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Abstract

The Council and the Parliament have recently reached a provisional agreement on the revision of the European dual-use export control regime. The revised regulation is supposed to enhance the clarity, effectiveness and efficiency of European dual-use trade rules. Moreover, it puts a special emphasis on human security and expands the list of controlled items to cyber-surveillance technology. Focusing on the revised regulation's scope and institutional design, we discuss whether and how it will promote coherence in European dual-use export control. We identify four problems that have produced incoherence in European dual-use governance so far and argue that the revised regulation is insufficient to provide a comprehensive remedy. Far-reaching national discretion and inadequate coordination mechanisms prevent a truly level playing field for European companies and hamper the EU's establishment as a fully coherent security actor.

Keywords

Coherence; Dual-Use Regulation; Export Control, Institutional Design.

Introduction*

The free movement of goods, services, and technology is a fundamental principle of the Internal Market. However, items that qualify as 'dual-use' are subject to regulations that might complicate or even prohibit their transfer and export. The dual-use category comprises any item that can be used for both civilian and military purposes. Whilst virtually any product might be used in a military context, the traditional focus on dual-use products emphasises their importance for the development, production, and use of weapons of mass destruction. To safeguard international security by preventing proliferation, control of dual-use trade is universally accepted and even required under international law.[1] To reconcile the principle of free trade with dual-use export control, Council Regulation 428/2009 set up a European dual-use export control regime which ought to establish an 'effective common system of export controls'.

In recent years, technological progress broadened the scope of the dual-use category. State and non-state aggressors employ new technologies to attack critical infrastructures, and authoritarian regimes use mass-surveillance technology for internal repression. The crackdown on protests during the Arab Spring and the steady expansion of mass surveillance in China fuelled the discussion on whether and to what extent the export of digital surveillance technology should be subsumed under existing export control regimes. In late 2013, members to the Wassenaar Arrangement, a multilateral export control regime for arms and dual-use products, agreed to extend the dual-use control list by including intrusion software and mass surveillance technology. Although respective changes were subsequently included in the European dual-use control list[2], existing European export control is insufficient to prevent new digital technology from being misused for severe human rights violations or against European critical infrastructure (Amnesty International 2020; European Commission 2016a: 5).

The regulatory gap regarding the export of security sensitive digital products and services is but one of several other problems of European dual-use export control. A key issue with the current European dual-use trade regime is rooted in its institutional design. Export control is a hybrid policy that cuts across the realms of trade and security. Whereas the regulation of trade is a comprehensive EU competence, security policy remains a largely national domain. The Dual-Use Regulation seeks to combine these different responsibilities in a unified framework. Although the regulation establishes one of the most sophisticated international export control regimes, the framework's hybrid character produces some degree of incoherence. Notably, the interpretation and application of European export control rules differ across member states (e.g. Bräuner 2013: 461; European Commission, 2015: 125 and 233; Vella 2017: 112). The European export control regime is thus less coherent and effective than it could be.

To address the regulatory and institutional shortcomings of the European dual-use trade regime, the Commission tabled a proposal for recasting the Dual-Use Regulation in 2016 (COM(2016) 616 final). On 9 November 2020, the Council and the Parliament reached a provisional political agreement on the revised regulation.[3] The revision introduces a new human security dimension to trade in dual-use items and includes several changes to enhance coherence.

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1 See esp. United Nations Security Council Resolution 1540 (2004).

2 See Commission Delegated Regulation (EU) No 1382/2014.

3 The final compromise text is available at: https://data.consilium.europa.eu/doc/document/ST-12798-2020-INIT/en/pdf

This policy paper looks at the new cyber-surveillance provisions and the institutional design of the projected revision. Our focus is on the prospects of future coherence in the interpretation and application of European dual-use export control rules rather than on the question of whether the revised regulation is suitable to strengthen the EU's human rights advocacy.

We begin our discussion of the revised regulation with a brief outline of the institutional history of European dual-use export control and explain the prominent role of national export authorities. In a next step we identify four problems that undermined the coherence of European dual-use export control in the past. We then look at whether and how the projected revision addresses these shortcomings. The final section summarises our findings and provides an outlook on how the revised regulation might possibly influence the future coherence of European export control.

The Exceptional Role of National Export Authorities

Two institutional design features of the European dual-use export control regime form the basis for policy coherence across the member states. First, national export authorities play a decisive role in the interpretation and application of European export control rules. Except for cases in which exporters may use EU General Export Authorisations (EUGEAs)[4], national authorities give clearance to all security-sensitive trade undertakings. Second, the Dual-Use Regulation defines a detailed list of items which are subject to an export authorisation. Although the control list provides a certain clarity regarding the question of what is and what is not controlled, the list is neither complete nor exhaustive. The member states may complement the EU control list with separate national lists, suspend the application of EUGEAs and impose authorisation requirements on non-listed items. As a result, the EU control list is important to establish coherence, but the member states and their national export authorities are crucial.

The prominent role of national export authorities in matters of trade regulation—an exclusive EU competence—is rooted in the institutional history of the Dual-Use Regulation. Export control is a hybrid policy because trade in dual-use items is not only a matter of trade and competition but also of foreign and security policy. Since dual-use items might be used for military purposes, hostile activities and severe human rights violations, states have a genuine interest in controlling trade in respective items. Contrary to arms, however, dual-use items are also frequently used for civilian purposes. The difference between commercial goods that circulate freely within the Internal Market and dual-use items is that the latter are subject to special controls to minimise security risks. To enable safe trade in dual-use items across the EU and to establish a level playing field for European companies, the member states sought to harmonise export control standards.

When the first European dual-use export control regime was created in 1994, the hybrid character of export control translated into a fundamental controversy: Is export control to be regulated as a matter of trade or security policy? The institutional implications of this question were substantial and have an effect until today. If export control was a matter of trade, it would have been subject to the supranational Common Commercial Policy (CCP). If it was a matter of security, export control would have been subject to the intergovernmental Common Foreign and Security Policy (CFSP). The solution to this controversy was the establishment of the so-called 'integrated system'. The integrated system put customs and licensing procedures under the CCP. Simultaneously, the control list and the licensing criteria became subject to the CFSP. The authority to grant or deny export requests was delegated to the national authorities.

Whilst the integrated system was considered successful in terms of Internal Market objectives, it failed to establish a coherent system of export control (Commission of the European Communities

[4] The European Commission (2019: 12) estimates that in 2017 only 14 per cent of European dual-use exports were processed under EUGEAs.

1998: 2). Different national control policies and licensing practices undermined the harmonisation of export control. To address these shortcomings, a new Dual-Use Regulation became effective in 2000. The revised regulation was entirely based on the CCP and put all relevant provisions under supranational control. However, the member states retained their direct influence on export control by keeping up with the practice of national licensing. The integrated system had shown that the control list and the licensing criteria were only secondary to flexible national implementation (Urbanski 2020: 79). As long as the member states may tighten or relax national export control, they forfeit little control.

The importance of national authorities is especially apparent with respect to their licensing activities and resources. Despite the availability of EUGEAs which facilitate the export of some products to specific destinations, an estimated three-fourths of all dual-use exports is processed under individual licenses (European Commission 2019: 12). Accordingly, approximately 25,600 single licenses were issued by national authorities in 2017 (ibid.: 10). The yearly number of incoming applications to export dual-use items thereby ranges from 26 to more than 16,000 per member state (European Commission 2015: 129). While some countries process export authorisations through their ministries (e.g. France and Italy), other have established special agencies (e.g. Germany and Spain), or a special committee (e.g. Latvia). Consequently, the budgetary size in handling dual-use export requests is also different among the member states, ranging between €70,000 and €5.9 million annually (ibid.).

Four Sources of Incoherence

The member states' administrative latitude in the processing of export authorisations interferes considerably with the CCP and the coherence of European export control. National authorities differ significantly in how they interpret and apply the European export control rules. 60 per cent of stakeholders surveyed by the Commission in 2015 reported that licensing decisions lack coherence to a degree that 'export approvals can be unpredictable and non-comparable among Member States' (European Commission 2015: 121).

The fact that national authorities play a central role in the European dual-use export control regime is not per se detrimental to coherence. The Dual-Use Regulation accounts for the institutional design decision to transfer licensing to 27 different national authorities. Article 19 establishes several administrative cooperation requirements to ensure a coherent application of European export control. Despite these requirements which include information exchange mechanisms and the setting up of a so-called Dual-Use Coordination Group, an intergovernmental working group, the institutional design of the current dual-use export control regime still promotes incoherence. We now identify four sources of potential incoherence.

Nonbinding and Incomplete Licensing Criteria

Two provisions of the 2009 Dual-Use Regulation are of particular importance for the question of whether or not national authorities grant an export authorisation.

Article 13 requires the competent authorities of any member state to examine whether essentially identical transactions have already been denied by other member states. Despite the obligation to consult national authorities which have adopted negative export decisions, the final decision is still with the licensing state. Accordingly, companies that fail to acquire an export license in one member state might be successful in another. For instance, in 2017, the BBC uncovered that the British defence company BAE Systems obtained a Danish export authorisation for cryptanalysis software (BBC 2017). Although the British export authorities clearly communicated to their Danish counterpart that they would refuse an export authorisation on grounds of national security, BAE Systems eventually realised its business under a Danish license. Whilst it is not clear from the BBC's report whether the British authorities had actually issued a negative export decision regarding BAE Systems, the underlying problem is obvious:

As long as there is no obligation to comply with negative assessments of other member states' export authorities, Article 13 is a potential source of incoherence.

The obligation to at least take negative export decisions of other member states into account is complemented by Article 12 which lists four general considerations to guide national licensing. These considerations aim at obligations under international non-proliferation arrangements, obligations under international sanctions, obligations under the European arms export control regime, and the intended end-use as well as the risk of diversion. However, the Dual-Use Regulation does not oblige Member States to base their licensing decision exclusively on these four aspects to justify their licensing decisions (Weidel 2002: 439). Instead, Article 12 permits national authorities to take into account 'all relevant considerations' including the aforementioned four criteria. Accordingly, the member states have a potentially wide discretion regarding their licensing decision. Adherence to non-exhaustive licensing criteria thus provides for potentially inconsistent licensing policies across the EU (European Commission 2016a: 7-8).

Although non-binding and incomplete licensing criteria may potentially undermine the coherence of European dual-use export control, they account for only a small portion of actual inconsistencies. The European Commission (2019:10) estimates that in 2017 only 631 denials were issued across the EU. Probably only a small fraction of these denials were substituted by exports from other member states.

Catch-All Clause

The second source of potentially incoherent European dual-use governance is the application of the so called 'catch-all clause'. Article 4 of the 2009 Dual-Use Regulation specifies that an export authorisation might be required even if respective items are not listed on the EU's control list. Non-listed products are not specified as dual-use items by their technical characteristics but by the importer and the intended end-use. For instance, pneumatic tyres are typically not subject to an export authorisation requirement. However, if the importer intends to use the tyres for a military truck, there is a military end-use. Thus, the export might, under certain conditions, be denied.

The catch-all mechanism causes that virtually any product can be subject to an authorisation requirement. National authorities have a wide room to manoeuvre in interpreting and applying the catch-all clause. A Commission survey among industry associations and companies indicated that the export of similar products was prohibited by one member state under the catch-all provision whereas it was authorised by another (European Commission 2013: 11). Similarly, the stakeholders and some member states complained that there is 'a certain lack of transparency of decisions, different legal requirements and divergent applications of catch all controls across the EU [which] act as a barrier to trade for companies and may in some cases have adverse security effects' (ibid.).

To remedy the effect of national interpretations of the catch-all mechanism, Article 4 of the Dual-Use Regulation states that any imposition of national authorisation requirements should, 'where appropriate', be notified to the Commission and the other member states. However, despite an extensive exchange via an electronic database, the so called Dual-use e-System (DUeS), differences in the utilisation of the catch-all mechanism persist.

Separate National Control Lists

Several provisions of the 2009 Dual-Use Regulation allow states to introduce national authorisation requirements which complement the EU control list. Separate national provisions may affect the export, transfer or transit of dual-use items, the brokering of services and the permission to use Union General Export Authorisations.

Arguably the most far-reaching provision for the coherence of the EU control list is Article 8 of the Dual-Use Regulation. Article 8 states that member states may, for reasons of public security or human rights considerations, prohibit or impose an authorisation requirement on the export of non-listed dual-use items. Today, thirteen member states (including the United Kingdom) apply additional controls on dual-use goods that are not covered by the EU's control list. Seven member states even introduced so-called National General Export Authorisations that put some dual-use items to certain destinations under special trade conditions. The Commission estimated that in 2014 approximately 6 per cent of all licensed dual-use exports in the EU were processed under national control measures (European Commission 2016a: 11).

The introduction of National General Export Authorisations establishes different trade rules for exporters in different countries across the EU. For instance, when the EU control list was extended to intrusion software and mass surveillance technology in 2014, Germany complemented European rules by separate national regulations for electronic monitoring systems and data retention technology. Respective control mechanisms were explicitly justified with a view to prevent internal repression and human rights violations. Accordingly, the German authorities do not only assess the technical characteristics of projected exports but include also political considerations in their export decisions.

When national security interests are at stake, the member states can go beyond European export control rules and impose far-reaching export restrictions. This practice was also confirmed by the Court (Weidel 2002: 431).

Implementation of European Dual-Use Sanctions

Contrary to European trade embargoes which are exclusively adopted through CFSP Council Decisions, dual-use embargoes are rarely imposed directly. In fact, the EU has explicitly imposed only four dual-use embargoes through the CFSP instrument. Respective sanctions target Iran, Myanmar/Burma, North Korea and Russia. Most European dual-use sanctions are established as a corollary of European arms embargoes.

The catch-all clause of Article 4 requires the member states to extend the scope of controlled products beyond the items listed on the EU control list. Any item that is or may be intended for a military end-use is automatically subject to an export authorisation. The scope of potentially affected goods thus expands to virtually any product, whether or not included in national or EU control lists.

This contingency as regard to the licensing requirement is a burden for both exporters and national export authorities. Exporters do not have a clear reference point for their exports, and national authorities have a large discretion as to which exports to authorise and which to deny. The issue is further complicated by the fact that countries like China and Russia maintain a state-owned arms industry. Russian companies like Almaz-Antey or the United Engine Corporation produce both military and civilian products. It is thus difficult to distinguish whether a projected export project is intended for a military or civilian end-use. As a result, the uniform implementation of indirect dual-use embargoes throughout the EU cannot be ensured. Even if the member states use the DUeS to exchange information on export denials, authorisations are typically not documented.

Does the Revised Regulation Address the Sources of Potential Incoherence?

From an institutional perspective, coherence in European export control could be promoted best through centralised licensing, exhaustive control and target lists, complete and binding licensing criteria, and a binding commitment to other member states' licensing decisions. From a political perspective, the hybrid character of export control makes none of these options attainable. In anticipation of severe opposition, the Commission did not even propose 'the establishment of a central licensing agency at the

EU level' to streamline the implementation of European export control (European Commission 2016b: 5). Consequently, the revised regulation does not put into question the basic institutional design decision to implement European export control primarily though national authorities. Nonetheless, several administrative and regulatory changes affect the issue of coherence—however, not necessarily for the better.

The preamble of the revised regulation puts a special emphasis on cyber-surveillance technology and its role for internal repression and human rights violations. The inclusion of respective technology in the EU control list was long overdue and will probably strengthen the EU's value-based approach to trade policy.

However, the revised regulation's emphasis on human rights marks a substantial shift in the definition of security. Cyber-surveillance technology is, at least to a considerable extent, not covered by traditional notions of security that focus primarily on proliferation, military capabilities and the protection of critical infrastructure. The new focus on human rights (which the preamble mentions twice even before proliferation) expressly broadens the scope of security to include human security. The special emphasis on human security was even more prominent in the Commission's 2016 proposal. Here, dual-use items were, inter alia, defined as 'cyber-surveillance technology which can be used for the commission of serious violations of human rights or international humanitarian law (…)' (European Commission 2016b: 19). The compromise text effectively narrows the scope of cyber-surveillance technology which is now treated as a dual-use item when it is 'specially designed to enable the covert surveillance of natural persons by monitoring, extracting, collecting or analysing data from information and telecommunication systems' (Article 2(21)). Whilst the draft regulation emphasised the potential effects of cyber-surveillance technology (i.e. human rights violations) the revised regulation focuses on their technical characteristics.

Despite the focus on technical properties, the preamble's emphasis on human security will possibly have a negative effect on European export control coherence. In the future, national export authorities might put a greater emphasis on human rights considerations and the intended end-use of dual-use exports. Since these considerations necessarily involve a political rather than a technical assessment, licensing decisions will potentially differ across member states.

The coherence problem is further enhanced by the fact that a new catch-all mechanism puts non-listed cyber-surveillance technology under an authorisation requirement if respective items 'are or may be intended (…) for use in connection with internal repression and/or the commission of serious violations of international human law' (Article 4a). Notably, the revised regulation does not establish a useful threshold condition. The notions of 'internal repression' and 'serious violations of human rights' are open to interpretation. There is a considerable national discretion in deciding whether human rights violations qualify as minor, moderate or serious. Thus, instead of mitigating the problem of incoherence emanating from the already existing catch-all mechanism, the revised regulation broadens the scope of this instruments.

To cope with the potential flexibility of the catch-all mechanism, the revised regulation introduces several new administrative procedures and information exchange instruments. Article 20 (formerly Article 19) obliges the member states to 'take all appropriate measures to establish direct cooperation and exchange of information (…) with a view (…) to ensure the consistent and effective implementation' of European export control rules. The DUeS should be developed further to exchange licensing data for each issued authorisation. Although such an information exchange would be a much better approach than just learn about the other member states' denials, the exchange of respective data is not mandatory but merely a recommendation. Best practice guidelines, recommendations and annual reports should further strengthen the transparency and efficiency of export control.

Similarly to the 2009 Dual-Use Regulation, the revised regulation allows member states to still impose national export control list for reasons of public security and human rights considerations.

However, the inclusion of cyber-surveillance technology in the EU control list will certainly establish greater coherence with regard to *listed* products. The updated control list promotes a level playing field for tech companies and enables member states to safely remove cyber-surveillance technology from their respective national lists.

The revised regulation does not address the issue of nonbinding and incomplete licensing criteria. In fact, the new Article 14 includes essentially the same licensing criteria as the 2009 Dual-Use Regulation. The Commission's original proposition sought to replace the established four licensing criteria with a conclusive and exhaustive list of six criteria. The adjunct 'all relevant consideration' of the 2009 regulation (see above) was eliminated in the draft. Instead, the six criteria defined, inter alia, respect for human rights in the country of final destination, the internal situation in the importing country and the perseveration of regional peace, security, and stability as relevant considerations. Yet, the compromise text dispenses with these criteria and the elimination of the 'all relevant considerations' adjunct. As a result, the licensing criteria are still open to separate national considerations. National authorities also still retain the right to pass over export denials issued by other member states. The unilateral denial of export, transfer or transit licenses remains an option, too.

Finally, the potentially incoherent implementation of European dual-use sanctions is beyond the scope of the revised regulation. Since, however, dual-use embargoes are also implemented through the catch-all mechanism, the revised regulation possibly provides for a more detailed information exchange regarding both positive and negative licensing decisions and political assessments of certain trade deals. Yet, in the absence of complete control lists and lists with particularly sensitive end-users, national export authorities might still differ in their risk assessment.

Conclusion and Outlook

The revised regulation extends the notion of security to human security, makes cyber surveillance technology part of the EU control list and introduces new administrative cooperation procedures and information exchanges mechanisms. In her assessment of the 2009 Dual-Use Regulation, Micara (2012: 591) concludes that '[l]ack of uniformity negatively affects the level playing field of European enterprises and security objectives.' Micara's conclusion will probably still hold for the revised regulation as well. The reasons for this is rooted in the institutional design of European dual-use export control.

Ever since the first Dual-Use Regulation of 1994, the EU sought to strike a balance between the supranational CCP and the member-dominated foreign and security policy to account for export control's hybrid nature. This balancing act informed the fundamental institutional design of all succeeding revisions of the Dual-Use Regulation. Most importantly, the implementation of common European export control rules was delegated to the member states. This basic design feature persists until today and has a substantial effect on export control coherence.

Neither the Commission nor the member states have comprehensive data on the actual size of the European dual-use industry or on how member states differ in their licensing practice. Hence, the extent of the coherence problem in European export control cannot be reliably defined. Still, the institutional design of the current export control regime hints at four sources of potential incoherence: nonbinding and incomplete licensing criteria, a catch-all mechanism for non-listed products, separate national control lists, and the implementation of dual-use sanctions.

The revised regulation will not provide a comprehensive solution to these four problems. The updated EU control list will include cyber-surveillance technology and will thus reduce differences between national control lists that have previously included such items. Yet, a newly introduced human rights catch-all clause will extend end-user related controls to potential human rights violations and internal repression. The new catch-all clause will thus enhance the coherence problem ingrained in the already

existing catch-all clause for non-proliferation. It is highly unlikely that all member states will qualify the same human rights violation as 'serious' and issue export denials. Even if the new administrative cooperation and information exchange mechanisms work as planned, national export authorities still enjoy a considerable discretion. The list of licensing criteria in the revised regulation remains incomplete and denials of one member state are still not binding for the other.

Whether the revised regulation will lead to a substantial change in the level of coherence, will primarily depend on how the member states embrace the newly incorporated human security dimension. Two scenarios seem probable.

In the first scenario, the member states will not make comprehensive use of the human security provision. The level of coherence in European export control will then remain largely unchanged. This scenario is likely because the 2009 Dual-Regulation already allows states to prohibit or impose an authorisation requirement for human rights considerations. Yet, this possibility was only occasionally used. There is no reason to believe that human security will play a more important role for national licensing decisions only because it is explicitly mentioned in the revised regulation. If, however, national authorities only rarely deny export authorisations for reasons of human security, the level of member state coordination will remain similar. If, in the case of serious human rights violation and internal repression, all member states are under pressure to act, it is likely that the Council will impose dual-use sanctions.

In the second scenario, some member states will make frequent use of the new human security provision. The level of coherence will then certainly decrease. The decrease of coherence will be caused by varying political assessments regarding the seriousness of human rights violations. A similar difference in the national assessment of the human rights situation in other countries can be observed in the field of arms trade. Common Position 2008/944/CFSP obliges EU member states to consider the human rights situation and the regional stability before exporting arms to third countries. However, the assessment of the situation in the recipient countries frequently differs across member states. A recent example for diverging assessments on the matter are European arms sales to Saudi Arabia and the United Arab Emirates (Maletta 2019). The crucial question is, why should human rights considerations regarding dual-use technology have a more restraining effect than human rights considerations regarding arms trade? Even if the member states make extensive use of the new coordination mechanisms, different political assessments of the human rights situation will likely produce new incoherencies in the European export control.

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