

COUNCIL REGULATION (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 113 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Whereas, in establishing the internal market, the free movement of goods, including dual-use goods, must be ensured in accordance with the relevant provisions of the Treaty; whereas intra-Community trade in certain dual-use goods is currently subject to controls by the Member States; whereas a condition for the elimination of such controls on intra-Community trade is the application by the Member States of the most effective controls possible, based on common standards, on the export of the aforesaid goods in the framework of a Community regime of exports controls for dual-use goods; whereas the elimination of such controls will improve the international competitiveness of European industry;

Whereas it is also the aim of this Regulation that dual-use goods should be subject to effective control when they are exported from the Community;

Whereas an effective system of export control on dual-use goods on a common basis is also necessary to ensure that the international commitments of the Member States and the European Union, especially on non-proliferation, are complied with;

Whereas common lists of dual-use goods, destinations and guidelines are essential elements for an effective control system; whereas decisions concerning the content of these lists are of a strategic nature and consequently fall within the competence of the Member States; whereas those decisions are the subject of joint action pursuant to Article J.3 of the Treaty on European Union;

Whereas the Ministers for Foreign Affairs of the Community adopted, on 20 November 1984, the Declaration of Common Policy, subsequently adopted by Spain and Portugal, which covers in particular the arrangements concerning intra-Community transfers of separated plutonium and of uranium enriched to more than 20 %, as well as installations, the main components of crucial importance and technology related to reprocessing, to enrichment and to the production of heavy water;

Whereas the aforesaid joint action and this Regulation constitute an integrated system;

Whereas this system represents a first step towards the establishment of a common system for the control of exports of dual-use goods which is complete and consistent in all respects; whereas, in particular, it is desirable that the authorization procedures applied by the Member States should be harmonized progressively and speedily;

Whereas the Community has adopted a body of customs rules, contained in the Community Customs Code (3) and its implementing provisions (4) which lay down, among other things, provisions relating to the export and re-export of goods; whereas nothing in this Regulation constrains any powers under and pursuant to the Code and its implementing provisions;

Whereas Member States should, when considering conditions concerning re-export or end-use of dual-use goods, take into account relevant principles of international law;

Whereas the aim of Articles 4 and 5 of this Regulation is to ensure effective control of exports of dual-use goods; whereas those Articles do not prevent Member States from adopting or maintaining, for the same purpose and with due regard for the internal market, additional export control measures which are compatible with this Regulation's objectives;

Whereas, to eliminate the risk of diversion of dual-use goods from their intended destination in another Member State to a destination outside the Community during the initial phase in which the Member States are adjusting to the requirements of this Regulation, provision should be made for the application of simplified controls on intra-Community trade in dual-use goods; whereas this may include a system of general authorizations; whereas the implementation period should be of limited duration; whereas, during this implementation period, intra-Community trade in dual-use goods should not be subject to stricter controls than are applied on exports from the Community;

Whereas, pursuant to and within the limits of Article 36 of the Treaty, and pending a greater degree of harmonization, Member States will retain the right, both during and after the

transitional period, to carry out controls on dual-use goods in order to safeguard public policy or public security;

Whereas, in order to ensure that this Regulation is properly applied, each Member State shall take measures giving the competent authorities appropriate powers;

Whereas each Member State shall determine the penalties to be imposed in the event of breach of the provisions of this Regulation,

HAS ADOPTED THIS REGULATION:

TITLE I Subject and definitions

Article 1

This Regulation introduces a Community system of export controls for dual-use goods.

Article 2

For the purpose of this Regulation:

(a) 'dual-use goods' shall mean goods which can be used for both civil and military purposes;

(b) 'export' shall mean a procedure referred to in Article 161 of the Community Customs Code under which Community goods temporarily or definitively leave the customs territory of the Community; it includes re-export, that is to say a transaction of the kind referred to in Article 182 of the Code by which non-Community goods leave the customs territory of the Community;

(c) 'exporter' shall mean any natural or legal person on whose behalf the export declaration is made and who is the owner of the dual-use goods or has a similar right of disposal over them at the time when the declaration is accepted. Where ownership or the benefit of a similar right to dispose of the dual-use goods belongs to a person established outside the Community pursuant to the contract on which the export is based, the exporter shall be considered to be the contracting party established in the Community;

(d) 'competent authorities' shall mean the authorities in each Member State responsible for applying this Regulation;

(e) 'export declaration' shall mean the act whereby a person indicates in the prescribed form and manner the wish to place dual-use goods under an export procedure.

TITLE II Scope

Article 3

1. An authorization shall be required for the export of the dual-use goods listed in Annex I to Council Decision 94/942/CFSP of 19 December 1994 on the joint action adopted by the Council on the basis of Article J.3 of the Treaty on European Union concerning the control of exports of dual-use goods (1).

2. In pursuance of Article 4 or Article 5, an authorization may be required for the export to all or certain destinations of certain dual-use goods not listed in Annex I to Decision 94/942/CFSP.

3. Dual-use goods which pass only through the territory of the Community, whether or not subject to a transit procedure, fall outside the provisions of the Regulation. A Member State may take appropriate measures in respect of such goods.

Article 4

1. An authorization shall be required for the export of dual-use goods not listed in Annex I to Decision 94/942/CFSP, if the exporter has been informed by his authorities that the goods in question are or may be intended, in their entirety or in part, for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or the development, production, maintenance or storage of missiles capable of delivering such weapons, as covered by the corresponding non-proliferation arrangements.

2. If the exporter is aware that the goods in question are intended, in their entirety or in part, for one of the purposes referred to in paragraph 1, he must notify his authorities, which will decide whether or not it is expedient to make the export concerned subject to authorization.

3. Member States may adopt or maintain national legislation stipulating that the exporter has to notify his authorities where he has grounds for suspecting that the goods concerned are intended, wholly or in part, for one of the purposes referred to in paragraph 1, and that in such a case the export operation may be made subject to authorization.

Article 5

1. With a view to pursuing the objectives of this Regulation effectively in terms of export controls, a Member State may prohibit or make subject to authorization the export of dual-use goods not listed in Annex I to Decision 94/942/CFSP.

2. Paragraph 1 shall apply to such measures which:

(a) exist at the time of entry into force of this Regulation, and (b) are taken after the date of entry into force of this Regulation.

3. Member States shall notify the other Member States and the Commission of the measures referred to in paragraph 2 (a) within one month of the date of entry into force of this Regulation.

Member States shall notify the other Member States and the Commission of the measures referred to in paragraph 2 (b) immediately after their adoption.

Member States shall also notify the other Member States and the Commission of any modifications concerning the measures referred to in paragraph 2, points (a) and (b).

4. The Commission shall publish the measures notified pursuant to paragraph 3 in the 'C' series of the Official Journal of the European Communities.

TITLE III Export authorization

Article 6

1. An individual authorization shall be required for each export subject to this Regulation. However, Member States may apply simplified formalities as provided for in the following points:

(a) a general authorization in respect of a type or category of dual-use goods, in accordance with Annex II to Decision 94/942/CFSP;

(b) a global authorization to a specific exporter in respect of a type or category of dual-use goods which may be valid for exports to one or more specified countries;

(c) simplified procedures if an authorization is required by the authorities of a Member State, under Article 5.

2. An export authorization may be subject, if appropriate, to certain requirements and conditions. In particular, the competent authorities of a Member State may require a statement of end-use and may impose other conditions concerning the end-use and/or the re-export of the goods.

3. The export authorization shall be valid throughout the Community.

Article 7

1. An export authorization shall be granted by the competent authorities of the Member State in which the exporter is established.

2. If the dual-use goods in respect of which an application has been made for an individual export authorization to a destination not specifically mentioned in Annex II to Decision 94/942/CFSP or to all destinations in the case of very sensitive dual-use goods referred to in Annex IV to the said Decision are or will be located in a different Member State, this shall be indicated on the application. The licensing authorities of the Member State to which the application for authorization has been made shall immediately consult the licensing authorities of the Member State(s) in question and provide the relevant information. The Member State(s) consulted shall make known, following receipt of the information referred to in Article 14 and of any supplementary information required, within 10 working days, any objections it (they) may have to the granting of such an authorization, which shall bind the Member State in which the application has been made.

If no objections are received within the above period, the opinion of the Member State consulted shall be regarded as positive.

3. If an exportation might prejudice its essential interests, a Member State may request another Member State not to grant an export authorization or, if such authorization has been granted, request its annulment, suspension, modification or revocation. The Member State receiving such a request shall immediately engage in consultations of a non-binding nature with the requesting Member State, to be terminated within 10 working days.

4. Member States shall furnish the Commission with a list of the competent authorities empowered to issue export authorizations for dual-use goods.

5. The Commission shall publish the list of the authorities referred to in paragraph 4 in the 'C' series of the Official Journal of the European Communities.

Article 8

In deciding whether or not to grant an export authorization, the competent authorities shall take into consideration in the common guidelines set out in Annex III to Decision No 94/942/CFSP.

Article 9

1. Exporters shall supply the competent authorities with all relevant information required for their applications for authorization.

2. The competent authorities of the Member State referred to in Article 7 (1), acting in accordance with this Regulation, may refuse to issue an export authorization and may annul, suspend, modify or revoke an export authorization which they have already issued. Where the authorization is refused, annulled, suspended, substantially limited or revoked, they shall inform the competent authorities of the other Member States and, where appropriate, exchange the relevant information with the other Member States and the Commission, while complying with the provisions of Article 13 (2) concerning the confidentiality of such information.

TITLE IV Customs procedures

Article 10

1. When completing the export formalities at the customs office responsible for handling the export declaration, the exporter shall furnish proof that the export has been duly authorized.

2. A translation of any documents furnished as proof into the official language or one of the official languages of the Member State where the declaration is presented may be required of the exporter.

3. Without prejudice to any powers conferred on it under, and pursuant to, the Community Customs Code, a Member State may also, for a period not exceeding 10 working days, suspend the process of release for export from its territory, or, if necessary, otherwise prevent the dual-use goods listed in Annex I to Decision 94/942/CFSP which are covered by a valid authorization from leaving the Community via its territory, where it has grounds for suspicion that:

- relevant information was not taken into account when the authorization was granted, or -
circumstances have materially changed since the issue of the authorization.

In such cases, the competent authorities of the Member State which have granted an export authorization shall be consulted forthwith in order that they may take action pursuant to Article 9 (2).

Should these authorities decide to maintain the authorization or if no reply has been received within the 10 working days mentioned in the first subparagraph, the dual-use goods shall be released immediately unless the consulting Member State has recourse to the provisions of paragraph 4.

4. In exceptional circumstances, where a Member State considers an exportation would be contrary to its essential foreign policy or security interests or to the fulfilment of its international obligations or commitments, it may prevent the dual-use goods from leaving the Community via its territory even though the export was duly authorized.

When a Member State takes action under this paragraph, the goods concerned shall be put at the disposal of the exporter.

The competent authorities of the Member State which issued the authorization shall be duly informed.

Article 11

1. Member States may determine that customs formalities for the export of dual-use goods may be completed only at customs offices empowered to that end.

2. Member States taking the option offered by paragraph 1 shall inform the Commission of the customs offices duly empowered. The Commission shall publish this information in the 'C' series of the Official Journal of the European Communities.

Article 12

The provisions of Part II, Title II, Chapter 11 of the provisions for application of the

Community Customs Code and Article 22 of Appendix I to the Convention on a common transit procedure (1) concluded on 20 May 1987 by the Community and the EFTA countries shall apply where carriage of dual-use goods is effected between two points in the Community through the territory of an EFTA country.

TITLE V Administrative cooperation

Article 13

1. Acting in liason with the Commission, Member States shall take all appropriate measures to establish direct cooperation and exchange of information between competent authorities, in particular to eliminate the risk that possible disparities in the application of export controls may lead to a deflection of trade, which could create difficulties for one or more Member States.

2. Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters (2), and in particular the provisions on the confidentiality of information, shall apply mutatis mutandis, without prejudice to Article 16 of this Regulation.

TITLE VI Control measures

Article 14

1. The exporters must keep detailed registers or records of their transactions, in accordance with the practice in force in the respective Member States. Such registers or records must include in particular commercial documents such as invoices, manifests and transport and other dispatch documents containing sufficient information to allow the following to be identified:

- the description of the dual-use goods,
- the quantity of the dual-use goods,
- the name and address of the exporter and of the consignee,
- where known, the end-use and end-user of the dual-use goods.

2. The registers and records and the documents referred to in paragraph 1 must be kept for at least three years from the end of the calendar year in which the export referred to in paragraph 1 took place. They must be produced to the competent authorities on request.

Article 15

In order to ensure that this Regulation is properly applied, each Member State shall take whatever measures are needed to permit the competent authorities:

- (a) to gather information on any order or transaction involving dual-use goods;
- (b) to establish that the control measures are being properly applied, which may include in particular the power to enter the premises of persons with an interest in an export transaction.

TITLE VII General and final provisions

Article 16

1. A Coordinating Group chaired by a representative of the Commission shall be set up. Each Member State shall appoint a representative to the Coordinating Group.

2. The Coordinating Group shall examine:

- (a) any question concerning the application of this Regulation, which may be raised either by the chairman or by a representative of a Member State; and (b) the measures which should be taken by Member States to inform exporters of their obligations under this Regulation.

3. The Coordinating Group may, whenever it considers it to be necessary, consult organizations representative of exporters concerned by this Regulation.

Article 17

Each Member State shall take appropriate measures to ensure proper enforcement of all the provisions of this Regulation. In particular, it shall determine the penalties to be imposed in the event of breach of the provisions of the Regulation or of those adopted for its application. Such penalties must be effective, proportionate and dissuasive.

In particular, for the implementation of Article 4 (2), each Member State shall lay down and specify the nature of the breach of national law and shall determine the nature of the penalty

to be imposed.

Article 18

Each Member State shall inform the Commission of the laws, regulations and administrative provisions adopted in implementation of this Regulation and of Decision 94/942/PESC.

The Commission shall forward this information to the other Member States. Every two years it shall present a report to the European Parliament and the Council on the application of this Regulation.

Article 19

1. For a transitional period, the following measures shall apply in respect of consignments dispatched from one Member State to another:

(a) for dual-use goods listed in Annex I to Decision 94/942/PESC, the relevant commercial documents shall indicate clearly that they are subject to control if exported from the Community;

(b) for dual-use goods listed in Annex IV to Decision 94/942/PESC, authorizations shall be required by all Member States. Those authorizations may not be general authorizations.

2. Documents and records of consignments of dual-use goods listed in Annex I to Decision 94/942/CFSP must be kept for at least three years from the end of the year in which a transaction took place and must be produced to the competent authorities on request. Any natural or legal person who engages in intra-Community trade in the dual-use goods listed in Annex I to Decision 94/942/CFSP must, before or within 30 days of the first such transaction, provide details to the competent authorities of his name and the address where the documents and records can be inspected.

3. (a) A Member State may require an authorization for the transfer of dual-use goods from its territory to another Member State in cases where at the time of transfer:

- the operator knows that the final destination of the goods concerned is outside the Community,

- export of those goods to that destination is subject to a licence pursuant to Articles 3, 4 or 5, and - no processing or working as defined in Article 24 of the Community Customs Code is to be performed on the goods in the Member State to which they are being transferred.

(b) The transfer authorization must be applied for in the Member State from which the dual-use goods are transferred.

(c) A Member State which adopts such rules shall forthwith inform the other Member States and the Commission of the measures it has taken in accordance with Article 13.

4. These measures shall not involve the application of internal frontier controls within the Community, but solely controls which are performed as part of the normal control procedures applied in a non-discriminatory fashion throughout the territory of the Community.

5. The need for the measures provided for by this Article shall be re-examined within three years from the date of entry into force of this Regulation.

6. Application of this Article may in no case result in consignments of a specific product from one Member State to another being subject to more restrictive conditions than those imposed for exports of the same product to non-member countries.

Article 20

1. For consignments dispatched from one Member State to another of dual-use goods listed in Annex V to Decision 94/942/CFSP, individual authorizations (including, if appropriate, conditions concerning end-use and/or retransfer) may be required by the Member States as indicated in that Annex.

2. The measures referred to in paragraph 1 shall not involve the application of controls at the Community's internal frontiers, but solely controls which are performed as part of the normal control procedures applied in a non-discriminatory fashion throughout the territory of the Community.

Article 21

1. An authorization shall be required for intra-Community transfers of separated plutonium and uranium enriched to more than 20 %, as well as installations, main components of crucial importance and technology related to reprocessing, to enrichment and to the production of heavy water, under the terms of the Declaration of Common Policy of 20 November 1984.

2. The measures referred to in paragraph 1 shall not involve the application of internal frontier controls within the Community, but solely controls which are performed as part of the normal control procedures applied in a non-discriminatory fashion throughout the territory of the Community.

Article 22

This Regulation does not affect:

- the application of Article 223 of the Treaty establishing the European Community;
- the application of the Treaty establishing the European Atomic Energy Community.

Article 23

Council Regulation (EEC) No 428/89 of 20 February 1989 concerning the export of certain chemical products (1) is hereby repealed.

Article 24

This Regulation shall enter into force on the day of its publication.

It shall apply from 1 March 1995.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19 December 1994.

For the Council The President K. KINKEL

(1) OJ No C 253, 30. 9. 1992, p. 13.

(2) OJ No C 268, 4. 10. 1993, p. 26.

(3) Council Regulation (EEC) No 2913/92 (OJ No L 302, 19. 10. 1992, p. 1).

(4) Commission Regulation (EEC) No 2454/93 (OJ No L 253, 11. 10. 1993, p. 1).

(1) See page 8 of this Official Journal.

(1) OJ No L 226, 13. 8. 1987, p. 2, as amended by OJ No L 402, 31. 12. 1992, p. 1.

(2) OJ No L 144, 2. 6. 1981, p. 1. Regulation as amended by Regulation (EEC) No 945/87 (OJ No L 90, 2. 4. 1987, p. 3).

(1) OJ No L 50, 22. 2. 1989, p. 1.