

6 October 1998

Proposal for a revised Council regulation
setting up a Community regime for the
control of exports of dual-use goods and technology

(COM (1998) 257 final)

UNICE position paper

A. General remarks

UNICE strongly supports development of a Community regime for the control of exports of dual-use goods and technologies. It considered the 1994 Regulation a first step towards the establishment of such a regime. It therefore welcomes the new Commission proposal for a revised Council Regulation for the control of exports of dual-use goods and technology.

UNICE notes with interest that the Commission has opted for a major redraft and not just for a reform of the previous Regulation. The inclusion of the list of controlled goods into the regulation, together with the proposals related to the Community general licence are important steps forward towards a common approach. Although export control policy is in continuous development, UNICE nevertheless would like to stress the importance of remedying the weaknesses of the old Regulation once and for all, as it will be difficult to carry through yet another major reform in the next few years.

Not only does the proposal contain important new steps on the way towards a real Community export control system, but many parts of the proposal reflect the views expressed by European industry after two years of experience with the system.

However, there are several areas of the proposed regulation which require further clarification and possible improvement. In particular, European business is concerned that the proposed new EU Regulation would lead to new controls and thereby introduce additional administrative burdens. It adds two new layers of control, namely

- Catch-all clause for all military end-use products and
- Controls on intangible technology transfer.

UNICE also notes that the administrative and procedural requirements have increased unnecessarily.

Apart from these areas of concern, UNICE offers other constructive comments on the major proposed elements of change.

B. Major elements of change

UNICE's views on the major elements of change are the following:

1. List of controlled goods

An important element of the proposal is that annex I (the list of controlled goods) is to become part of the Regulation.

Although the responsibility for updating the list of controlled goods will be delegated to the Member States, meeting in a List Group, UNICE is convinced that the possibility to speak with one Community voice will increase.

Technology and market circumstances change very fast and industry is the evident expert in the field of exports of dual-use goods and technology. UNICE, therefore, recommends that, to enhance transparency in the List Group deliberations, at least once a year an in-depth exchange of views is organised between the List Group and representatives of European industry on the subject of updating and reducing the list of controlled goods. This exchange of views can be organised through the Co-ordination group as envisaged by article 19.

2. General Community licence

Another important element of the proposal is a General Community Licence for many controlled goods to 10 countries outside the Community. This will most certainly facilitate the execution of export controls by industry.

UNICE insists that competitive disadvantages for and within European industry are taken into account in determining the number of countries to which this general Community licence will be applicable.

Japan, the US and the Netherlands have general licences allowing the export of many controlled products to over 200 countries. For some controlled products the UK, Germany and Denmark have similar broad general licences. A thorough but quick study by the Commission services with help from industry on these important differences could be a starting point for decision-making.

3. Guidance to exporters

A third positive element of the proposal is the recommendation to provide a similar level of guidance to exporters on catch-all sensitive end-users. Such guidance will most certainly make catch-all controls more manageable for industry.

However, UNICE wants to recall its position that not only guidance on sensitive end-users is needed, but also guidance on products that are relevant in this context.

UNICE strongly suggests the catch-all paragraph be rephrased such that it becomes clear that only controllable products “materially contributing to the unwanted end-use” are to be watched.

4. Licence-free intra-Community trade

A fourth positive element of the proposal is licence-free intra-Community trade in almost all dual-use goods contained in the present annexes IV and V, however with a notification procedure for certain goods. This means the creation of a real licence-free zone in the Community.

UNICE however strongly recommends that notification be possible after the transaction, in order to prevent unnecessary delays.

UNICE is concerned about the proposed notification procedure for sensitive areas like stealth technology, Missile Technology Control Regime (MTCR) and encryption. These rather confusingly phrased procedures would create a very heavy administrative burden and would be difficult to implement for both industry and authorities. In fact it would not encourage harmonisation of licence-free intra-Community trade.

5. Standard procedures and forms

A fifth positive element of the proposal is the obligation for Member States to maintain or introduce the possibility of granting a global authorisation and to use a standard form for this licence (authorisation). This will increase the use and mutual recognition of this very important licence facility. UNICE, however, strongly suggests regular comparison of the contents of these global authorisations granted by Member States, in order to create ever-growing liberalisation and harmonisation.

6. New controls

The proposal also contains new controls: controls on “intangibles” and a certain extension of the catch-all provisions. Even though UNICE understands the reasons behind these new controls it feels bound to point out that control costs are likely to be considerable for companies and governments.

UNICE urges that the controls on “intangibles” at least be limited e.g. to the area of non-proliferation. UNICE also strongly recommends that the embargoes referred to in the extension of the catch-all provisions be listed in an annex to the Regulation.

C. Conclusion

In summary, UNICE wants to express its appreciation of the contents of the proposal, but urges that its comments made in this paper are taken into account in further decision-making.

European industry, represented by UNICE, has proven able and willing to co-operate with the Commission and the Member States whenever needed to make the system effective. This partnership is essential because if governments are responsible for designing the control system, execution of the controls is a mutual responsibility shared with the export industry.

Attachment: Comments by article

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Attachment

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UNICE comments by article

UNICE comments in particular on the following articles of the draft Regulation:

Article 2

Article 2.c - Definition of „exporter“

The new definition which avoids the „property“ pitfalls is closer to the practical situation of exporting companies. If required, it could be necessary to clarify this definition with regard to the definition as given by the Customs Code or to adjust the Customs Code accordingly.

Otherwise, the „exporter“ as per Customs Code definition could differ from the „exporter“ according to the Dual-use Regulation which could definitely lead to enormous difficulties for the completion of customs procedures (export certificate and licence/authorisation showing different „exporters“).

The same comment applies to Article 3, para.5 and Article 22, par. 2.

The term „natural or legal person“ does not include groups of persons without a legal status of their own, although such groups of persons can act as „entities“ in legal procedures (joint venture, consortium etc.). As given in Customs Code Article 4 No.1, also the Dual-use Regulation should allow such groups of persons to have corresponding rights and duties.

Article 2.d - Definition of „export declaration“

The term „prescribed form“ should be more precisely defined as „form as prescribed by the Customs Code“.

Article 3: Scope

Article 3.2 - Intangible technology

The criteria for when an item should appear on a control list are usually defined as follows:

- being a major or key element
- no foreign availability
- ability to control
- clear and objective specification.

It is obvious that a transfer by fax or e-mail is not controllable. However, UNICE suggests that intangible technology transfer be limited to the area of non-proliferation only, if a criterion along these lines is unavoidable.

Article 3.3 - Non-listed items

This par. could be deleted since this information is already covered by the relevant articles of this Regulation and since it is being followed in the practical course of Customs procedures anyhow.

Article 3.4 - Transit through the Community

The content should preferably be integrated in article 1 (subject of the Regulation). Further UNICE proposes addition to these exemptions of the term “re-export after repair”.

Article 3.5 - Government contracts

UNICE proposes addition of "and acting on behalf of the European Union or the United Nations“.

Article 4: Catch-all clause

Article 4 General

The total article should be rephrased such that it becomes clear that only controllable products “materially contributing to the unwanted end-use” are to be watched.

Article 4.2

The term „UN embargo“ could be misleading. Clear definitions and precisions are necessary. UNICE strongly recommends that the embargoes and the subject countries be listed in an annex to the Regulation.

In this context, licence requirements for „military end-use“ for non-listed goods in case of trade embargoes, oil (i.e. not weapons related) embargoes etc. do not make sense. This paragraph is obviously focused just on weapons embargoes.

Further, for practical reasons, it is necessary to specify the range of goods to be controlled, i.e. only goods for direct military use should be addressed and there should also be a reference to where and how „weapons“ and „military“ are defined, such as the UN Weapons Register.

Thus, control of items like non-listed accessories for auxiliary equipment should be avoided which UNICE feels would be going too far and could not be justified as contributing to the aims of a harmonised export control policy and would be difficult to administrate by the authorities and by the exporting companies. In this respect, clear definitions are required.

Further, UNICE proposes to exempt general purpose goods such as nuts, bolts, off-the shelf mass products, standard products etc. which are not controllable due to world-wide availability and to exempt very low value shipments.

Depending on the results of the clarifications as proposed above, UNICE may wish to make further comments at a later date.

Article 4.4 - Grounds for suspecting

As far as UNICE is aware, this option is only applied in the UK, and therefore proposes it should be deleted for reasons of European harmonisation and an equal competitive situation within the EU.

Article 4.5, 4.6 and 4.7 - Information to other Member States in cases of denial of a licence

These provisions could impose heavy burden of consultation. The information process should never create delays in doing business and place EU companies in a disadvantageous competitive position.

Article 4.7 - Essentially identical

The term „essentially identical“ needs to be clearly defined.

Article 5: Exceptional prohibition

Paragraph 1 permits unilateral controls/sanctions by Member States, which causes competitive disadvantage and distortions within the EU. UNICE, therefore, proposes deletion of this article 5 in its entirety.

Article 6: Export authorisation

Article 6.1 - Authorisation granted

The first sentence of this paragraph should be deleted, as it is misleading. Otherwise it would be questionable whether the term „each export subject to this Regulation“ is to be understood as if all exports falling under this Regulation would require a licence (authorisation).

Example: The exports of goods to be notified per article 4 par. 3 may or may not require a

licence depending on the decision of the competent authority of the respective Member State.

This implies that there are exports falling under the Regulation for which no licence is required.

Article 6.2, 2nd sentence - Community General Authorisation/CGA

UNICE welcomes the effort to create the first CGA generally as positive and as a further step to harmonisation.

For reasons of international competitiveness, in particular with respect to the US, the scope of goods which are exempted from the benefits of the CGA should be kept as small as possible and should be harmonised internationally.

The list of countries to which exports are allowed under CGA should match the countries eligible for US general licences.

Article 6.4 - End-use requirements and conditions

Based on proven behaviour of exporting companies, the competent authorities of the Member States should be given the right to waive the obligation to submit statements of end-use, delivery verifications and import certificates if the relevant basic export control requirements are satisfied.

The above-mentioned statements and certificates should only be required for authorisations falling under article 3 (goods subject to annex I, i.e. listed goods) and should also be recognised by the authorities of other member states.

Awarding contracts to sub-suppliers leads in many cases to the situation that the sub-suppliers have the status of exporter without a direct relation to the end-user in the country of final destination.

If the sub-supplier requires an end-use statement or certificate to obtain an Export Authorisation, it should be mandated by the EU dual-use Regulation that an end-use statement / import certificate of an importer / third country be acknowledged by the competent authority of the Member State where the contractor (the party awarding the subcontracts) is located.

The acknowledgement of this authority should be valid and binding for the respective authorities in the other Member States where the sub-suppliers are located.

If required by the nature of certain export business cases, the authority in the Member State of the contractor should be obliged to issue legally valid copies („splitting“) of such end use statement/ import certificate acknowledgement on request.

This requirement is very important for the plant engineering business and European logistics (this will serve as an amendment to the provision for legal copies of the Export Authorisation as given under article 10 par. 4).

As a long-term goal UNICE would like to see EU harmonised requirements for the above statements and certificates.

Article 7: Intra-EU licensing

Article 7.1 - Previous location of goods in a different Member State prior to export

UNICE proposes to delete paragraph 1, since the respective export control goal is not clear and the requirement could not be administered by exporting companies („...will be or have been located in a different Member State in the last nine months..“). Export controls on goods which do not fall under the CGA licence exception would give rise to competitive distortion.

Examples illustrating the negative impact on companies:

- High bay automated warehouses which are important for eurologistics could not cope with the requirement to mark and to manage different „received“ dates and classifications for the same products due to origin from different EU Member States and depending on the possibility of future exports.
- In the numerous cases of intra-EU trade of unfinished products with the purpose of transformation into finished goods (so called „inward processing“), the compilation and management of the intra-EU transshipment data of the goods is largely impossible and surpasses the administrative capacity of the involved companies.
- For the export of a good previously imported from outside of the EU into the Member State of the exporter (for example from Brazil), no nine-months time frame with regard to location needs to be considered, whereas the same good which had been previously obtained from another EU Member State needs to be specially marked and administered.

UNICE does understand that article 7 is in relation to article 22 and replaces the intra EU licensing obligation by a notification system.

Article 10: Single Forms for individual export authorisation

Article 10.1 - Single forms for authorisations/annex III

UNICE welcomes the obligation for the authorities of the Member States to issue the individual export authorisations on a single layout with mutual recognition.

Article 10.4 - Legally valid copies

UNICE also welcomes this possibility, in particular for the plant engineering business and European logistics.

With regard to customs procedures, additional clarifications of some special questions and details by EU customs officials are necessary, such as a uniform EU-wide method of deduction of part shipments from the authorised total quantity/amount (so called „attribution“), real possibility of uncompleted customs declaration as theoretically mentioned in the Customs Code.

Article 11: International Import Certificates/end-use certificates

In the first sentence, UNICE proposes to replace the phrase „...shall be used only to certify that ... " by „...serve the purpose of supervision or to oblige the importer in the third country outside the EU respectively that ...“.

Article 12: Control List Group

The proposal for a Control List Group is being welcomed. UNICE strongly suggests that industry experts are consulted by this group.

It would be desirable to include a deadline for the updating of annex 1 in relation to the discussion held by control regimes.

Article 14: Customs formality

Such an article limits the flexibility of an operator without adding any value to the control itself. It will definitely increase the transportation costs unnecessarily.

Article 16: Administrative co-operation

Article 16.2 - Direct co-operation

UNICE does not see how the present paragraph will be implemented without being centralised at Commission level (Community information centre or database). This article 16.2 may only stay as a declaration of good intention without any effect.

Article 22: Intra-EU shipments/notifications

UNICE welcomes in general the efforts to reduce the licence requirements for intra-EU trade.

Article 22.2, 22.3 and 22.4

Attention should be paid to keep the scope of the data to be notified to a minimum (in particular with regard to the value of the consignments) for reasons of competition.

Annex II: Countries

It is necessary to clarify that mentioning Switzerland includes Liechtenstein as well. Liechtenstein has transferred export customs controls to Switzerland. In the customs field there is no differentiation between the two.

Annex III: Single layout of the authorisation form

Field 21 (location, not just Member State) of the form should be deleted, since this information is irrelevant for Export Controls and since it would create host of logistics problems. The location where the actual export is to be made is in many cases determined

by the freight forwarder and not by the exporter.
