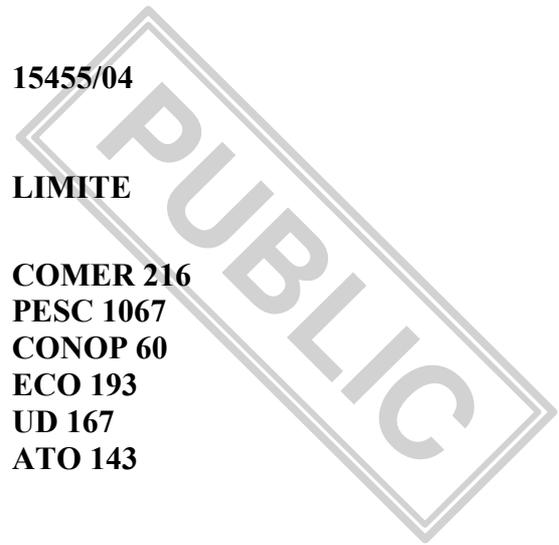


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COVER NOTE

From: Working Party on Dual Use Goods
To: Political and Security Committee/Permanent Representatives' Committee
Subject: Recommendations further to the first stage of the Peer Review of Member States' Export Control Systems for Dual Use Goods conducted in the framework of the EU Strategy against the proliferation of Weapons of Mass Destruction

Delegations will find attached recommendations further to the first stage of the Peer Review of Member States' Export Control Systems for Dual Use Goods conducted in the framework of the Thessaloniki Action Plan and the EU Strategy against the proliferation of Weapons of Mass Destruction.

The recommendations contained in the report, supported by the Working Party on Dual Use Goods at its meeting on 30 November 2004, are based on the Task Force's report to the Working Party.

RECOMMENDATIONS FURTHER TO THE FIRST STAGE OF THE PEER REVIEW OF MEMBER STATES' EXPORT CONTROL SYSTEMS FOR DUAL USE GOODS

Conducted in the framework of the EU Strategy against the proliferation of Weapons of Mass Destruction

A detailed table of contents can be found on page 14. An extract of the main heading of the report is provided below :

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I. SUMMARY

The Task Force, as mandated by the European Council, has prepared recommendations for the follow-up to the Peer Review. The report suggests timely and concrete actions to strengthen and improve the efficiency of the EU export control system and of Member States' national practices (cf. part III of the present report).

Recommendations are based on the recognition that there is a need to adopt more pro-active EU and national approaches to the control of exports of dual-use items so as to properly address the challenges of combating possible access to items relevant for WMD proliferation purposes by terrorists and other undesirable end-users in third countries while preserving the single market for dual use items and allowing for some level of divergence in the implementation of export controls by Member States to the extent necessary to accommodate very different situations in Member States in terms of volume of dual-use external trade.

Recommendations include the following:

- (a) Approaches to export control should be based to a greater extent on risk analysis at national and EU level, on timely sharing of sensitive information at national and EU level, on systematic awareness raising and outreach to exporters at national and EU level, and on more systematic assessments of the new proliferation risks attached to innovation (researchers or start ups in very innovative and "high tech" dual use sectors);

- (b) Adoption of measures to reduce the trade distortions arising from diverging practices in the implementation by Member States of Regulation (EC) No. 1334/2000 (as amended) on the control of exports of dual use items and technology;
- (c) Enhancement of government interaction with exporters (awareness raising, internal compliance programmes, consultation of industry on modalities of controls).

Finally, bearing in mind the reticence of key third countries to accept new EU Member States in international export control regimes and the fact that such non-regime membership affects the efficiency of the Community system, the Task Force suggests that a statement on the Peer Review should be adopted by the Council. This would contribute to allaying third countries' concerns that EU enlargement led to the weakening of the Community export control system.

II. PEER REVIEW - BACKGROUND AND METHODOLOGY

In June 2003 the European Council in Thessaloniki adopted the Action Plan against the Proliferation of Weapons of Mass Destruction, paragraph 21 of which called for the launching of a "Peer Review of all Member States' and Acceding Countries' export controls". Paragraph 21 states that *"in order to better co-ordinate EU's export control activities and to learn from each other's experience a Peer Review in all Member States and Acceding Countries should be conducted. Peer Review teams of two to three countries in each, consisting both of Member States and Acceding Countries could examine the national legislation and its implementation in order to establish the best practices in the enlarged Union. The Commission could be asked to coordinate the Peer Review and be assisted by a Task Force, that shall prepare a set of concrete steps to be taken for an effective implementation."*

The Commission Services made proposals for the implementation of the Peer Review which were endorsed by the Political and Security Committee at its meeting on 16 September 2003. In line with the Commission Services' proposals, a Task Force composed of representatives of Finland, the Council Secretariat and the Commission Services was set up. At the Presidency's request during the 7 November 2003 meeting of the Working Party on Dual Use Goods the Commission Services agreed to act as Task Force Coordinator.

At its meeting on 3 February 2004, the Working Party on Dual Use Goods agreed on the methodology for the review (organisation of visits, list of questions to be addressed in each visit) suggested by the Task Force (cf. Outcome of proceedings of the meeting, document 5954/04, and DS 36/2/2003 REV 2).

The launching of the Peer Review was facilitated by the provision by DG TRADE of a specific budget to finance travel costs incurred by Member States' experts.

The visits, organised in ten clusters composed of three Member States each, commenced on 23 February 2004 and were completed on 8 July 2004. Final reports of each of the clusters' visits were submitted to the Task Force. Based on these reports, the Task Force has prepared an analysis of the situation and recommendations. The recommendations, which take into account those contained in the reports of each cluster, are contained in part III below.

III. RECOMMENDATIONS FOR STRENGTHENING THE EFFICIENCY OF THE EU EXPORT CONTROL SYSTEM

SUMMARY OF RECOMMENDATIONS

1. Ensure transparency and awareness of legislation implementing the EU system.
2. Minimise any significant divergences in practices amongst Member States.
3. Investigate the possibilities for adding controls on transit and transshipment.
4. Provide assistance in recognition of dual-use items subject to control.
5. Improve exchanges of information on denials, and consider the creation of a data base to exchange sensitive information.
6. Agree best practices for the enforcement of controls.
7. Improve transparency to facilitate harmonisation of implementation of controls on non-listed items (catch-all).
8. Enhance interaction with exporters.
9. Agree best practices for controlling intangible transfers of technology.

DETAILED RECOMMENDATIONS

III.1 NATIONAL SECONDARY LEGISLATION

III.1.1 Transparency on national measures

(a) Notification of legislation to Member States and exporters

The Task Force insists that Member States should fulfil their obligations under article 20 of the Regulation (EC) No 1334/2000 to notify their legislation, and any modifications thereof, concerning export controls of dual use items to the Commission Services and Member States. The Task Force recommends that Member States keep exporters regularly informed of changes in national measures and EU legislation.

The Task Force suggests that new legislation adopted by Member States, as well as national general licences and other important measures adopted nationally should become a regular agenda item of the Working Party on Dual Use Goods. It is important that Member States notify the WP Dual Use of their implementation of Joint Action 2000/401 CFSP (concerning the control of technical assistance related to certain military end uses).

The Task Force recalls that to date the practice has been to send legislation electronically to the Commission Services which circulated a “raw English translation” to members of the Article 18 Coordinating Group. In order to facilitate exchanges of views on legislation, the Task Force recommends that copies of any new legislation be provided to the Working Party on Dual Use Goods.

Time frame for implementation: immediately

(b) Systematic notification of changes of contact points for licences and denials

Member States are encouraged to continue reporting any change of contact points for notification of denials and for licensing procedures to the Council Secretariat and the Commission Services.

Time frame for implementation: immediately

III.1.2 Complementary and compatibility of secondary national legislation with Regulation (EC) No. 1334/2000

(a) Address contradictions of national legislation

New national legislation must acknowledge the applicability of Regulation (EC) 1334/2000 as last updated. Former legislation which is incompatible with the Regulation (as pointed out during the Peer Review visits) should be amended.

Time frame for implementation: as soon as possible

(b) Facilitate the understanding of complementarity of national measures

Efforts to reduce overlap between the Regulation and national legislation should be made to avoid confusion. In addition, it is considered that handbooks which facilitate the understanding by exporters of their obligations arising from Regulation (EC) No. 1334/2000 and its amendments and from national complementary legislation are very useful tools to contribute to the enforcement of export controls.

Time frame for implementation: as soon as possible

III.1.3 Staff in charge of licensing process

While acknowledging that it is the responsibility of each Member State to ensure that sufficient human and financial resources are devoted to export controls, the Task Force recommends that those Member States which lack resources in this area should remedy the situation as a matter of priority.

Time frame for implementation: immediately

III.2 REDUCTION OF DIVERGING PRACTICES TO MINIMISE THE RISK OF LICENCE SHOPPING IN THE SINGLE MARKET

III.2.1 Diverging practices regarding the conditions of use of CGEA

The Commission intends to put forward a proposal with a view to reaching harmonisation of the conditions of use of the CGEA.

Time frame for implementation: this issue could be discussed in the Working Party on Dual Use Goods early in 2005 on the basis of an analysis of the situation by the Commission Services, drawing on the answers to DS 36/2/2003 REV 2.

III.2.2 Consultation mechanisms between Member States for article 7

The format for consultation proposed in the Article 18 Coordination Group (document CG03/26) and used by many Member States since it was proposed should be used by all Member States.

Time frame: Immediate use of the format proposed in the Article 18 Coordinating Group

III.2.3 Reviewing the use of national general and global licences

(a) National General licences

If the current variety of situations regarding the use of national general licences appears as creating distortions affecting trade and security, the Working Party Dual Use should review the issue.

Time frame for implementation: assessment in 2005

(b) Global licences

Member States which have not yet developed experience in the area could benefit from assistance from volunteering Member States.

Time frame for implementation: assessment in 2005

III.2.4 Different practices regarding the use of end-use certificates and special conditions attached thereto

Different practices lead to different conditions applied to importers in third countries of dual use items of EU origin.

Time frame for implementation:

- Study of Member States' practices regarding end-use certificates is ongoing in the Article 18 Coordinating Group and must be accelerated in particular with the input of the new Member States and those which have not yet contributed to the study. Practice will be reported to the Working Party on Dual Use Goods by mid-2005. On the basis of this information, the Commission might propose amendment of the Dual Use Regulation.
- Member States are requested to report to the Commission Services on the conditions they attach to the use of the CGEA by early 2005. On the basis of this information, the Commission will, if necessary, make a proposal for harmonisation of the use of the CGEA (see action III.2.1).

III.3 CONTROLLING TRANSIT AND TRANSHIPMENT OF DUAL USE ITEMS

III.3.1 Scope of possible EU controls and modalities of controls

Examination of the feasibility of introducing a transit/transshipment provision in the Dual-Use Regulation, sufficient to enable Member States to detain dual-use items of concern that were transiting or being transhipped via their territory, without having to resort to the imposition of an individual licensing requirement on all transits/transshipments of dual-use items should be carried out without delay.

Time frame for implementation: The Commission Services have circulated an analysis of the issue for discussion by the Working Party on Dual Use Goods. It is important to note that proposals for amendment of the Custom Code with the view to ensure enhanced controls of pre-arrival and pre-departure of containers are under discussion in relevant EU Customs Committees. Member States as well as Commission should ensure that the dual-use dimension is fully taken into account at the time of adoption of these new measures.

III.4 IMPROVED IDENTIFICATION OF ITEMS SUBMITTED TO EXPORT CONTROLS AND TRAINING

The Task Force notes that the following options are available to meet the needs of a number of Member States:

III.4.1 Use of Correlation list between Annex I of Regulation (EC) No. 1334/2000 (as amended) and TARIC codes

Cooperation is encouraged between the Commission Directorate-General for Taxation and the Customs Union (DG TAXUD) and Member States which have developed correlation tables between items as identified in Annex I to the Dual Use Regulation and TARIC Codes.

Time frame for implementation: Recalling the well-know limits of such table, the Commission Services have forwarded to Member States a correlation table regarding Annex I to Regulation 1504/2004.

Member States wishing to comment on the table will contact DG TAXUD within 2 months. After this period and based on comments received, DG TAXUD will inform the Working Party on Dual Use Goods of the final table to be used by the interested Member States.

III.4.2 Mutual assistance between Member States

(a) Sharing existing tools

Member States which have developed software to assist in identification of items covered by export control Regulation and in analysing risks attached to exports could consider sharing their experiences with a view to providing the best system to other interested Member States.

Time frame for implementation: as soon as the decision is taken it can be implemented.
Commission Services to report on progress to Working Party on Dual Use Goods by mid-2005

(b) Creation of a pool of experts for a pilot period of one year

Member States (and relevant Commission Services such as the Directorate General for Transport and Energy, and the Joint Research Centre nuclear items) which have developed expertise in Annex I items could consider nominating experts in a specific area of competence who would, on a voluntary basis and for a pilot phase of maximum 12 months, agree to provide assistance (oral/email) to any requesting Member State.

Time frame for implementation: the nomination of experts could be made before early in 2005.
Member States which use the pool and those who offer technical assistance could report on their experience to the Working Party on Dual Use Goods.

III.5 MEASURES TO IMPROVE EXCHANGES OF NOTIFICATIONS OF DENIALS

III.5.1 Periodic review of denials

Member States should review their denials before expiry of their three-year validity, with a view either to renewing them or notifying them as no longer valid. This information should be notified to all Member States and the Commission.

III.5.2 Improved notifications of denials and common understanding on the concept of essentially identical transaction

A more comprehensive description of the application denied together with common understanding of the concept of what is an “essentially identical transaction” would improve the application of Article 9 of the Dual Use Regulation. Proposals for guidelines for implementation of “essentially identical” will be made in the Working Party on Dual Use Goods.

III.5.3 Efficient notifications

Denials should be notified as soon as possible; there should be little delay between the final decision by the licensing authorities and the notification to exporters, Member States and international regimes. For the time being, Member States should be encouraged to notify via Coreu, using the CODUD acronym, or secure fax (pending on the possible creation of an electronic system,

described below). Best practices regarding notification of denials under appeal by exporters will be defined.

Time frame for implementation: all the above measures should be implemented as soon as they are endorsed by Working Party on Dual Use Goods.

A progress report should be made no later than mid-2005 by the Working Party, on the basis of which the Commission Services will decide whether it is necessary to propose an amendment to the Regulation to confirm Member States' responsibilities in this area.

III.5.4 Creation of an electronic and secure system of information sharing on denials which could be extended to wider exchanges

Such a database could help ensure that all denials in force are accessible by all relevant actors.

A number of clusters have recommended that a secure electronic system be extended to include exchanges of sensitive information and consultations on licence applications. Before launching such system, it would be necessary to carry out an analysis to determine the technical characteristics of such system, the linkages between the system and export control regimes' data bases (with a view to avoiding duplication of information) and the cost of launching and managing such a system.

Time frame for implementation: In the course of 2005, discussions in the Working Party on Dual Use Goods on the possible terms of reference for a feasibility study on the launching of a data base/electronic information-sharing system.

Implementation of the system will depend on the results of the study.

III.6 PRO-ACTIVE STRATEGIES AND BEST PRACTICES TO PREVENT ACCESS BY TERRORISTS TO RELEVANT TECHNOLOGIES

Improvement of information sharing at EU level must be considered as a priority given the unequal access by Member States to "intelligence" information (due to non membership of regimes and unsatisfactory exchanges on denials). Access to sensitive information is crucial for efficient export controls. Relevant Council Working Parties could put on their agenda the analysis of proliferation risks. Enhanced coordination and information sharing could be organised between the various Council Working Parties having a mandate related to fight against terrorism, cyber security, non-proliferation and the Working Party on Dual Use Goods.

Best practices in the following areas could be developed:

III.6.1 Systematic use of risk analysis regarding export controls of dual-use items at national level

III.6.2 Assessment at national level of the methods used by relevant actors to access sensitive information

III.6.3 Assessment at national level of the efficiency of the sharing of sensitive information between the different actors and institutions involved in the enforcement of Regulation (EC) No. 1334/2000

III.6.4 Enhanced use of bilateral consultations in case of doubts concerning applications for export licences

Possible time frame for follow-up:

- (a) December 2004 to June 2005: Member States should at national level examine how they access sensitive information and communicate it to relevant actors involved in the enforcement of Regulation (EC) No.1334/2000. A workshop could be held on this issue in the Article 18 Coordinating Group;
- (b) 2005: Working Party on Dual Use Goods should discuss the possible enhancement of implementation of Article 15 ;
- (c) Second semester 2005: A workshop could be held in the Working Party on Dual Use Goods or in the Article 18 Coordinating Group with delegations comprising custom and licensing officers and other enforcement services. Volunteering Member States could make presentations of current practices to facilitate exchanges of experience and possible difficulties in implementation of Article 12 of the Dual Use Regulation by enforcement authorities;
- (d) 2006 and beyond: On the basis of the achievement of these three first steps, best practices could be developed in close cooperation with relevant Council bodies with a view to defining possible mechanisms to increase efficient access to relevant information by those concerned.

III.7 HARMONISATION OF THE IMPLEMENTATION OF CATCH ALL CONTROLS (CONTROLS OF NON LISTED ITEMS)

III.7.1 Transparency on requirement of export authorisations for non listed items

Based on Article 4(6) of the Dual Use Regulation, in cases where a licence requirement for non-listed items is imposed, where appropriate, Member States could circulate information notices using a specific format.

Time frame for implementation: immediate implementation for volunteering Member States. Discussions to be held in Working Party on Dual Use Goods in 2005 on possibilities of systematic use of the format by all Member States.

III.7.2 Obligation for Member States receiving the information notices on requirement of export authorisation for non-listed items

Member States should inform their customs officials of this information notice.

Time frame for implementation: immediate implementation for volunteering Member States.

III.7.3 Regular discussions in the EU on the implementation of the catch-all clause (denials and notification of licence requirement for export of non listed items)

Possible time frame for implementation: Working Party on Dual Use Goods in 2005

III.8 MEASURES TO ENHANCE INTERACTION WITH INDUSTRY AND RESEARCHERS AT NATIONAL AND EU LEVEL

III.8.1 National evaluation of existing practice of interaction with industry

Member States at national level should assess interaction with industry and examine possible ways and means to improve the level of awareness of existing legislation. In particular, Member States should develop specific interaction with industry to examine the best possible means to control intangible transfers of technology.

Time frame for implementation: as soon as possible

III.8.2 Exchange of practices regarding interaction with industry

Workshops could be held in the Article 18 Coordinating Group on the following issues: presentation of materials and support used by Member States in interaction with industry; presentations by volunteering Member States of possible methods to identify new suppliers in certain dual use sectors where innovation is high and the suppliers are small entities (SMEs, start ups); presentation by volunteering exporters of their Internal Compliance Programmes; presentations of best practices such as “nomination of a person responsible for exports” and possible applications to SMEs, presentation of best practices in terms of relation with industry regarding controls of intangible transfers of technology.

Time frame for implementation: Workshops in Article 18 Coordinating Group before June 2005.

III.8.3 Mutual assistance on interaction with industry

Interested Member States could start developing bilateral cooperation either prior to or after the workshops mentioned above, depending on needs for technical assistance and support.

Time frame for implementation: 2005

III.8.4 Consultation of industry at national and EU level prior to amendments of the Regulation

- (a) All Member States should consult national industry on proposals in discussion in export control regimes so as to ensure the enforceability of the measures adopted in the export control regimes and report in the EU and if necessary in the regimes so as to ensure the enforcement of the Regulation’s criteria for export controls in particular “enforceability, proportionality and foreign availability”.

Time frame for implementation: as soon as possible

- (b) The Commission should consult industry on the implementation of the Regulation and on its possible amendments. Issues of importance such as how to facilitate dual use trade for companies respecting internal compliance programmes should be addressed.

Time frame for implementation: in the course of 2005

III.8.5 National assessment of the practice of interaction with researchers

In line with the WMD Strategy, Member States should assess their level of awareness raising and outreach to researchers and academics with a view to defining ways and means to ensure that relevant strategic sectors of research are aware of existing legislation in particular the need for authorisation before transferring listed technologies to third countries while respecting the notion of “public domain”. The implementation of Joint Action 2000/401 CFSP (technical assistance related to WMD) and article 2(b)iii of the Dual Use Regulation (controls of intangible transfers of technology) by academics and researchers would benefit from systematic outreach to these sectors.

Time frame for implementation: by end of 2005, a workshop should be held and best practices reported by volunteering Member States.

IV. CONCLUSIONS ON THE PEER REVIEW OF THE EU SYSTEM OF EXPORT CONTROLS OF DUAL USE ITEMS

The Peer Review, launched by the Thessaloniki Action plan, was carried out by all Member States with the active support of the Council Secretariat and the Commission. The process was strongly supported by the Political and Security Committee and benefited from the active contribution of Finland in the Task Force, and a positive attitude and good cooperation among Member States who were grouped in ten clusters. This most useful exercise has contributed greatly to developing confidence among Member States' authorities, which is key to the functioning of the EU system, and to accelerating the learning process of the new Member States.

Some of the challenges that the Peer Review has highlighted were already well known, in particular those already the subject of actions in the Thessaloniki Action Plan and the WMD Strategy. However, the added value of the Peer Review has been to facilitate the emergence of consensus on a larger number of activities to be implemented at EU and national level with a view to increasing the efficiency of the EU regime.

Approaches to export controls of dual-use items were considerably affected by the events of 11 September 2001. The focus after 11 September has been to prevent access by terrorists in third countries to dual use items, while in the past export controls were more focussed on preventing the development of WMD programmes by States outside the EU. This has an important impact on the role of Customs in the enforcement of Regulation (EC) No. 1334/2000. The role of Customs in achieving these post 11 September objectives is increasingly important as they are major actors not only in the implementation of the Regulation but also in the implementation of the Proliferation Security Initiative, the Container Security Initiative and certain provisions of the UN Resolution 1540 (2004).

To meet all these challenges, Customs rely on reinforced use of risk analysis. This can only be achieved on the basis of enhanced information sharing at national level and between EU Member States. The efficiency of the EU export control regime could be increased with the creation of a secure system of exchange of sensitive information containing all the active denials in force in the EU. It is recommended the the Working Party on Dual Use Goods should examine possible terms of reference for a feasibility study of such a system.

The need to adopt control measures which are proportionate and which do not create excessive barriers to legitimate trade of dual use items requires consultation of industry before proposing modifications to EC legislation. Issues of importance such as how to facilitate dual use trade for companies respecting internal compliance programmes should be addressed.

The Peer Review highlights the need to attach more importance to the functioning of the EU system than has been the case in the past, in particular in order to meet the requirements of the management of common enlarged borders. There is still much to do to achieve Action 7 of the Thessaloniki Action Plan to "make the EU a leading cooperative player in export control regimes". In particular, the non-membership of 7 new Member States of the Missile Technology Control Regime and of 6 Member States of the Wassenaar Arrangement considerably affects the efficiency of the EU system and of these regimes. This issue should be addressed at the highest level.

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