



## FIM POSITION PAPER

**Recast of Regulation 428/2009 setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items**

### **Context**

The European Commission adopted the 28<sup>th</sup> of September 2016, a recast of Regulation 428/2009 setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (COM(2016) 616).

In its explanatory memorandum, the Commission justifies the proposed changes in the draft legislation:

- Modernisation of existing control provisions
- Optimisation of EU licensing architecture
- Convergence of catch-all controls
- Re-evaluation of intra-EU transfers
- An initiative to control exports of cyber-surveillance technologies
- Enhanced cooperation on implementation and enforcement
- Transparency and outreach - private sector partnership
- Export control dialogue with third countries

The European Commission recalls the necessary consistency with existing provisions in the policy area, in particular when it comes to the contribution to peace and security, as well as to free and fair trade and to the protection of human rights (Article 3 of the Treaty on the Functioning of the European Union) and in relation to REFIT initiative (Regulatory fitness of EU legislation).

### **Position of the French Federation of Mechanical Engineering Industries**

The French Federation of Mechanical Engineering Industries wishes to make the following comments.

#### Scope

Regulation 428/2009 focuses on the control of exports of dual-use items, by codifying international agreements (Wassenaar Arrangement (WA), Missile Technology Control Regime (MTCR), Australia Group (AG), Nuclear Suppliers Group (NSG) and Chemical Weapons Convention (CWC)).

In addition, pursuant to article 4 of Regulation 428/2009, a Member State may consider that an authorization has to be required for non-listed items, provided that one of the following conditions is met:

- The items in question are or may be intended, for use in connection with the development,... of chemical, biological or nuclear weapons or other nuclear explosive devices
- In case the purchasing country or country of destination is subject to an arms embargo decided by a common position or joint action adopted by the Council or a decision of the Organisation for Security and Cooperation in Europe (OSCE) or an arms embargo imposed by a binding resolution of the Security Council of the United Nations and if the exporter has been informed by the authorities that the items in question are or may be intended, in their entirety or in part, for a military end-use

- If the items in question are or may be intended for use as parts or components of military items listed in the national military list that have been exported from the territory of that Member State without authorisation or in violation of an authorisation prescribed by national legislation of that Member State.

In comparison with the current Regulation, the Commission has considerably broadened the scope.

For listed dual-use items, a new category has been introduced, in relation to cyber-surveillance technologies.

For non-listed dual-use items, two new conditions have been added:

- Use by persons complicit in or responsible for directing or committing serious violations of human rights or international humanitarian law in situations of armed conflict or internal repression in the country of final destination, as identified by relevant public international institutions, or European or national competent authorities, and where there is evidence of the use of this or similar items for directing or implementing such serious violations by the proposed end-user
- Use in connection with acts of terrorism

In addition, the recast extends the control of brokering activities to non-listed items and new requirements have been introduced to include technical assistance, based on the current philosophy for brokering activities.

When it comes to the issue of exportation, the scope is broadened to outward processing procedure.

To end with, article 16 of the recast allows the European Commission to modify the list as given in Annex I, section B, « if this is necessary due to risks that the export of such items may pose as regards the commission of serious violations of human rights or international humanitarian law or the essential security interests of the Union and its Member States ».

These additions call for the following comments:

- They modify the philosophy of the current legislation, which relies on the codification of international agreements. This will complicate the duties of manufacturers and increase their exposure to risks, in particular when the use of a dual-use item could be considered as abusive, in case of violations of human rights or acts of terrorism.
- Since these additions are specifically European, they distort competition, in particular in comparison with our American counterparts
- With the broadening of the scope comes additional licenses to grant. In the hypothesis that MS resources will be maintained, this will result in the increase of the processing time for license applications

**FIM considers that these additions are detrimental to the competitiveness of the European industry. This is in contradiction with one of the main objectives of the recast and raises the question of the availability of MS resources to process additional license requests.**

**FIM wishes that the current philosophy remain in the recast, as provided for in Regulation 428/2009, and specifically requests the deletion of the following provisions:**

- **New conditions listed in article 4 (articles 4.1.d and 4.1.e)**
- **The possibility to modify Annex I, section B (article 16.2.b)**
- **The extension of exportation to outward processing procedure (article 2.2.c)**

**Essential issues regarding human rights and terrorism should be dealt with by specific measures - outside the catch-all clause - country by country, which would mitigate legal risks for exporters under their obligation to exercise due diligence.**

#### Information procedure in the catch-all clause

The information procedure to Member States (article 4.4) seems difficult to implement. Specifically, the duration of 10 working days during which MS shall make known any objections they may have to the imposition of an authorisation requirement is unrealistic. In the probable absence of objections, this provision will prevent the harmonisation of MS practices in that field.

**FIM wishes that the use of article 4 (see comments on the scope) be limited and that this information procedure be modified, so that MS practices are harmonised.**

#### Technical assistance

Technical assistance is generally a service provided by manufacturers of dual-use items, in particular for activities described in the contractual arrangement (assistance during the delivery of the product, maintenance...). Nevertheless, it appears that technical assistance is often required in case of emergency, for instance in case of repair or unscheduled maintenance.

In this context, provisions stated in article 7 of the recast are not adapted to the current course of commercial relationships, for instance in case of emergency (repair of a defective product, delivery of a spare part...).

In addition, the extraterritorial nature of article 11.1 ignores how companies work and lead to an unjustified burden for European companies.

**FIM wishes that the specific regime as described in article 7 be deleted and integrated into the licence request for listed goods (article 3) or in the framework of article 4. The extraterritorial nature of article 11.1, second paragraph, should also be deleted.**

#### Period of validity of authorisations

The period of validity of one year as detailed in article 10.3 of the recast is not in line with BtoB business cycle and product development, generally around two years. Exporters will then have to request an extension of their licence, which is purely administrative and time-consuming for both parties (exporters and competent authorities in charge of delivering the license). The comment stands also for licenses granted in application of article 4.3.

**FIM wishes that the period of validity be fixed at two years, for any authorisation regime defined in the recast, with the exception of large projects.**

### Cybersecurity technologies

The addition of this new field requires clarification on the scope. For instance, would a device integrating a remote surveillance system, a storage capacity and remote control be covered?

**FIM wishes that the scope and the definition (article 2.21) of cybersecurity technologies be clarified, for instance with guidelines and examples.**

### Large projects

New provisions regarding large projects are welcome, especially when considering that the validity of the authorisation is fixed by the competent authority, based on the nature of the project. Nevertheless, the definition should be clarified (article 2.13).

**FIM wishes that the definition of « large projects » be clarified.**

### Internal Compliance Programme

In the framework of global licenses, the recast provides for the implementation by the exporter of an Internal Compliance Programme and an annual reporting to the competent authorities. These requirements are not sufficiently precise at this stage, the definition given in 2.22 being too general.

**FIM wishes that requirements regarding the Internal Compliance Programme be clarified, especially the definition.**

Courbevoie, the 9<sup>th</sup> of November 2016

The French Federation of Mechanical Engineering Industries (FIM) is in charge of the economic and technical interests of 28 trade associations, representing companies in the three following fields:

- Equipment : Machinery, production systems, components
- Metal processing : Subcontracting, tools, household goods
- Precision : Optical goods, health care equipment, measuring instruments

The mechanical engineering industries generated in 2015 a turnover of 121.8 billion euros (6<sup>th</sup> rank in the world), with an export ratio of 40%. This sector represents in France 30 200 companies with more than one employee and 629 000 employees.

#### **FIM contact**

**Benjamin Frugier** - Telephone: 01 47 17 60 20 - E-mail: [bfrugier@fimeca.org](mailto:bfrugier@fimeca.org)  
 FIM is registered under the EU Transparency Register ([ID 428581813783-89](#))