



2016/0295(COD)

10.4.2017

DRAFT OPINION

of the Committee on Foreign Affairs

for the Committee on International Trade

on the 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)0616 – C8-0393/2016 – 2016/0295(COD))

Rapporteur: Marietje Schaake

SHORT JUSTIFICATION

New technologies have profound impact on foreign policy. From cybersecurity to human rights, from digital trade to development, we need to ensure the EU fosters opportunities and mitigates threats. The review of the Dual-Use Regulation aims to further strengthen the EU's role as a leading and responsible global actor by preventing the proliferation of technologies that hurt our strategic interest or the human rights of people worldwide.

This update is essential in a time of rapid technological changes and the ongoing shift in the global geopolitical balance. The rapporteur strongly supports the Commission's human security approach and has sought to clarify this in a number of areas, which further contributes to the streamlining of human rights in the EU's foreign policy and trade policy and adds coherence between the EU's foreign and security policies and its economic and commercial interests.

Given the rapid changes in technology, it is very timely that the EU added certain cyber-surveillance technologies to the control list as dual use items which can be used to commit human rights violations or to undermine EU strategic interests. At the same time, not every technology requires controls, and the exports of technologies that actually enhance human rights protection, such as encryption, should be facilitated. We also need to be sure that we do not create unnecessary burdens for exporters or hurdles for legitimate internet security research.

The targeted human security end-use control for non-listed items is a good step to make sure the EU can stop illegitimate transfers, but it should provide more legal clarity. Dual-use items (especially cyber-surveillance technology) are often used both to directly commit human rights violations, but they can also facilitate other serious human rights violations. Such as when illicitly obtained information of human rights defenders or journalists is used to subsequently detain and/or torture them.

We need a future proof framework that can take into consideration changing realities. When Member States decide to enact the targeted end-use control, an amendment of the control lists should be considered. When it comes to the EU autonomous list covering cyber-surveillance technologies, the urgency procedure should be available to allow for quick responses to changes on the ground in third countries or in terms of new technological developments requiring scrutiny.

With foreign transactions becoming ever more complex, it is important to enhance information sharing and to strengthen transparency. Member States should make available all licensing information, to enhance accountability and oversight. This would build on existing best practices while some already do this voluntarily. To create a level playing field, penalties on breaches of the regulation should also be uniform across the Union.

The European Parliament has been pushing for an update of the dual-use regulation for years, it is essential that the process now moves on as swiftly as possible.

AMENDMENTS

The Committee on Foreign Affairs calls on the Committee on International Trade, as the committee responsible, to take into account the following amendments:

Amendment 1

Proposal for a regulation

Recital 5

Text proposed by the Commission

(5) *Considering the emergence of new categories of dual-use items, and in response to calls from the European Parliament and indications that certain cyber-surveillance technologies exported from the Union have been misused 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, it is appropriate to control the export of those technologies in order to protect public security as well as public morals. These measures should not go beyond what is proportionate. They should, in particular, not prevent the export of information and communication technology used for legitimate purposes, including law enforcement and internet security research. The Commission, in close consultations with the Member States and stakeholders, will develop guidelines to support the practical applications of those controls.*

Amendment

(5) *Certain cyber-surveillance technologies have emerged as a new category of dual-use items that have been used to directly interfere with human rights, including the right to privacy, the right to data protection, freedom of speech and freedom of association, by monitoring or exfiltrating data without obtaining a specific, informed and unambiguous authorization of the owner or administrator of the system and/or by incapacitating or damaging the targeted system. In response to calls from the European Parliament, and evidence that certain cyber-surveillance technologies have been misused by persons complicit in or responsible for directing or committing violations of international human rights law or international humanitarian law in countries where serious human rights violations have been established, it is appropriate to control the export of those technologies. Similarly the current level of control on encryption runs counter to the fact that encryption is a key means to ensure that citizens, businesses and governments can protect their data against criminals and other malicious actors, to secure access to services and to enable secure communications, including for human rights defenders. It is therefore appropriate to further facilitate the export of encryption.*

Or. en

Amendment 2

Proposal for a regulation Recital 6

Text proposed by the Commission

(6) As a result, it is also appropriate to revise the definition of dual-use items, and to introduce a definition of cyber-surveillance technology. It should also be clarified that assessment criteria for the control of exports of dual-use items ***include considerations regarding their possible misuse in connection with*** acts of terrorism ***or human rights violations***.

Amendment

(6) As a result, it is also appropriate to revise the definition of dual-use items, and to introduce a definition of cyber-surveillance technology. It should also be clarified that assessment criteria for the control of exports of dual-use items ***takes into account the direct and indirect impact of these technologies on human rights, as well as their impact on the prevention of*** acts of terrorism, ***as reflected in the User's Guide to Council Common Position 2008/944/CFSP^{1a}***.

^{1a} ***Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (OJ L 335, 13.12.2008, p. 99).***

Or. en

Amendment 3

Proposal for a regulation Recital 6 a (new)

Text proposed by the Commission

Amendment

(6 a) Measures controlling the export of cyber-surveillance technology should not go beyond what is necessary and proportionate. They should, in particular, not prevent the export of information and communication technology used for legitimate purposes, including law enforcement and internet security research. The Commission, in close consultations with the Member States and stakeholders, should develop guidelines to

support the practical applications of those controls.

Or. en

Amendment 4

Proposal for a regulation

Recital 9

Text proposed by the Commission

(9) The scope of "catch-all controls", that apply to non-listed dual use items in specific circumstances, should be clarified and harmonised, and should address the risk of *terrorism* and human rights violations. Appropriate exchange of information and consultations on "catch all controls" should ensure the effective and consistent application of controls throughout the Union. Targeted catch-all controls should also apply, under certain conditions, to the export of cyber-surveillance technology.

Amendment

(9) The scope of "catch-all controls", that apply to non-listed dual use items in specific circumstances, should be clarified and harmonised, and should address the risk of *terrorist acts* and human rights violations. Appropriate exchange of information and consultations on "catch all controls" should ensure the effective and consistent application of controls throughout the Union. Targeted catch-all controls should also apply, under certain conditions, to the export of cyber-surveillance technology.

Or. en

Amendment 5

Proposal for a regulation

Recital 17

Text proposed by the Commission

(17) Decisions to update the common list of dual-use items subject to export controls in Section A of Annex I should be in conformity with the obligations and commitments that Member States and the Union have accepted as members of the relevant international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties. Decisions to update the common

Amendment

(17) Decisions to update the common list of dual-use items subject to export controls in Section A of Annex I should be in conformity with the obligations and commitments that Member States and the Union have accepted as members of the relevant international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties. Decisions to update the common

list of dual-use items subject to export controls in Section B of Annex I, such as cyber-surveillance technology, should be made in consideration of the risks that the export of such items may pose as regards ***the commission of serious*** violations of human rights or international humanitarian law or the essential security interests of the Union and its Member States. Decisions to update the common list of dual-use items subject to export controls in Section B of Annex IV should be made in consideration of the public policy and public security interests of the Member States under Article 36 of the Treaty on the Functioning of the European Union. Decisions to update the common lists of items and destinations set out in Sections A to J of Annex II should be made in consideration of the assessment criteria set out in this Regulation.

list of dual-use items subject to export controls in Section B of Annex I, such as cyber-surveillance technology, should be made in consideration of the risks that the export of such items may pose as regards ***their use for*** violations of ***international*** human rights ***law*** or international humanitarian law ***in countries where serious human rights violations have been established***, or the essential security interests of the Union and its Member States. Decisions to update the common list of dual-use items subject to export controls in Section B of Annex IV should be made in consideration of the public policy and public security interests of the Member States under Article 36 of the Treaty on the Functioning of the European Union. Decisions to update the common lists of items and destinations set out in Sections A to J of Annex II should be made in consideration of the assessment criteria set out in this Regulation.

Or. en

Amendment 6

Proposal for a regulation Recital 22 a (new)

Text proposed by the Commission

Amendment

(22 a) Given the importance of accountability and public scrutiny of export control activities, it is appropriate that Member States should make publicly available all relevant licensing data.

Or. en

Amendment 7

Proposal for a regulation Recital 25

Text proposed by the Commission

(25) Outreach to the private sector and transparency are essential elements for an effective export control regime. It is therefore appropriate to provide for the continued development of guidance to support the application of this Regulation and for the publication of an annual report on the implementation of controls, in line with current practice.

Amendment

(25) Outreach to the private sector and transparency are essential elements for an effective export control regime. It is therefore appropriate to provide for the continued development of guidance to support the application of this Regulation and for the publication of an annual report on the implementation of controls, in line with current practice. ***Given the importance of guidance for the interpretation of some elements of this Regulation, it is appropriate that this guidance should become publicly available when this Regulation enters into force.***

Or. en

Amendment 8

Proposal for a regulation

Recital 27

Text proposed by the Commission

(27) Each Member State should determine effective, proportionate and dissuasive penalties applicable in the event of breach of the provisions of this Regulation. It is also appropriate to introduce provisions to tackle specifically instances of illicit trafficking of dual-use items in order to support effective enforcement of controls.

Amendment

(27) Each Member State should determine effective, proportionate and dissuasive penalties applicable in the event of breach of the provisions of this Regulation. It is ***desirable to achieve a level-playing field and a coherent approach and therefore it is appropriate that penalties in each Member State are similar in nature and effect.*** It is also appropriate to introduce provisions to tackle specifically instances of illicit trafficking of dual-use items in order to support effective enforcement of controls.

Or. en

Amendment 9

Proposal for a regulation

Article 2 – paragraph 1 – point 1 – point b

Text proposed by the Commission

(b) cyber-surveillance technology 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;

Amendment

(b) cyber-surveillance technology which can be used ***to directly interfere with human rights, including the right to privacy, the right to data protection, freedom of speech and freedom of association, or which can be used*** for the commission of serious violations of human rights ***law*** or international humanitarian law, or can pose a threat to international security or the essential security interests of the Union and its Member States;

Or. en

Justification

It is important to clarify which human rights are often violated using cyber-surveillance technology.

Amendment 10

Proposal for a regulation

Article 2 – paragraph 1 – point 5 a (new)

Text proposed by the Commission

Amendment

5a. 'end-user' shall mean any natural or legal person or entity that is the final recipient and user of the exported dual-use items;

Or. en

Justification

Defining end-user as the actual final recipient and user of the item, should make sure that the information that exporters provide on end-users is specific and granular, allowing a proper evaluation by authorities on whether or not a licence for export should be provided.

Amendment 11

Proposal for a regulation

Article 2 – paragraph 1 – point 21 – introductory part

Text proposed by the Commission

21. 'cyber-surveillance technology' shall mean items specially designed to enable the covert intrusion into information and telecommunication systems with a view to monitoring, *extracting*, collecting and analysing data and/or incapacitating or damaging the targeted system. This includes items related to the following technology and equipment:

Amendment

21. 'cyber-surveillance technology' shall mean items specially designed to enable the covert intrusion into information and telecommunication systems with a view to monitoring, *exfiltrating*, collecting and analysing data and/or incapacitating or damaging the targeted system *without the specific, informed and unambiguous authorisation of the owner or administrator of the systems*. This includes items related to the following technology and equipment:

Or. en

Amendment 12

Proposal for a regulation

Article 2 – paragraph 1 – point 21 – point e

Text proposed by the Commission

(e) *digital forensics*;

Amendment

deleted

Or. en

Justification

Digital forensics are not covered by the control lists, items named in a), b) (Section A Annex I), c) and d) (Section B Annex I) are.

Amendment 13

Proposal for a regulation

Article 4 – paragraph 1 – point d

Text proposed by the Commission

(d) for use by persons complicit in or responsible for directing or committing

Amendment

(d) 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, as identified by relevant public international institutions, or European* or national competent authorities, and where there is evidence of the use of this or similar items for directing or implementing such *serious* violations by the proposed end-user;

violations of *international* human rights *law* or international humanitarian law in *countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe, the Union* or national competent authorities, and where there is evidence of the use of this or similar items for directing or implementing such violations by the proposed end-user;

Or. en

Justification

Necessary because the human rights violations committed with dual-use items often will not qualify as serious human rights violations. Violations of human rights using cyber-surveillance tools (violation of right of privacy, free speech, etc.) are often committed in the run-up to other violations which can be classified as serious, such as torture, forced disappearances, etc. Also necessary to clarify which international bodies should provide the assessments, for more legal certainty.

Amendment 14

Proposal for a regulation

Article 4 – paragraph 1 – point e

Text proposed by the Commission

(e) for use *in connection with acts of terrorism*.

Amendment

(e) for use *by persons, groups and entities involved in terrorist acts and subject to restrictive measures as laid down in Common Position 2001/931/CFSP*.

Or. en

Justification

Necessary to provide more legal certainty and clarity.

Amendment 15

Proposal for a regulation

Article 4 – paragraph 4 – subparagraph 2

Text proposed by the Commission

If no objections are received, the Member States consulted shall be considered to have no objection and shall impose authorisations requirements for all "essentially similar transactions". They shall inform their customs administration and other relevant national authorities about the authorisations requirements.

Amendment

If no objections are received, the Member States consulted shall be considered to have no objection and shall impose authorisations requirements for all "essentially similar transactions". They shall inform their customs administration and other relevant national authorities about the authorisations requirements.
Furthermore, if no objections are received, the Commission shall assess the necessity to adopt delegated acts amending the lists of dual-use items set out in Annex I and Section B of Annex IV by adding items referred to in paragraphs 1, 2 and 3 to those lists in line with the procedures provided for in Article 16.

Or. en

Justification

If all Member States agree that a certain product requires a licence, it is logical that it should be considered to add this to the control list for permanent control.

Amendment 16

Proposal for a regulation

Article 4 – paragraph 4 – subparagraph 3

Text proposed by the Commission

If objections are received from ***any consulted Member State***, the requirement for authorisation shall be revoked unless the Member State which imposes the authorisation requirement considers that an export might prejudice its essential security interests. In that case, that Member State may decide to maintain the authorisation requirement. This should be notified to the Commission and the other Member States without delay.

Amendment

If objections are received from ***at least four Member States representing at least 35% of the population of the Union***, the requirement for authorisation shall be revoked unless the Member State which imposes the authorisation requirement considers that an export might prejudice its essential security interests, ***or risk being used by persons complicit in or responsible for directing or committing violations of international human rights law or international humanitarian law in countries where serious human rights violations have been established.*** In that

case, that Member State may decide to maintain the authorisation requirement. This should be notified to the Commission and the other Member States without delay.

Or. en

Justification

Member States must also be able to uphold their requirement for authorisation if they see a risk of human rights violations, not only in case of security concerns.

Amendment 17

Proposal for a regulation

Article 10 – paragraph 4 – subparagraph 1

Text proposed by the Commission

Exporters shall supply the competent authority with all relevant information required for their applications for individual and global export authorisation so as to provide complete information in particular on the end user, the country of destination and the end use of the item exported.

Amendment

Exporters shall supply the competent authority with all relevant information required for their applications for individual and global export authorisation so as to provide complete information in particular on the end user, the country of destination and the end use of the item exported. ***When dealing with governmental end-users, the information supplied shall define specifically which sub-entity, department, agency or unit will be the final end-user of the item exported.***

Or. en

Justification

Necessary to ensure that it is clear specifically who or what entity is the end-user of a product, to the most detailed level possible.

Amendment 18

Proposal for a regulation

Article 10 – paragraph 4 – subparagraph 2

Text proposed by the Commission

Authorisations *may* be subject, *if*

Amendment

Authorisations ***for cyber-surveillance technology shall*** be subject ***to an end-use***

appropriate, to an end-use statement.

statement. Authorisations for other items may be subject to an end-use statement if appropriate.

Or. en

Amendment 19

Proposal for a regulation Article 14 – paragraph 2

Text proposed by the Commission

2. The Commission and the Council shall make available guidance and/or recommendations to ensure common risk assessments by the competent authorities of the Member States for the implementation of those criteria.

Amendment

2. The Commission and the Council shall make available guidance and/or recommendations to ensure common risk assessments by the competent authorities of the Member States for the implementation of those criteria *when this Regulation enters into force.*

Or. en

Justification

Necessary because guidelines are crucial interpretative tools for stakeholders.

Amendment 20

Proposal for a regulation Article 16 – paragraph 2 – point b

Text proposed by the Commission

(b) The list of dual-use items set out in Section B of Annex I may be amended if this is necessary due to risks that the export of such items may pose as regards the commission of serious violations of human rights or international humanitarian law or the essential security interests of the Union and its Member States.

Amendment

(b) The list of dual-use items set out in Section B of Annex I may be amended if this is necessary due to risks that the export of such items may pose as regards the commission of serious violations of human rights or international humanitarian law or the essential security interests of the Union and its Member States. *Where imperative grounds of urgency require a removal or addition of specific products in Section B of Annex I, the procedure provided for in Article 17 shall apply to delegated acts*

adopted pursuant to this point.

Or. en

Justification

Necessary given the rapid changes in technology and the potential that new dangerous technologies arise that need to be added to the control list without delay.

Amendment 21

Proposal for a regulation

Article 20 – paragraph 2 – point a

Text proposed by the Commission

(a) information regarding the application of controls, including licensing data (number, value and types of licences and related destinations, number of users of general and global authorisations, number of operators with ICPs, processing times, volume and value of trade subject to intra-EU transfers etc), and, where available, data on exports of dual-use items carried out in other Member States;

Amendment

(a) **all** information regarding the application of controls, including licensing data (number, value and types of licences and related destinations, number of users of general and global authorisations, number of operators with ICPs, processing times, volume and value of trade subject to intra-EU transfers etc), and, where available, data on exports of dual-use items carried out in other Member States;

Or. en

Amendment 22

Proposal for a regulation

Article 20 – paragraph 2 – point b

Text proposed by the Commission

(b) information regarding the enforcement of controls, including details of exporters deprived of the right to use the national or Union general export authorisations 1, reports of violations, seizures and the application of other penalties;

Amendment

(b) **all** information regarding the enforcement of controls, including details of exporters deprived of the right to use the national or Union general export authorisations 1, **any** reports of violations, seizures and the application of other penalties;

Or. en

Amendment 23

Proposal for a regulation

Article 20 – paragraph 2 – point c

Text proposed by the Commission

(c) data on sensitive end users, actors involved in suspicious procurement activities, and, where available, routes taken.

Amendment

(c) **all** data on sensitive end users, actors involved in suspicious procurement activities, and, where available, routes taken.

Or. en

Amendment 24

Proposal for a regulation

Article 22 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. The Commission shall assess whether rules on penalties laid down by Member States are of a similar nature and effect.

Or. en

Amendment 25

Proposal for a regulation

Article 24 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. Member states shall make publicly available every month an easily searchable digital overview of licensing data based on common fields, which include:

(a) date;

(b) type of licence;

- (c) *product category;*
- (d) *product description;*
- (e) *end use;*
- (f) *destination country;*
- (g) *end user;*
- (h) *value;*
- (i) *volume;*
- (j) *granted/denied.*

Or. en

Amendment 26

Proposal for a regulation Article 25 – paragraph 3

Text proposed by the Commission

3. The registers or records and the documents referred to in paragraphs 1 and 2 shall be kept for at least *three* years from the end of the calendar year in which the export took place or the brokering or technical assistance services were provided. They shall be produced, on request, to the competent authority.

Amendment

3. The registers or records and the documents referred to in paragraphs 1 and 2 shall be kept for at least *five* years from the end of the calendar year in which the export took place or the brokering or technical assistance services were provided. They shall be produced, on request, to the competent authority.

Or. en