



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 20 September 2004

12531/04

**COMER 167
PESC 745
CONOP 33
ECO 153
UD 133
ATO 89**

COVER NOTE

from: Commission
date of receipt: 20 September 2004
to: Mr Javier SOLANA, Secretary-General/High Representative
Subject: Commission Staff Working Paper
Report to Parliament and the Council on the implementation of Council Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology
October 2000 to May 2004

Delegations will find attached a Commission Staff Working Paper - Report to Parliament and the Council on the implementation of Council Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology - October 2000 to May 2004.

Encl.: SEC(2004)1158



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17.9.2004
SEC(2004) 1158

COMMISSION STAFF WORKING PAPER

**REPORT TO PARLIAMENT AND THE COUNCIL ON THE IMPLEMENTATION OF
COUNCIL REGULATION (EC) No 1334/2000 SETTING UP A COMMUNITY REGIME
FOR THE CONTROL OF EXPORTS OF DUAL-USE ITEMS AND TECHNOLOGY
OCTOBER 2000 TO MAY 2004**

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I- BASIC POINTS REGARDING EXPORTS OF DUAL-USE ITEMS AND TECHNOLOGIES IN GENERAL AND COUNCIL REGULATION (EC) NO 1334/2000 IN PARTICULAR

1) Context of the report

Council Regulation (EC) No 1334/2000¹ setting up a Community regime for the control of exports of dual-use items and technology was adopted on 22 June 2000. It entered into force on 26 September 2000. Article 20 of Regulation (EC) No 1334/2000 provides that “*every three years the Commission shall present a report to the European Parliament and the Council on the application of this Regulation. Member States shall provide to the Commission all appropriate information for the preparation of the report*”.

Article 2(a) of the Regulation defines dual-use items as “items, including software, and technology, which can be used for both civil and military purposes”. This includes “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”. A few examples will illustrate the concept and highlight the difference between dual-use technology and conventional weapons. Among the things that would count as dual-use items and technologies are: computers, particularly powerful software, naturally occurring viruses (such as Ebola), chemical products sold in large, industrial quantities, equipment for a nuclear plant, parts for missile-guidance systems and machine tools.

The reporting period ended just as the EU enlarged and the Regulation, with amendments, was coming into force in the ten new Member States. Accordingly, the report is chiefly concerned with implementation in the fifteen “old” Member States. Whenever the report specifically deals with the ten new Member States, this is made explicit.

2) Background to Council Regulation (EC) No 1334/2000

The Regulation, based on Article 133 of the Treaty, was adopted following two judgments of the Court of Justice of the European Communities pointing out that dual-use items were subject to the common commercial policy. Prior to this Regulation the system was based on two different legal instruments: Regulation (EC) No 3381/94, based on Article 113 (as it then was), which laid down the basic principles for export controls and administrative cooperation between Member States, and lists of dual-use items drawn up under Joint Action CFSP/94/942.

3) Links between Council Regulation (EC) No 1334/2000 and Member States’ commitments under international export control regimes.

a) The items and technology covered by Annex I to the Regulation are based on lists established by international export control regimes.²

¹ Published in the OJ L 159, 30.6.2000, p.1. An index of the items listed in Annex 1 to the Regulation was published in OJ C 241, 23.8.2000.

² Only a fraction of the states belonging to the international community are members of international export control regimes. The number of members for any one regime varies from 33 to 44. In most cases, EU Member States account for more than half of the membership. The countries that are members of international export control regimes represent a large proportion of the suppliers of dual-use technology, but not all of them. China, for instance, is a member of just two regimes: the NSG (since May 2004) and the Zangger Committee. Russia is a member of all of them except the Australia Group (chemical and biological). India, Pakistan, North Korea and Libya are all outside these regimes.

b) The international export control regimes for dual-use technology were set up to reinforce implementation of the non-proliferation and disarmament treaties authorising, in their respective fields, international cooperation for legitimate civil purposes. Their members decide by consensus on the items to be subject to export controls to guarantee their use for civil purposes that comply with the non-proliferation and disarmament treaties.

c) The EU's role in the international export control regimes and the post-enlargement outlook:

When the Regulation was adopted all EU Member States were members of all the international export-control regimes for dual-use items and technologies, a fact which had a decisive influence on the content of the Regulation. This is no longer true of the enlarged EU. However, all 25 Member States are now members of the NSG (the Nuclear Suppliers' Group, concerned with nuclear items) and the Australia Group (dual-use chemical and biological items), and have been since the end of May 2004. All the new Member States have applied¹ to join but are not yet members of the Missile Technology Control Regime (MTCR) and the Wassenaar Arrangement (successor to COCOM, covering both conventional weapons and dual-use items such as machine tools, computers and materials). Not all Member States belong to the Zangger Committee (nuclear items). For more detailed information on the situation and what it means for the Regulation, see part III-3.

d) Status of the European Commission in the international export control regimes:

The Commission is a member of the Australia Group and an observer at the NSG and the Zangger Committee. It has no status at the Wassenaar Arrangement or the MTCR but it has been invited to take part in plenary meetings of the Wassenaar and MTCR through the EU Presidency delegation. Following the decisions taken under the action plan adopted by the Thessaloniki European Council in June 2003, the Commission has also been invited to participate through the Presidency delegation in all meetings of the working parties of these two regimes.

4) Trade between members of international export control regimes for dual-use items and the EU's special status post-enlargement

Countries participating in an international export regime undertake to control exports of the dual-use items listed by that regime and, in certain cases, unlisted items (through application of the "catch-all" clause adopted by most of the regimes and inspired by the "catch-all" clause of the Regulation).

Member countries have the right to determine their own export control procedures. These may therefore vary greatly among the member countries of an international regime (except within the EU, where the Regulation reduces the margin of discretion for Member States).

Regimes do not provide for free movement of dual-use items or technologies between members, except within European Union where the principle of free movement applies to virtually all items listed in Annex I² to the Regulation (with the exception of the items listed in Annex IV).

The Community system introduced by the Regulation is unique in the international community in that it is the only arrangement that legally binds 25 countries (as from 1 May 2004).

¹ Cyprus, Estonia, Latvia, Lithuania, Malta, Slovakia and Slovenia applied to join the MTCR in 2003 or earlier and Cyprus, Estonia, Latvia, Lithuania, Malta and Slovenia applied to join the Wassenaar Arrangement in 2003 or earlier.

² Annex I is based on the lists established under the international export control regimes. Annex IV, which lists the items subject to control within the single market is a very restricted subset of Annex I.

5) Fundamental principles of Council Regulation (EC) No 1334/2000

a) Dual-use items and technology listed in Annexes I, II and IV¹

The items and technology covered by Annexes I are based on the lists established by international export control regimes. The list of items covered by the Regulation is regularly updated on the basis of Article 11 of the Regulation.²

b) Granting authorisations

Member State authorities are responsible for issuing or refusing export authorisations for the dual-use items covered by the Regulation under the conditions laid down in the Regulation, since Member States are best placed to know their potential applicants for authorisation (exporters), and dialogue with industry is essential to effective implementation of the Regulation (see Part II-6).

c) The single market and recognition of the validity of authorisations issued

Two important principles of the Regulation should be noted. One is the free movement of dual-use items within the single market, with the exception of items listed in Annex IV. The other is the validity of export authorisations issued by Member States, subject to certain specific cases (see Articles 7, 9, and 12) in which provision is made for consultation between Member States prior to the issue or refusal of authorisations.

6) The key advantages of Council Regulation (EC) No 1334/2000 over the previous system are that it introduces:

a) A single legal instrument

The entry into force of a single legal instrument has made it possible to ensure that all Member States carry out controls at the same time on the same items listed in the Annexes, thus reducing potential distortion of competition on external markets.

b) A Community general export authorisation (CGEA) - Article 6 and Annex II

This authorisation, defined by Article 6 of the Regulation and Annex II has facilitated export of most items listed in the export control regimes (other than the sensitive items listed in part 2 of Annex II)³ to a small number of countries (listed in part 3 of Annex II), namely, since 1 May 2004 the United States, Canada, Norway, Japan, Switzerland, Australia and New Zealand.⁴

c) An obligation to control intangible transfers of technology (Article 2(b)(iii)).

¹ Annex I is based on the lists established under the international export control regimes. All the other Annexes except Annex III are subsets of Annex I. Annex IV, which lists the items subject to control within the single market is therefore a very restricted subset of Annex I. The items listed in Part 2 of Annex II (not covered by the Community General Export Authorisation) is also a subset of Annex I, bigger than Annex IV since it includes Annex IV and some other items sufficiently sensitive to be excluded from a general Community authorisation.

² Details in Part II-1 of the Report

³ Part 2 of Annex II includes Annex IV items and other sensitive items.

⁴ On 26 April 2004, the Council, acting on a proposal from the Commission (COM(2004) 148), adopted Regulation (EC) No 885/2004, which was published in OJ L 168, 1.5.2004 and entered into force on 1 May 2004. The Regulation removed Hungary, the Czech Republic and Poland from Part 3 of Annex II.

The purpose of including this provision in the Regulation was to ensure that Member States controlled the transfer of dual-use items out of Community customs territory whether by traditional tangible means (the “off-line world” already provided for in the previous Regulation) or by new means of communication (fax, telephone or “on-line” media such as e-mails). As regards controls on the transfer of technology by telephone, Article 2(b)(iii) provides that *“this applies to oral transmission of technology by telephone only where the technology is contained in a document the relevant part of which is read out over the telephone, or is described over the telephone in such a way as to achieve substantially the same result”*.

When the Regulation was being negotiated, the Commission pointed to the possibility of difficulties arising in the application of this provision, which was inspired by discussions within the Wassenaar Arrangement (which covers dual-use and conventional military items). Since then a plenary session of the Wassenaar Arrangement in 2003 has shown progress in the discussion of methods of controlling intangible transfers of technology in practice. Other regimes such as the Australia Group have also addressed this question, in particular in parallel with the question of how to define information “in the public domain”. Within the EU, many important concepts for facilitating the application of Article 2(b)(iii) of the Regulation were clarified through a number of meetings of the Coordinating Group set up under Article 18 (see point II-2(b)).

d) A “catch-all” clause authorising controls on goods not listed in the Annexes to the Regulation (Articles 4 and 5)

This clause, set out in Articles 4 and 5, authorises the Member States to control the export of items and technology not listed in the Annexes on a case-by-case basis in accordance with the provisions of those Articles. This gives the national export control authorities the necessary flexibility to deal with specific situations (proliferation risks associated with rapid innovation) or foreign or security policy developments calling for a quick reaction.

e) A Coordinating Group (Article 18)¹

This group, chaired by a Commission representative (DG Trade), is mandated to discuss any practical issues concerning implementation of the Regulation and to consult organisations representing exporters.

II– REVIEW OF IMPLEMENTATION OF COUNCIL REGULATION (EC) NO 1334/2000

1) Amendments to the Regulation

The Regulation has been amended six times since it entered into force.² The amendments mainly concerned adjusting the lists of items subject to export controls, in particular in Annex I¹ (based on

¹ Article 18: *“A Coordinating Group chaired by a representative of the Commission shall be set up. Each Member State shall appoint a representative to the Coordinating Group. The Coordinating Group shall examine any question concerning the application of this Regulation which may be raised either by the chairman or by a representative of a Member State and, inter alia:*
a) the measures which should be taken by Member States to inform exporters of their obligations under this Regulation;
b) guidance concerning export authorisation forms.
The Coordinating Group may, whenever it considers it to be necessary, consult organisations representative of exporters concerned by this Regulation.”

² See the following Regulations: Regulation (EC) No 2889/2000 of 22 December 2000, OJ L 336, 30.12.2000 (entry into force: 4 January 2001); Regulation (EC) No 458/2001 of 6 March 2001, OJ L 65, 7.3.2001 (entry into force: 12 March 2001); Regulation (EC) No 2432/2001 of 20 November 2001, OJ L 338, 20.12.2001

the lists of international export control regimes), part 2 of Annex II (items excluded from the Community export authorisation) and Annex IV (items and technology subject to intra-Community controls).

The Commission decided that from the end of 2002, whenever there was a proposal to amend the Regulation, all the Annexes would be systematically published in order to place a single consolidated document at the disposal of exporters and those responsible for issuing authorisations in the Member States.

2) Work of the Coordinating Group (Article 18)

The Coordinating Group met eleven times, chaired by the Commission. It discussed a large number of issues concerning implementation of the Regulation.

a) Definition of “exporter” (Article 2(c))

The Group addressed practical issues relating to the application of the definition of “exporter”. One of the conclusions reached was that the term “exporter” (natural or legal person) referred to a person who was in a position to decide to send items (covered by the Regulation) out of the customs territory of the Community (so that the negotiation of the export contract could be a concrete fact defining the exporter). There was a consensus concerning the importance of ensuring that European industry should not suffer delays in the issue of authorisations as a result of Member States being unable to agree swiftly which of them was responsible for dealing with the application.

b) Controls on intangible transfers of technology (Article 2(b)(iii) and Joint Action CFSP/401/2000

Over a number of sessions the Coordinating Group drew operational conclusions and recalled the scope of the Regulation and the Joint Action respectively.

When the Council Group and the Article 18 Group looked into the matter, the conclusion was that amending Article 2(b)(iii) was not necessarily the most practical way of ensuring effective controls on intangible transfers in the EU, given that the challenge is to keep up with ever-changing communications technology. Technological innovation has made information easier to disseminate (but has made controls more complicated because there is potentially more to control), but innovation has also made it easier to identify the people using the information (which facilitates controls).

It was noted that in practice the control procedures established at national level had to take account of the constant evolution of communications technology. It seemed unlikely that a company would decide to make technology subject to export controls freely accessible on the market outside the EU via new communications media, since this would run counter not only to industrial and intellectual property law but also to compliance with the dual-use Regulation.

(entry into force: 19 January 2002); Regulation (EC) No 880/2002 of 27 May 2002, OJ L 139, 29.5.2002 (entry into force: 3 June 2002); Regulation (EC) No 149/2003 of 27 January 2003, OJ L 30, 5.2.2003 (entry into force: 7 March 2003); Regulation (EC) No 885/2004 of 1 May 2004, OJ L 168, 1.5.2004 (entry into force: 1 May 2004).

¹ In COM(2004) 339, the Commission proposed amending Annex I to the Regulation to incorporate the decisions taken by international export-control regimes since the adoption of Regulation 149/2003. The Member States unanimously decided to amend this proposal to incorporate the decisions taken at the 2004 Australia Group plenary.

The basic rule contained in the Regulation is that the exportation of items and technologies (including those engendered by new means of communication) is subject to authorisation. The Regulation does not cover transfers that take place through the cross-border movements of natural persons (Article 3(3)) or data in the public domain. Article 19 of the Regulation criminalises individual acts that infringe the basic rule.

Progress was made on concepts relating to the intangible transfer of technology, such as the concept of electronic export from the EU; cases where transfers between branches and parent company require authorisation because they entail export from the EU via new means of communication (such as intranet) were examined; and analysis of cases in which controls are applicable to the publication of information on the Internet.

Transfers effected through the cross-border movement of persons out of the territory of the Community are covered by Joint Action CFSP 401/2000.¹

To ensure that controls are effective and proportionate, the national licence-granting authority needs to have close contacts with the companies and exporters concerned to make sure that it understands their needs and that these are reflected as much as possible in their licences. Some Member States have already indicated that some of their general licences also cover intangible technology transfers.

The Commission also encouraged the members of the Group to follow the work of the Council's Working Party on issues relating to new technology and "cyber security".

The Commission has asked the Member States on many occasions to notify it of what legislation they have adopted to implement Article 2(b)(iii) of the Regulation. It needs this information so it can compare practices and so that the Group has something to work on. And the Member States are required to provide the information under Article 20 of the Regulation (see part 3 below).

c) Penalties (Article 19)

All Member States have adopted penalties applicable to infringements of the Regulation, but the basis of these penalties is not always the same: some Member States have adopted legislation providing that penalties are only applied where the infringement was obviously intentional, while others are based on a finding of negligence on the part of the exporter. The Council Group's work has been instrumental in shedding light on the various types of penalties in the Member States and showing that all Member States have provision for both civil and criminal penalties.

d) "Catch-all" clause (Articles 4 and 5)

- The application of Articles 4(1) and 4(3) depends on the existence and quality of dialogue between Member State authorities and national industries based on their territory, in particular those producing items that have a connection with weapons of mass destruction. A better understanding

¹ The Joint Action sets out the provisions that should be introduced into national legislation concerning the control of technical assistance relating to military activities (in particular those involving weapons of mass destruction). It was published in OJ L 159, 30.6.2000, p.216. Its purpose is to impose controls on intangible transfers of technology that are effected through the movement of persons outside the borders of the EU (except to the countries listed in Annex II to the Regulation). It does not cover actions associated with basic/fundamental research. In May 2004, eight Member States adopted appropriate legislation and one adopted legislation covering part of the scope of the Joint Action. Six still had no legislation, of which four were busy preparing some in 2003 and the two remaining were considering preparing legislation for 2004. Of the new Member States, two have not yet adopted appropriate legislation.

of some of the practices in force was achieved through presentations of the types of dialogue in place between Member States and the industry based on their territory.

- The Group discussed Article 4(2) (requiring an authorisation for exports to countries subject to a military embargo of dual-use items not listed in the Regulation but intended for military use), and clarified some terms, in particular the “*military end-uses*” defined in the Article.

- Not all the Member States have made use of the possibility offered by Article 4(5) to “*adopt or maintain national legislation imposing an authorisation requirement on the export of dual-use items not listed in Annex I if the exporter has grounds for suspecting that those items are or may be intended, in their entirety or in part, for any of the uses referred to in paragraph 1*” (paragraph 4(1) refers to the risk of proliferating weapons of mass destruction).

- Article 5 provides that “A Member State may prohibit or impose an authorisation requirement on the export of dual-use items not listed [by the Regulation] for reasons of public security or human rights considerations”. Some Member States (Germany, France and the United Kingdom) have adopted national legislation defining the items covered by Article 5 (see point 3 below).

e) Documents useful for processing authorisation applications

The Group found that the number and kind of documents necessary for correctly assessing the risk associated with applications for export authorisations is an essential question to which no over-general or standard answer can be given, since the aim of the body responsible for processing applications is to obtain all information it needs to evaluate the risk associated with the transaction, and each transaction may raise different issues and give rise to atypical information requirements or call for specific types of verification.

f) Internal Compliance Programmes for export controls

Some Member States explained the link between the Internal Compliance Programmes (ICP) that firms introduce to manage export control procedures and the authorisations granted by some Member States to facilitate exports. The Member States that use the ICPs as a (non-exclusive) criterion for granting authorisations regularly audit the firms concerned and, if appropriate, adjust the authorisations to the results of the audits.

g) E-licensing

The Group also considered the advantages of authorisation management procedures based on the communications facilities provided by new technology. It was found that this type of management could help facilitate rapid processing of files in countries with a large quantity of export authorisations to issue. However, e-licensing had its drawbacks in that some documents needed for proper examination of authorisation applications (for instance, end-user certificates) had to be sent by traditional means for their authenticity to be verified. The small number of Member States that have launched successful experiments with e-licensing will present them to the Group in 2004 and the new Member States with experience to share will be invited to do so too.

3) **Member States’ secondary legislation**

Article 20 of the Regulation provides that each Member State is to inform the Commission of “*the laws, regulations and administrative provisions adopted in implementation of this Regulation, including the measures referred to in Article 19. The Commission shall forward the information to the other Member States.*”

a) In the old Member States

Since the Regulation entered into force, most Member States have notified the Commission of the adoption of supplementary national legislation. Only a few have not amended their legislation already in force (Portugal's legislation dates from 1991, Spain's from 1998 and Austria's from 1995 and 1997). Austria has announced that it intends to draft new legislation for the summer of 2004.

Notifications are more useful if they are accompanied by translations into English.

The Commission has published information on the measures taken by Member States to implement some aspects of the Regulation in the Official Journal of the European Union, viz:¹

- Article 5 (dual-use items and technology not listed by the Regulation and subject to export authorisation for reasons of public security or human rights considerations). Only France, Germany and the United Kingdom have made use of the opportunity provided by the Regulation and have published national lists;

- Article 6(6) (Authorities responsible for issuing export authorisations for dual-use items). Following discussion in the Coordinating Group set up under Article 18 of the Regulation, the Commission listed this information on its website under the heading "links". This means that information published in the Official Journal can be updated promptly when details of the authorities concerned change, and information on the competent authorities in the new Member States can be included to facilitate enlargement;

- Article 13 (customs offices empowered to handle export formalities for dual-use items): no Member State has made use of the possibility offered by the Regulation to confine the completion of customs formalities for the export of dual-use items to specified customs offices.;

- Article 21(2) (authorisations for intra-Community transfers of items not listed in Annex IV). Only France, Germany and the United Kingdom have adopted such measures.

b) In the new Member States

Most of the new Member States have adopted legislation since 2000 to comply with the Regulation. In some cases, this legislation is now being amended in response to the entry into force of the Regulation and its various amendments. In most cases, the Commission has not yet been notified of this new legislation in line with Article 20.

4) Granting of export control authorisations by the old Member States

a) Statistics

One Member State reported that it had received more than 10 000 applications a year for authorisations, while others reported far lower figures (a few hundred). The only statistics that can be compiled with a relative small margin of error relate to individual export authorisations. The number of individual authorisations issued in 2002 ranged from 72 to 5048 per Member State. The number of global authorisations ranged from 2 to 83.

It is impossible to provide reliable annual statistics on industry's use of export authorisations since some authorisations may be valid for over a year. Another reason why it is hard to produce statistics

¹ OJ C 273, 14.11.2003

is that export authorisations are often applied for in anticipation of a contract, which may not in the end be concluded or honoured.

b) Community general export authorisation (Article 6, Annex II)

This authorisation, introduced by Regulation (EC) No 1334/2000, marks a new departure in two ways: it is the subject of Community law and, prior to the adoption of the Regulation many Member States did not have a national general authorisation. The Community general authorisation has thus facilitated the exportation of a large number of dual-use items and technologies (except those covered by part 2 of Annex II) to certain countries (ten in all).

Most of the traders concerned in the Member States have made use of this authorisation. Some Member States, under the arrangements authorised in Annex II (“Conditions and requirements for use of this authorisation”), have asked traders to inform the competent authorities in advance of their intention of using the authorisation. Other Member States do not require traders to wait before using the authorisation but do require them to notify the authorities when it is first used.

c) National general export authorisations (Articles 6 and 10, Annex III b)

Some Member States had national general export authorisations before the Regulation was adopted. This applied in particular to the United Kingdom, Sweden, the Netherlands, Ireland, France and Germany. After the Regulation was adopted, Ireland repealed its national authorisation, whereas Italy and Greece adopted national authorisations. At present, therefore, the following Member States have national general authorisations in force: the United Kingdom, Sweden, the Netherlands, France, Germany, Greece and Italy. These authorisations are intended to cover more targeted items than those covered by Annex II (CGEA) and facilitate trade in these items to countries other than those already covered by part 2 of Annex II. Some Member States’ general authorisations cover some of the new Member States, and the Commission noted that they would have to be updated upon enlargement.

d) Global and individual authorisations (Articles 6 and 10 and Annex IIIa)

The Regulation does not define the nature of an individual authorisation. The Coordinating Group set up under Article 18 found that national practices did not cover exactly the same real situations, but that the point in common between them was the use of individual authorisations to apply the strictest control possible to a given transaction.

In general the individual authorisation covers a transaction between an exporter and an end-user (the transaction may cover one or more items). In practice the individual authorisation may cover the following cases: a single exporter sending more than one item to a single end-user; a single exporter sending more than one item to a single end-user, but without any limit on quantity or value; or, in some countries which have “individual open authorisations”, a single exporter but more than one country (this individual open authorisation is very close to the global authorisation defined in Article 6(5) of the Regulation).

Global authorisations are defined in Article 6(5) as follows: “*Member States shall maintain or introduce in their respective national legislation the possibility of granting a global authorisation to a specific exporter in respect of a type or category of dual-use item which may be valid for exports to one or more specified countries*”. In practice, this authorisation may thus cover a specific exporter for a single type or category of items intended for several end-users in different countries.

The differences between Member States in the frequency with which such authorisations are used are explained in part by the volume of their exports of dual-use items and technology.

It is difficult to compare Member States' practices in the use of individual authorisations for Annex IV items (items subject to intra-Community controls) and items listed in Annex 2 part2 because not all of them have replied to the Commission questionnaire, despite the fact that Article 20 of the Regulation provides that Member States must "*provide to the Commission all appropriate information for the preparation of the report*". Those who have replied have not always given enough information on which to base working conclusions. Despite the lack of information, one initial conclusion can be drawn: the Member States always decide what type of licence to use for sensitive goods on a case-by-case basis.

5) Denials of export authorisations (Article 9)

Member States are required to notify the Commission when they refuse to authorise exportation of goods that are listed by the Regulation or covered by the catch-all clause. Under Article 9, *Member States must inform the Commission and all Member States when they refuse to grant an export authorisation or when they intend to disregard a refusal by another Member State within the previous three years to authorise an essentially identical transaction.*

Note that, under international export-control regimes, the Member States exchange refusals to authorise exports that have been issued more than three years previously but that have been renewed. To ensure the Regulation works properly and Member States have as much information as possible about refusals, it would be highly desirable, given that the Regulation makes consultation compulsory where another Member State has previously issued a refusal, for Member States to provide at least as many details on their refusals as under international regimes and to reassess their refusals at regular intervals when more than three years have elapsed since they notified the other Member States.

However, export refusals are confidential and are not automatically made public by the Member States. Only certain Member States publish information concerning exports of dual-use items and technologies.¹ Given the confidential nature of such information and the fact that not all Member States publish reports of their activities concerning the issue or refusal of export authorisations for dual-use items, the Commission does not consider that it should give details of such refusals.

As part of implementation of the Thessaloniki action plan, the Commission has put forward proposals aimed at improving implementation of Article 9 with enlargement in mind and has reminded all Member States of the requirement to notify it of refusals to issue export authorisations.

6) Dialogue with industry

a) General

Regular meetings were held within the Group established under Article 18 of the Regulation between the Member State authorities competent to issue authorisations and representatives of industry. The meetings provided an opportunity to discuss many issues and highlight certain obstacles to perfect competition between exporters.

¹ Only a few Member States report to their parliaments on export controls on dual-use items or technology, or release information on them into the public domain. The UK, Spain, Italy, Denmark and Sweden do produce annual reports. In general, the reports in question are much less detailed than the reports on arms exports and contain little information on export refusals, which are always presented in such a way as to preserve the confidentiality of the parties involved in the transactions and avoid leaks that could damage international security.

The Commission also maintains regular contact with exporters outside the Article 18 Coordinating Group.

b) Time taken to issue authorisations

According to the industry, the average time taken for the authorities to issue export authorisations varies greatly from one Member State to another. Some Member States have set target waiting-times. It should be pointed out that some complicated transactions take more time to investigate (see point 2(e) above).

c) Competition and the “catch-all” clause

The industry reported that the very existence of the catch-all clause in the Regulation was a source of legal instability. The catch-all clause by definition covers items that are not listed in the Regulation, not published nationally and not reported to other Member States (unless an export authorisation has been refused for the goods in question). The clause is applied without Community harmonisation,¹ which is likely to affect conditions of competition between Member States. The industry wished to see more dialogue on this aspect of the Regulation.

d) Reform of export controls

Exporters' representatives contributed their ideas about the possibility of reforming the authorisation systems based chiefly on *ex ante* controls and replacing them with systems using exporter certification. The Member States have not adopted a position on these proposals, of which a first draft version was presented in the Coordination Group.

III- PREPARATION FOR ENLARGEMENT

The Coordinating Group devoted a number of its sessions to enlargement, providing useful contributions to the work of the Council's Working Party.

2) Analysis of preparations for adopting the acquis

DG Trade informed the old Member States of the results of its regular talks with the new and future Member States (including those set to join in 2007) and the replies it had received to its questionnaire of February 2002, the purpose of which was to get an idea of how much of the acquis had been adopted. The answers to the questionnaire revealed that the new Member States had gone some way towards aligning their legislation with the Regulation. In particular, they had, for the most part, introduced provisions for controls on intangible transfers of technology and a catch-all clause.

As regards the type of authorisations granted, it was found that the new Member States mainly used individual authorisations, since on the whole the volume of applications for export authorisations was relatively small (compared to some of the present Member States which are among the biggest exporters of dual-use items and technology).

As regards the number of authorisations granted, enlargement should not affect the current situation in which there are major differences between Member States. According to the information

¹ The other Member States need not be informed where the catch-all clause does not lead to a refusal to grant an export authorisation, which it quite often seems not to.

gathered in 2002, the highest number of authorisations granted in the new Member States was 1300, with an average of around 300.

Import authorisations for dual-use items were noted as in application in the new Member States.

2) Communicating the results of the Article 18 Group's work to the new Member States

DG Trade decided to send the new Member States the conclusions of the Article 18 Group and the Council Group on implementation of the Regulation, article by article, since its entry into force. It wanted them to have the conclusions before enlargement and duly sent them to all Member States on 10 March 2004.

3) New Member States and the international export control regimes

The EU adopted a proactive strategy (Thessaloniki action plan, action 7 “Make the EU a leading co-operative player in the export control regimes”) to enable the new Member States to join in 2004. The decisions to participate in the regimes are political, but are partly based on technical criteria.

Though not all of the new Member States were members of the MTCR and Wassenaar¹ when they joined the EU, the Regulation now applies to them and so they are bound, as EU Member States, by the same export control obligations for dual-use items as the other Member States (which were already members of the international export-control regimes). But they do not have access to the exchanges of sensitive information that take place within the regimes.²

Exclusion from access to sensitive information exchanged within the MTCR and the Wassenaar Arrangement, (which holds frequent meetings) makes it harder for the new Member States to implement the Regulation, while their export potential for dual-use items has increased as a result of their membership of the single market.

As a result of this, there are serious inequalities between Member States with regard to both drawing up of EU trade legislation and security matters: the Member States that are members of international export-control regimes have the right to veto decisions within those regimes. Meanwhile, decisions that are adopted are likely to be the subject of Commission³ proposals to amend the annexes to the Regulation, despite the fact that Member States that do not belong to the regimes have no say over their decisions, yet may have them imposed on them by Community law.

¹ Since none of the new Member States that had applied to join the regimes had been accepted as a member by the end of 2003, the Commission had pointed out to the Member States that those countries may not be able to attend some of the regimes' plenary meetings in 2004 that would decide which goods should be subject to controls. As it happened, thanks to the EU's efforts, the NSG admitted the three new Member States that had applied and China at the 2004 plenary meeting on 27 May. The five new Member States that had applied to join the Australia Group were admitted on 26 May 2004. The seven new Member States that have applied to join the MTCR (Cyprus, Estonia, Latvia, Lithuania, Malta, Slovakia and Slovenia) and the six that applied to join the Wassenaar Arrangement have not yet been admitted.

² As a rule the international export-control regimes have a number of different technical groups that draft decisions which then have to be adopted unanimously at the plenary meetings. There are technical groups that discuss which items should be subject to controls, customs groups that discuss customs-related aspects of controls and information groups that discuss proliferation trends and the risk that dual-use items and weapons of mass destruction could be acquired by states and other entities.

³ Under Article 11 of the Regulation the lists of items set out in Annex I are updated in conformity with the obligations and commitments that each Member State has accepted as a member of the international non-proliferation regimes and export control arrangements.

IV- COMBATING THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION; THE THESSALONIKI SUMMIT

1) The international context

Combating the proliferation of weapons of mass destruction and, in particular, preventing non-governmental agents (terrorists) from gaining access to dual-use items and technology became priorities for the international community after the events of September 11 2001. The risk of terrorists using weapons of mass destruction had been discussed in international bodies and in the Member States well before that date, but prevention of this eventuality had not been systematically included in the objectives of international export control regimes for dual-use items.

The threat posed by the proliferation of weapons of mass destruction can be explained by the following facts: some countries are not members of the relevant disarmament and non-proliferation treaties (and have therefore developed some of this kind of technology and weapons, and are capable of exporting them). Others have failed to honour their obligations under the treaties to which they signed up (for instance, the Iran-Iraq war brought to light the Iraqi regime's use of chemical weapons). Still other countries, which were members of the treaties, are showing a desire to withdraw from them and from the obligations of international cooperation limited to objectives compatible with the treaties.

Following the events of 11 September 2001, the international export control regimes included in their objectives preventing the acquisition for terrorist purposes of weapons of mass destruction or dual-use items that could serve to produce such weapons. This meant that the working methods of the regimes had to be significantly adjusted, since the regimes had been set up to prevent the formation of illicit military programmes, not the fraudulent use of dual-use items by non-governmental and, by their nature, clandestine groups.

2) The Thessaloniki summit and follow-up

At the Thessaloniki summit in June 2003 the European Union adopted a declaration on the principles of non-proliferation and an action plan. The action plan includes the following actions relating to implementation of the Regulation: Action 7 (making the EU a leading cooperative player in the export control regimes), Action 20 (reinforcing the efficiency of export controls in the Community), and Action 21 (peer reviews of new and old Member States' export control regimes).

The Commission has made a large number of proposals concerning implementation of these actions. The proposals relate in particular to: support for the acceptance of the new Member States in the international dual-use export-control regimes; the Commission's role in the Wassenaar Arrangement and the MTCR; practical ways of enhancing the coherence of EU proposals and coordination with an eye to decisions taken by international export-control regimes; ways of identifying items subject to controls more easily; a more effective system for exchanging denials within the EU and implementation of peer reviews. By and large, the proposals were well received by the Council and most are being put into practice if they have not already been, or being discussed.

The Commission has been given the task of coordinating the peer review of implementation of the Regulation in the enlarged EU and a Task Force has been set up to that end. The Task Force is comprised of representatives from DG Trade and DG Relex, the Council Secretariat and Finland. Agreement was reached on 3 February 2004 on the working method proposed by the task force, which paved the way for the adoption of an ambitious schedule of visits: each Member States will be visited by representatives from two other Member States, providing both old and new Member States with an opportunity to discuss their experience with implementation of the Regulation on the

basis of a list of twenty key subjects. DG Trade has contributed a large sum (a commitment of €135 000) towards funding these visits by experts.

In addition to the Thessaloniki action plan, a strategy for combating the proliferation of weapons of mass destruction was finalised in December 2003. The strategy has taken certain parts of the plan and put them in a more general context..

V- CONCLUSION

The entry into force of Regulation (EC) No 1334/2000 represented a major advance for the EU's external trade, for exporters and for those in the EU responsible for managing authorisations. It promoted the coordination of Member States' positions in international export regimes for all issues relating to its operational principles.

Enlargement offers the opportunity to both enhance implementation of the Regulation and increase the convergence of Member States' practices to maintain export controls compatible with the growing globalisation of the dual-use economy.

Export controls are an important and practical pillar of the fight against the proliferation of weapons of mass destruction. Their implementation, which has an economic impact, needs to be constantly adjusted to balance security objectives and the objectives of developing legitimate dual-use international trade for civil purposes.

Security Council Resolution 1540 requires all countries within the international community to introduce controls on the exportation of dual-use items and technologies involved in the proliferation of weapons of mass destruction. If certain major conditions are met, this requirement could reduce the competitive distortions affecting the European dual-use industry which are caused by the lack of a uniform, multilateral approach to implementing export controls. It could also reinforce international security. Given that the resolution calls for controls which the Regulation has not introduced but which are the EU's responsibility, it is important for the Commission to take an active role in contributing to the EU implementation of the resolution.