

Fighting trade in tools for torture and executions

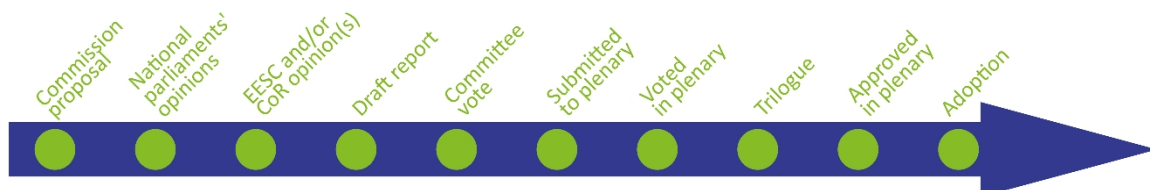
SUMMARY

The EU is committed to fighting torture and use of the death penalty throughout the world. Both phenomena continue to afflict a significant number of countries, and trade in torture tools is booming. One of the most important measures taken by the EU has been its 2005 Regulation imposing restrictions in trade in torture tools. Despite some visible effects, it has been repeatedly criticised for loopholes which allow trade in goods that could be used for torture, executions and other ill-treatment, as well as related activities like brokering or advertising such goods to continue.

Responding to a 2010 European Parliament resolution, the European Commission adopted a legislative proposal to amend the Regulation in 2014. The proposal was criticised by civil society organisations fighting torture since it did not address all potential loopholes. The EP's International Trade Committee proposed several amendments aiming to further restrict the trade in torture tools and the provision of related services. The final compromise text, agreed after three trilogue meetings, reflected most of INTA's proposals, albeit with certain modifications. It was adopted by the EP and the Council as such, entering into force in December 2016.

Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment

<i>Committee responsible:</i>	International Trade (INTA)	COM(2014) 1 final of 14.1.2014
<i>Rapporteur:</i>	Marietje Schaake, ALDE, The Netherlands	<i>procedure ref.:</i> 2014/0005(COD)
<i>Procedure completed</i>	Regulation (EU) 2016/2134 OJ L 338, 13.12.2016, p. 1	Ordinary legislative procedure



This updates a previous edition, of September 2016: [PE 586.659](#).

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Introduction

In January 2014, the Commission put forward a proposal to amend Council [Regulation \(EC\) No 1236/2005](#) of 27 June 2005. The purpose of the 2005 Regulation has been to ban or restrict trade in tools used, or that could be used, for torture and applying the death penalty. This Regulation has come under repeated criticism for allowing some forms of trade, as well as related activities, like brokering or commercial marketing and promotion, to continue. The Commission had tried to tackle the existing loopholes by extending twice, in [2011](#) and [2014](#), the list of products coming under the scope of the Regulation, but some trade and related activities conflicting with the purpose of the Regulation persisted, as civil society organisations have highlighted. In [2010](#), the European Parliament urged the Commission to initiate substantial changes to the Regulation through a new legislative proposal. The issue at stake is to balance the legitimate trade interests of exporters with the concerns expressed by human rights organisations. To this end, the Commission proposal introduces only such new additional trade restrictions as it considers necessary and proportionate, avoiding cumbersome administrative procedures. The proposal fell short however of the changes desired by civil society.

Context

The prohibition of torture is universal and absolute. Torture is banned by Article 5 of the [Universal Declaration of Human Rights](#) and by a number of international and regional human rights treaties ratified by the vast majority of states. It is also [considered](#) that the prohibition of torture has attained the status of *jus cogens*, thus being a fundamental principle of international law from which no derogation by any state is ever permitted.¹ There are no circumstances, including in times of war or significant threats to national security, in which it can be set aside. A specific instrument against torture, namely the 1984 [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) – CAT (ratified by [158](#) states) and its 2002 optional protocol (ratified by [80](#) states) require states parties to take all necessary measures to prevent torture on the territory under their jurisdiction, admitting of no exception in the use of torture. The Convention in its first article defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. The Convention equally prohibits any other acts of cruel, inhuman or degrading treatment and punishment, for which, however, it does not provide an explicit definition.

The definition of torture has been taken over in the EU Regulation, and in EU Guidelines concerning torture.

Torture continues however to be used in many countries in the world on a large scale, not only in those that have not ratified the relevant international treaties, but also in many of those which have done so. According to Amnesty International, at least 79 of the countries which ratified CAT were still torturing in [2014](#). The same organisation also informs that, between 2009 and 2013, it received reports on torture and other ill-treatment in 141 countries, from every region of the world. In some of these countries, torture was an isolated occurrence while in many others it was routine.² As a consequence of the widespread practice of torture, trade in torture tools is [booming](#) in the world; China is a major provider of torture devices.

Unlike torture, which is universally banned but takes place in the shadows, the death penalty is still legally allowed in a number of countries; international legal obligations to end it apply only to those countries which have ratified the relevant [texts](#). According to a 2016 [Report](#) by Amnesty International on the death penalty, it continued to be applied in 2015 in 25 countries (3 more than in 2014), while 140 countries in the world have abolished it in law or in practice. In 2015, the number of executions rose dramatically by 54% compared to the previous year: at least 1 634 persons being executed. However, this figure excludes China, the [biggest executioner](#) in the world, which does not make public any data.

At EU level, the [Charter of Fundamental Rights](#) prohibits the death penalty and execution in its Article 2, and torture and inhuman or degrading treatment in its Article 4. The EU is deeply committed to fighting both torture and the death penalty in the world. In its [Guidelines on torture and other cruel, inhuman or degrading treatment or punishment](#), adopted in 2001 and reviewed in 2012, and its [Guidelines on the Death Penalty](#), adopted in 2013, it has defined an extensive set of measures to be applied in the framework of its Common Foreign and Security Policy. These include addressing the issues of torture and the death penalty in its human rights strategies and political dialogues with third countries, prioritising them in bilateral and multilateral cooperation, urging third countries to take appropriate measures to end them, intervening on behalf of the individuals concerned, including observing trials, and urging non-abolitionist countries to respect minimum standards when applying the death penalty.

Existing situation

The EU also acts against torture and the death penalty in the area of trade. Its main instrument is Regulation (EC) No 1236/2005 of 27 June 2005, [amended several times](#) by the Commission. The Regulation is a unique example in the world of such a legal instrument. It distinguishes between equipment and products with no other practical use than capital punishment, torture or other cruel, inhuman or degrading treatment, and goods that have been designed for other purposes (especially for law enforcement), but could be used for torture and ill-treatment. The first category of goods (listed in Annex II) is banned from trade and any technical assistance related to them is equally prohibited. The second category of goods (listed in Annex III) is subject to trade controls, requiring authorisation, on a case by case basis, by national authorities.

The Commission has revised twice, in 2011 and 2014, the lists of prohibited and controlled goods, updating and extending them. The main modification introduced in 2011 consisted of the inclusion among the listed goods of certain medicinal products

(barbiturate anaesthetic agents), which can be used in lethal injections. Since these products can also be used for medical purposes such as anaesthesia and sedation, they were not prohibited from trade, but became subject to authorisation. In 2014, the European Commission once again extended the lists of goods.

As a result of these modifications, Annex II (banned goods) in the latest [version](#) includes the following categories of goods which are banned from trade:

- Goods designed for the execution of human beings (gallows and guillotines; electric chairs; automatic drug injection systems);
- Restraint equipment considered not suitable for restraining human beings (body-worn electric shock devices, thumb-cuffs and finger-cuffs, thumbscrews and finger-screws; leg restraints and gang chains; restraint chairs; wall handcuffs, shackle boards and shackle beds; cage and net beds);
- Tools deemed not suitable to be used for law enforcement: spiked batons and shields; certain whips.

The goods listed under this category can be exempt from the prohibition on trade only if they are intended to be displayed in a museum.

Annex III (goods requiring authorisation) includes goods designed for restraining human beings (shackles and gang chains, certain types of individual cuffs or rings), weapons and devices designed for the purpose of riot control or self-protection (portable electric discharge weapons), weapons and equipment disseminating incapacitating or irritating chemical substances for the purpose of riot control or self-protection, and products which could be used for the execution of human beings by means of lethal injection. All these goods require trade authorisation, but under the current regime, no authorisation is required for such goods merely transiting through the EU's customs territory.

Another essential element of the Regulation is that it requires Member States to put in place 'effective, proportionate and dissuasive' penalties for breaches of the Regulation, and to notify the Commission of these (Article 17). It also imposes information obligations on the competent authorities, which have to notify all other Member States' authorities and the Commission when they refuse to issue an authorisation, and on the Member States, which are required to publish an annual activity report concerning the number of applications received, the goods and countries concerned, and the decisions taken on these applications.

Under the current Regulation, the Commission is empowered to amend the annexes whenever necessary under the delegated acts procedure, in order to take into account new data and new technological developments.

The ban imposed by the Regulation on medical substances which can be used for executions has produced visible results. In the USA, the [lack](#) of such substances, as a consequence of the EU ban, made executions more [difficult](#) to perform. On the other hand, since its entry into force in 2006, the Regulation has been repeatedly criticised by human rights organisations for containing numerous loopholes which allowed trade in torture items and related activities to continue. Several reports³ by Amnesty International and Omega Foundation found that companies operating in a number of Member States had marketed or promoted equipment prohibited under the Regulation, or had traded equipment, which although not prohibited, could be used for torture or ill-treatment.

Non-EU companies have promoted torture devices in the EU online and at trade fairs, and EU-based companies have brokered trade in such products between third countries.

The changes the proposal would bring

The [proposal](#) put forward by the Commission introduces a number of important changes.

In order to ease the administrative burden, now deemed unnecessarily cumbersome by exporters and competent authorities, the proposal modifies the **export regime for medicinal substances** that can be used in executions (now listed in a separate Annex IIIa) and **introduces several types of authorisation** for all goods requiring an export authorisation. The Union General Export Authorisation applies for exports of medical substances to countries that have abolished the death penalty for all crimes (as listed in a new Annex IIIb) and is valid for all exporters that respect its conditions and requirements in order to avoid the diversion of the goods to a non-abolitionist country. More specifically, exporters may not use this procedure if they have been informed by the competent authorities, or otherwise know or suspect, that the goods in question are intended for use in capital punishment or for re-export to a third country. They also have the obligation to enter contractual arrangements with the distributor or to obtain a written declaration from the end-user in the third country in order to prevent the goods from being used for capital punishment. For exports of medical substances of concern to non-abolitionist countries, two other types of authorisation apply under similar conditions: either an individual authorisation (valid only for a specific exporter and a specific end-user, and covering one or several goods) or a global authorisation (valid only for a specific exporter in relation to a type of goods and for one or more specified end-users or a distributor).

The individual and global authorisations also apply to all controlled goods listed in Annex III. For Annex II goods intended to be displayed in a museum an individual authorisation is necessary.

The proposal **prohibits brokering** in relation to the banned goods (Annex II items). It also prohibits brokering services and provision of technical assistance in relation to controlled items (Annex III and IIIa goods) if the broker or provider of technical assistance knows, or has grounds to suspect, that these may be used for torture, ill-treatment or capital punishment. The prohibition is limited to those cases when the provider is aware of the intended use, because, most often, not enough information is available to competent authorities.

The proposal **does not impose any restrictions on the transit** through EU territory of controlled goods. Such a prohibition is not considered proportionate since transporters usually do not have information about the end-user. This information is usually only available to exporters, based in third countries.

The proposal **modifies the definitions** of torture and of 'other cruel, inhuman or degrading treatment or punishment', in order to bring them into line with the relevant case law of the European Court of Human Rights. As torture, 'other cruel, inhuman or degrading treatment or punishment' is considered now to consist of acts leading to severe pain, while previously it amounted to acts causing significant pain. What distinguishes torture from other types of ill-treatment is no longer the degree of severity, but the presence, only in the case of torture, of a specific purpose for which it is inflicted (e.g. to extract information). Both definitions would also be extended to include pain or

suffering caused by inappropriate conditions of detention, even if they are not caused intentionally by those in charge of detention facilities.

Another amendment introduces the **exchange of information** by customs authorities regarding cases of imports or exports of prohibited goods. A further proposal requires all notifications among Member States relating to refusal or annulment of authorisations to pass through an encrypted system to protect the legitimate interests of economic operators.

The proposal includes provisions on delegated acts, providing that the Parliament and Council have two months to object to a proposal, which may be extended at the initiative of the co-legislators by a further two months.⁴ It also introduces a new urgency procedure which should enable the Commission to react promptly to any new developments on the market, which would otherwise enable the regulation to be circumvented. In such cases of urgency, especially when new equipment enters the market and it is important to prevent the building up of stocks, modifications may enter into force immediately and remain valid for as long as neither the Council or the Parliament object to them.

The [compromise text](#) agreed after the trilogue negotiations (see last section) includes some further changes, and also modifies some of the Commission's proposed amendments to the existing Regulation:

- Definitions: Goods for which an export authorisation is required in order to prevent them from being used for capital punishment are more precisely defined in order to exclude non-lethal goods. Regarding the modification of the definitions of torture and other cruel, inhuman or degrading treatment or punishment', the compromise takes out suffering arising from inappropriate conditions of detention, which had been added by the Commission.
- The provision of brokering services and of technical assistance in relation to goods listed in Annex III or IIIa is made subject to prior authorisation instead of the prohibition proposed by the Commission, which was conditional on the knowledge of the supplier about the intended use. Concerning goods listed in Annex II, brokers and suppliers of technical assistance are prohibited from providing training; the promotion and advertisement of such goods at fairs in the Union, as well as online and in the media are prohibited. The transit through the Union's territory of Annex II goods is prohibited, while for Annex III and IIIa goods this prohibition applies when the transporter knows about their intended use for banned purposes.
- The secure and encrypted mechanism for sharing information among competent authorities in the Member States on denials of authorisations will be set up as part of the existing system for exchange of information about dual use items.
- Several technical changes are made to the text in order to take into account the new legal regime established by Regulation (EU) No 37/2014 concerning delegated acts in trade policy areas.
- The Commission is tasked to draft an annual report compiled from annual activity reports by Member States on the number of applications received, on the goods and countries concerned by these applications, and on the decisions they have taken on these applications. A coordination group will be established to serve as a platform for Member States' experts and the Commission to exchange information and to discuss questions of interpretation.

Preparation of the proposal

In March 2012, the Commission issued a [call for applications](#) with a view to establishing a Group of Experts to assist it with the in-depth review of the Regulation (EC) No 1236/2005. The Group of Experts met six times with Commission staff.

Parliament's starting position

In June 2010, the European Parliament adopted a [resolution](#) on the Regulation, which was instrumental in persuading the Commission eventually to propose changes. The Parliament urged Member States to improve their compliance with their information obligations under the Regulation, namely regarding the penalties imposed, applications received and licencing decisions. It asked the Commission to add certain new items to the lists of prohibited and controlled items. These items were included in the Commission's subsequent modifications of the Annexes. The Parliament also asked the Commission to propose substantive changes to the Regulation, namely to establish a specific procedure to regularly review the lists of items subject to trade controls; to insert in the Regulation a 'torture end-use' clause that would allow Member States to refuse the export of any non-listed items which could be used for torture, ill-treatment and the death penalty; to impose a prohibition on the brokering of transactions by agents from the EU; and to make the transit of controlled goods subject to authorisation.

In a further [resolution](#), adopted in 2014, on the eradication of torture in the world, the EP reiterated its earlier call for the introduction in the Anti-Torture Regulation of a 'torture end-use catch-all clause' to allow Member States, on the basis of prior information, to license or refuse the export of any items which pose a substantial risk of being used for torture, ill-treatment or capital punishment.

Stakeholders' views

Amnesty International and Omega Foundation, two anti-torture NGOs which have been particularly active in denouncing the shortcomings of the existing Regulation, declared in a [joint report](#) in May 2015 their support for many of the Commission's proposals which focus on long-standing limitations previously highlighted by the two organisations. However, they consider that the Commission's proposals fail to effectively address a number of crucial weaknesses and loopholes in the Regulation. Their report considers that the exclusion of provision of ancillary services (transport, financial services, insurance or re-insurance, and general advertising or promotion) from the scope of the regulation will in fact limit its effectiveness and, consequently, recommends the inclusion of such services under the ban when the provider knows or has grounds to suspect that the goods are to, or may, be used for torture or capital punishment. The report asks for the introduction of a transit authorisation for all items subject to trade authorisation. Furthermore, it recommends that the commercial marketing and promotion of banned goods in the EU should be prohibited.

Amnesty International and Omega Foundation also advocate the adoption of a targeted end-use clause allowing individual Member States to act immediately to halt a transfer of grave concern independently of any actions which the EU may or may not take. They support the urgency procedure proposed by the Commission for updating the lists of goods, but consider that it is sometimes insufficient. Item-based systems have certain shortcomings: they do not control a whole range of products which are left out of the lists; they allow for a delay between the production and use of a new product and its inclusion in the list; and they allow for big evasion potential by suppliers who can easily

rename their products. For example in the USA, many states are exploring the use of new medical substances for executions and it is necessary to react promptly to any new developments in this area. They also reiterate their support for the introduction of an effective mechanism to formally review the regulation and its implementation by Member States at regular periods. Most of these recommendations have been addressed in the INTA report.

National parliaments

No [national parliament](#) submitted a reasoned opinion or contribution on the proposal. The subsidiarity deadline has passed.

Legislative process

The legislative proposal, COM(2014) 1, adopted by the European Commission on 14 January 2014, was [assigned](#) to the International Trade Committee (INTA), while the Foreign Affairs Committee (AFET) was to issue an opinion on the proposal. The INTA Committee nominated Marietje Schaake (ALDE, The Netherlands), and AFET, Barbara Lochbihler (Greens/EFA, Germany), as rapporteur and rapporteur for opinion respectively. The [draft report](#) was presented in INTA on 20 May 2015, while the AFET Committee issued its opinion on 6 July 2015. Amendments were tabled in the INTA Committee on 14 July and the [Committee's final report](#) was adopted on 22 September.

Most amendments proposed in the AFET [opinion](#) overlap with those in the INTA [report](#). Their respective proposals regarding the introduction of a targeted end-use clause or a catch-all clause differ to a certain extent. The targeted end-use clause proposed by AFET requests Member States to suspend or halt the transfer of goods that clearly have no practical use other than for the purposes of capital punishment, torture or other ill-treatment (for INTA catch-all clause see below).

The INTA report includes a wide range of amendments to the Commission proposal:

- It requires the inclusion of ancillary services (transport, financial services, insurance or re-insurance, and general advertising and promotion, including via internet) in the definition of brokering. This would amount in practice to a ban on these services under the same conditions as for brokering.
- Another amendment prohibits the transit of banned items through EU territory. For the transit of controlled items, the competent authority can decide that an authorisation is necessary, based on information it receives that the goods in question could be used for torture, ill-treatment or capital punishment.
- A further amendment prohibits commercial marketing and promotion of banned items, including via internet.
- A catch-all clause is inserted, imposing an authorisation requirement for exporters who have been informed by authorities about the possible use of non-listed items for torture, capital punishment and other ill-treatment. This clause also grants national authorities the possibility to decide whether an authorisation is necessary once they have been informed by the exporter – who has an obligation in this sense – that the goods concerned can be used for torture or capital punishment. This clause is considered necessary in order to guarantee flexibility for adapting to changing technologies.

- The Commission should compile an annual report based on the annual reports provided by the Member States. It should also establish a review mechanism, to be activated every three years, including information on licensing practices and penalties in Member States.
- The creation of an Anti-Torture Coordination Group is further proposed, which should be composed of a representative of each Member State and chaired by a representative of the Commission. The Group will be charged with examining issues relating to the application of the regulation and with coordinating an exchange of information between competent authorities with a view to eliminating possible disparities in trade practices at national level.
- The INTA Committee also proposes some modifications to the list of countries considered abolitionist (listed in Annex IIIb): Liberia, Madagascar and Mongolia, which have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, but retain the death penalty in their national legislation, as well as Benin and São Tomé and Príncipe, which have not ratified the above-mentioned Protocol, should be excluded, while Gabon, which has ratified the Protocol, should be included.
- The specific provisions proposed by the Commission concerning the delegation of powers are deleted, because the 'Anti-Torture Regulation' has already been included in the ['Trade Omnibus Package'](#) aligning it with the provisions of the Lisbon Treaty. The new urgency procedure is maintained.

The report was debated and voted in plenary in October 2015. The European Commission, represented in the plenary by the Trade Commissioner, Cecilia Malmström, [expressed reservations](#) about some of the proposals for amendments, while declaring its support for the objectives which inspired them. According to the Commissioner, some of the proposed amendments are without precedent in export-control legislation, especially the proposed catch-all clause. It could lead to restrictions going beyond what is necessary, and prevent a level playing field for exporters, thus endangering the uniformity of EU trade policy. The inclusion of a range of other activities in the definition of brokering services would make compliance very difficult to monitor and control. The proposal for the Coordination Group should be checked for its compliance with provisions about delegated powers.

The plenary [approved](#) the Commission proposal as amended by the INTA Committee. The proposal was referred back to INTA in order to start trilogue negotiations with the Council, with the aim of finalising the procedure with a first-reading agreement. For its part, the Presidency of the Council presented a [compromise proposal](#) as basis for the trilogue negotiations. The proposal was endorsed by the Council Working Party on Trade Questions in November 2015, enabling interinstitutional negotiations to start. On 24 May 2016, a political agreement was reached during the third round of trilogue negotiations. The political agreement was endorsed by Coreper on behalf of the Council on 30 June 2016. The INTA Committee approved the compromise text on 13 July without debate.

The compromise text, approved by the Parliament's plenary on 4 October 2016 with a wide majority of 612 votes in favour, contains changes which are in line with most of the recommendations put forward by the INTA Committee, with one notable exception – the catch-all clause, which is not included. Thus, the compromise strengthens the provisions on transit, advertisement, technical assistance and training as requested in the INTA

report. While it does not adopt EU restrictions on other ancillary services, it provides Member States with the possibility to adopt or maintain national measures in order to restrict services such as transport, financial services, insurance or reinsurance, general advertising or promotion in relation to goods listed in Annex II. The role of competent national authorities in assessing the risk of diversion is strengthened with respect to chemical substances for riot control. The compromise also provides for the exchange of information among competent authorities; the compilation of a yearly report by the Commission; the establishment of a Coordination Group; and the partial modification of the Annex IIIb countries list.⁵ The regulation's implementation will be reviewed every five years through an impact assessment delivered to the Parliament and Council.

On 14 November 2016, the Council adopted the legislative act in the form approved by the EP, paving the way for its entry into force. The legislative text was [published](#) in the Official Journal on 13 December 2016 and entered into force three days later.

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Amnesty International, [European Union: Stopping the Trade in Tools of Torture](#), 2007.

Endnotes

¹ This was the conclusion reached for example by the International Tribunal for the Former Yugoslavia in the [Prosecutor v Furundzija](#) case.

² Amnesty International considers however [impossible](#) to statistically assess the whole scale of the phenomenon, because torture takes place in the shadows, with governments trying to cover it up.

³ The relevant reports are listed under the references.

⁴ In the meantime, these provisions have become outdated, because the Commission's delegated powers are now regulated through the ['Trade Omnibus'](#) Regulation (No 37/2014), including the power to amend the list of competent authorities in the Member States and the list of goods prohibited and subject to trade restrictions in the 2005 Regulation. The Trade Omnibus regulation was adopted after the Commission proposal was published.

⁵ Of the countries proposed in the INTA report to be added or removed from the list of abolitionist countries, Gabon is added, Madagascar and São Tomé and Príncipe are removed, while Benin, Liberia and Mongolia are kept.

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