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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**amending Regulation (EC) No 428/2009 setting up a Community regime for the control
of exports, transfer, brokering and transit of dual-use items**

EXPLANATORY MEMORANDUM

The EU dual-use export control system, as set out in Regulation (EC) No 428/2009¹, requires an authorisation for the export of dual-use items² listed in Annex I to the Regulation. Article 9(1) of the Regulation specifies that EU General Export Authorisations are one of the four available types of export authorisations that may be used to export dual-use items from the EU. Annex II to Regulation (EC) No 428/2009 contains the EU General Export Authorisations currently in force.

Updates of the EU control list (Annex I of Regulation 428/2009)

Decisions to control the export of dual-use items are taken by consensus in international export control regimes (Australia Group (AG) for biological and chemical items; Nuclear Suppliers Group (NSG) for civil nuclear items, the Missile Technology Control Regime (MTCR) and the Wassenaar Arrangement (WA) for conventional arms and dual-use goods and technologies). The purpose of these export control regimes is to limit the risk of sensitive dual-use items being used for military purposes and/or in proliferation programmes. With a view to making export controls as effective as possible, the international export control regimes bring together the major suppliers of dual-use items. By agreeing to control trade in specific items, they effectively work together to limit the proliferation risk, while ensuring that legitimate trade is not hindered.

Technological progress in today's world means that there is a need to regularly update the list of controlled items. While decisions of these international regimes are not legally binding, Article 15 of the Regulation specifies that "the list of dual-use items set out in Annex I shall be updated in conformity with the relevant obligations and commitments, and any modification thereof, that Member States have accepted as members of the international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties".

The international export control regimes take control list decisions approximately 4 times per year. These updates need to be integrated into EU legislation on a regular and timely basis due to their security and trade implications. On the one hand, a decision by international export control regimes to add new items to the control lists means that these additional items also need to be controlled consistently by the entire EU for security reasons. On the other hand, a decision by international export control regimes to stop controlling certain items needs to be translated into EU legislation as quickly as possible in order to allow EU exporters to compete on the global market.

Currently, any update of Regulation (EC) No 428/2009 including of Annex I requires the use of the ordinary legislative procedure. At the same time, given the technical nature of these amendments and the fact that these changes need to be in conformity with decisions taken in

¹ Council Regulation(EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items

² Dual-use items are defined in article 2(1) of Regulation (EC) No 428/2009 as "items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices".

the international export control regimes, there is little margin for manoeuvre for introducing modifications to the amendments agreed in the regimes.

Consequently, it is necessary to introduce delegated acts in order to update Annex I of Regulation (EC) No 428/2009 on a regular basis. This approach would allow the Commission to make the necessary updates as and when required.

Necessary modifications to EU General Export Authorisations (Annex II of Regulation (EC) No 428/2009)

EU General Export Authorisations, as set out in Article 9(1) and Annex II of Regulation (EC) No 428/2009, have proven to be highly successful tools facilitating lower risk exports of certain items to certain destinations. A single EU General Export Authorisation (EU001) has existed for many years allowing for facilitated exports of most controlled items to seven low-risk destinations (Australia, Canada, Japan, New Zealand, Norway, Switzerland and USA). The Commission proposed in December 2008 to introduce six new EU General Export Authorisations³. An agreement concerning these new Authorisations was reached in mid-2011.

The contents of existing and future EU General Export Authorisations need to be continuously monitored in order to ensure that only low-risk transactions are covered by the Authorisations. Given the fast pace of developments around the world, there is a need to ensure that existing EU General Export Authorisations can be modified rapidly as regards their destination and item scopes, so that changing global circumstances can be properly reflected in the EU export control system.

Consequently, it is necessary to introduce delegated acts in order to allow the Commission to rapidly remove destinations and/or items from the scope of existing EU General Export Authorisations.

Existing legislative proposals on dual-use export control issues

The European Parliament and the Council are currently dealing with two legislative proposals that will amend Regulation (EC) No 428/2009:

- (1) The first proposal (COM(2008) 854) aims at introducing new EU General Export Authorisations. The European Parliament voted in favour of the proposal on 27 September 2011. Once adopted, this amending Regulation will also modify the terminology used in Regulation (EC) No 428/2009 (references to 'Community' will whenever possible be changed to 'Union').
- (2) The second proposal (COM(2010) 509) aims at updating the EU control list by introducing modifications agreed in the international export control regimes in 2009. The European Parliament voted in favour of the proposal on 13 September 2011.

Commission proposal

³ COM(2008) 854 final

In the light of the above considerations it is necessary to amend Regulation (EC) No 428/2009.

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amending Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items⁴ requires such items to be subject to effective control when they are exported from or transit through the European Union (EU), or are delivered to a third country as a result of brokering services provided by a broker resident or established in the EU.
- (2) In order to enable Member States and the European Union to comply with their international commitments, Annex I to Regulation (EC) No 428/2009 establishes the common list of dual-use items that are subject to controls in the European Union. Decisions on the items subject to controls are taken within the framework of the Australia Group (AG), the Missile Technology Control Regime (MTCR), the Nuclear Suppliers Group (NSG), the Wassenaar Arrangement and the Chemical Weapons Convention (CWC).
- (3) Article 15 of Regulation (EC) No 428/2009 provides for Annex I to be updated in conformity with the relevant obligations and commitments, and any modification thereof, that Member States have accepted as members of the international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties.
- (4) Annex I to Regulation (EC) No 428/2009 needs to be updated regularly so as to ensure full compliance with international security obligations, to guarantee transparency, and maintain competitiveness of exporters. Delays with regard to the updating of the EU

⁴ OJ L 134, 29.05.2009, p. 1.

control list may have negative effects on security and international non-proliferation efforts, as well as on the performance of economic activities by exporters in the European Union. At the same time, the technical nature of the amendments and the fact that these changes shall be in conformity with decisions taken in the international export control regimes, means that an accelerated procedure should be used to put the necessary updates into force in the European Union.

- (5) Article 9(1) of Regulation (EC) No 428/2009 introduces EU General Export Authorisations as one of the four types of export authorisations available under the Regulation. Such General Export Authorisations allow exporters established in the EU to export certain specified items to certain specified destinations subject to the conditions of the General Authorisations.
- (6) Annex II to Regulation (EC) No 428/2009 sets out the EU General Export Authorisations currently in force in the EU. Given the nature of such EU General Export Authorisations, there may be a need to remove certain destinations and/or items from the Authorisations, in particular if changing circumstances show that facilitated export transactions should no longer be authorised under an EU General Export Authorisation for a particular destination and/or item. Such a removal of a destination and/or item from the scope of an EU General Export Authorisation should not preclude an exporter from applying for another type of export authorisation under the relevant provisions of Regulation (EC) No 428/2009.
- (7) In order to ensure regular and timely updates of the EU control list in conformity with the obligations and commitments taken by Member States within the international export control regimes, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of amending Annex I to Regulation (EC) No 428/2009 within the scope of Article 15 of the Regulation. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level.
- (8) In order to allow for a swift EU response to changing circumstances as regards the assessment of the sensitivity of exports under EU General Export Authorisations, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of amending Annex II to Regulation (EC) No 428/2009 as regards the removal of destinations and/or items from the scope of the EU General Export Authorisations. Given that such modifications should only be made in response to an increase in the assessment of the risk of the relevant exports and that the continued use of General Export Authorisations for these exports could have an adverse effect on the security of the European Union and its Member States, an urgency procedure may be used by the Commission.
- (9) The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.
- (10) Regulation (EC) No 428/2009 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 428/2009 is amended as follows:

- (1) The following paragraphs are added at the end of paragraph 1 in Article 9:

"The Commission shall be empowered to adopt delegated acts in accordance with Article 23a concerning the removal of destinations and items from the scope of EU General Export Authorisations included in Annex II.

Where, in the case of a significant change of circumstances as regards the assessment of the sensitivity of exports under an EU General Export Authorisation included in Annex II, imperative grounds of urgency require a removal of particular destinations and/or items from the scope of an EU General Export Authorisation, the procedure provided for in Article 23b shall apply to delegated acts adopted pursuant to this Article."

- (2) The following paragraph is added as paragraph 3 in Article 15:

"3. The Commission shall be empowered to adopt delegated acts in accordance with Article 23a concerning updating the list of dual-use items set out in Annex I. The updating of Annex I shall be performed within the scope set out in paragraph 1."

- (3) The following article 23a is inserted:

"1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The delegation of power referred to in Articles 9(1) and 15(3) shall be conferred for an indeterminate period of time from the date of entry into force of Regulation (EU) No ../... [this Regulation].

3. The delegation of powers referred to in Articles 9(1) and 15(3) may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Articles 9(1) and 15(3) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of 2 months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or the Council."

(4) The following article 23b is inserted:

"1. Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.

2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article 23a (5). In such a case, the Commission shall repeal the act without delay following the notification of the decision to object by the European Parliament or the Council."

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President