IA remains vague about the overall impact of this proposal on SMEs.

The IA addresses international competitiveness in the chapter dedicated to the assessment of policy options, under the economic and trade perspectives. The comparison of policy options (IA, p. 39) indicates that option 3 could help reduce distortions of competition with operators from third countries, whereas option 4 involves a risk of new distortions of competition at global level. As the preferred option is a combination of options 3 and 4, the overall impact on competitiveness remains unclear.

Simplification and other regulatory implications

The IA indicates that other regulations or directives play an important role in regulating the trade of sensitive items (e.g. directives on firearms, drugs precursors or intra-EU transfer of defence material), but that 'each of those instruments deals either with a specific and different category of items/or end-uses, or addresses different types of situations. Therefore [...] those instruments cannot address the 'dual dimension' of security' (IA, p. 5).

This proposal is part of the Regulatory Fitness and Performance Programme (REFIT), as it is 'expected to contribute to a simplification of certain control procedures and a more clear and consistent application of controls throughout the EU' (IA, p. 7).

As regards consistency with other EU policies, the IA mentions that the objectives of the proposal are fully in line with the EU foreign and security policies, in particular on addressing the challenges presented by the proliferation of WMD, and in line with the EU trade policy to foster competitiveness and reduce distortions to trade (IA, p. 22).

Relations with third countries

The IA mentions the international commitment of the EU and its Member States to comply with international obligations, especially as regards the fight against proliferation of WMD. It indicates that enhanced controls on dual-use item exports could benefit third country civil society exposed to human rights violations, as well as human rights activists and dissidents located in third countries (IA, p. 17).

Quality of data, research and analysis

As regards the **problem definition**, the IA uses recent facts to illustrate the security threat issues faced by the EU, making it an informative read. The information collected comes from various sources (e.g. press reports, expert reports, revelations from leaked documents) and is put in the context of recent conflicts (e.g. Syria, Arab Spring) when applicable. A data collection project to sketch the profile of the EU dual-use industry, concerning the economy and trade, was commissioned from external consultants (Annex 1, p. 45). The IA presents some data related to the size of the dual-use item sector (IA, pp. 15-16) and to dual-use item employment (IA, pp. 19-20) to contextualise the analysis. As regards the assessment of the impact of the different policy options, the IA points to the difficulty of quantifying the expected impacts; hence, the analysis is essentially qualitative but is supported by quantitative data whenever possible (IA, p. 30). More generally, a glossary would have been useful to define key concepts.

Stakeholder consultation

In view of Annex 2 of the IA dedicated to stakeholder consultation, it seems that the Commission deployed important efforts to collect relevant information. The Commission launched an open, online, public consultation on 15 July 2015 to collect stakeholders' views on the EU export control policy review. As the IA does not state when the open online public consultation finished, it is not clear whether the mandatory 12-week period required by the better regulation guidelines was respected.

The Commission received 97 responses from dual-use exporters and manufacturers (55 %), industry associations (21 %), civil society representatives (8 %) and Member State authorities (6 %). In addition to this consultation, the Commission contracted an external consultant to collect data related to the EU dual-use industry and the possible impact of options. Finally, the Commission took into account the results of other consultation activities carried out during previous years.

Monitoring and evaluation

The IA indicates that a monitoring of implementation is envisaged in cooperation with Member States. A table is provided with indicators established for each of the objectives, the source of data and the frequency of measurement (IA, pp. 41-43). However, these indicators do not appear to be explicitly reflected in the legislative proposal.

The IA envisages regular information transmission from the Commission to the European Parliament and the Council regarding the implementation of the initiative. It states that the Commission will undertake an evaluation of this initiative within five years of its entry into force, while the proposal provides for a period of between five and seven years after the date of its application.

Commission Regulatory Scrutiny Board

The European Commission's Regulatory Scrutiny Board (RSB) issued a positive [opinion](#) on the draft IA report, but called for further improvements. Annex 1 of the IA details the comments of the RSB and the revisions performed by DG TRADE. However, some RSB requests do not seem to have been fully covered. These include calls to strengthen the problem definition by better demonstrating its magnitude, to clarify the intervention logic and linkages between problems, objectives and options, to make a clearer distinction between the complementary and alternative elements composing the policy options, and to deepen the analysis of impacts.

Coherence between the Commission's legislative proposal and IA

The proposal seems to follow the recommendations expressed in the IA.

Conclusions

The IA is well structured, clear and compact. Overall, it appears to provide well-researched explanation of the evidence base of the legislative proposal. The problem definition is illustrated by facts and figures which give a clear view of international security threats. The outcome of the stakeholder consultation is clearly presented and has been integrated into the analysis and the assessment of the different options, with a transparent presentation of stakeholders' views throughout. Nevertheless, the IA has a number of shortcomings. A clearer explanation of the links between the problems and their drivers, the objectives of the legislative proposal and the options considered, would have strengthened the IA. The report would have been more persuasive had it been clearer about the methodological approach to the comparison of the options. Even if the Commission made efforts to collect relevant data in preparation of the IA, the analysis remains essentially qualitative. Finally, the IA remains vague about the overall impact of the proposal on SMEs and competitiveness.

This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on International Trade (INTA), analyses whether the principal criteria laid down in the Commission's own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for information and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

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