Position Paper (Updated Version)

# EU Export Controls of Dual-Use-Goods – Draft Proposal for the Revision of EU Reg. No. 428/2009

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# Draft by the Commission regarding an amendment and recast of the EU Dual-Use Regulation No. 428/2009

## General

The German Engineering Federation VDMA represents over 3,200 German and international member companies, making it the largest capital goods association in Europe. In Germany, the industry employs more than 1 million people. The sector generates a turnover of circa €218 billion (2015).

The character of the capital goods industry is dominated by medium-sized companies. Around 87% of all VDMA members are – pursuant to the EU definition – small and medium-sized companies (SME). Two thirds of them have a staff of no more than 100, at that. Given its average export quota of 77%, it is not only highly export-oriented, but also highly successful all over the world. This is shown, among other things, by the fact that 60% of all exports go outside the EU. Another token for the high innovative power of the industry is that VDMA member companies are currently world market leaders in 18 out of 32 internationally comparable machinery engineering product areas.

To be able to continue its successful operations also on the European level, the export markets must be kept open and existing trade barriers must be removed from the market. Only then will it be possible to achieve sustainable growth in Europe, maintain jobs and create new ones.

## General assessment

The VDMA and the European industry have been pro-actively involved in the dialogue with the Commission regarding a revision of the EU Dual-Use Regulation No. 428/2009 for over two years. During this time, various notes and comments have been made. Unfortunately, it is not discernible that this input has been taken duly into account for the first formal Commission draft. Instead, the Commission draft contains new, even more stringent elements that have hitherto not been discussed with the industry and could therefore not be commented on earlier.

The Commission draft constitutes a significant aggravation compared to the existing legal situation. Positive, disencumbering elements are discernible only in very few fields of minor importance[1].

VDMA supports export control that is based on facts and maintains reasonableness to prevent proliferation of mass destruction weapons and exercise political control of critical conventional arms programmes. The Commission draft is far away from these parameters. Hence, the hitherto existing basic consensus between industry and politics is called into question as far as export control of dual use goods is concerned.

The Commission draft makes the already complex system of dual-use export control even more complicated. It increases bureaucracy, and massively at that. On the one hand, the burden on the economy will increase, and the uncertainty potential for companies and staff will grow even more. On the other, it is impossible for VDMA to see how the new rules can achieve the factual results pursued by the Commission.

[1] For example, draft Article 12 (EU general export authorisation for intra-EU trade with Annex IV goods).

The Commission draft contains new control provisions (catch-all clauses attributable to “human rights violations” and “application to terrorism”) that – irrespective of political factors – are questionable from both a systematic and a factual perspective. Dual-use export controls are no suitable tool to fight terrorism or prevent human rights violations.

From our perspective, the Commission draft also contains structural errors, up to a clear violation of international law (introduction of extraterritorial export controls). In addition, the Commission draft does not assess, with the one single exception of a certain control of intra-EU trade, the manageability of or the control success achieved by any of the previous rules imposed. Instead, new controls and new bureaucratic processes are to be introduced in all respects.

## Assessment of specific draft provisions

### 1. The Commission draft provides that in the field of so-called catch-all controls, all EU member states are obliged to accept national individual interventions by individual EU countries[2] due to the risk of follow-up purchases made in circumvention.

VDMA rejects this proposal, because it lacks usefulness and, at the same time, massively increases bureaucracy.

The proposal will invariably result in a list of hundreds of individual prohibitions that would have to be assessed and taken into account in the daily business. Specifically SMEs do not have the staff and organisation in place to cope. To make matters worse, the list would require continuous updating.

The Commission proposal would lead to hitherto unknown bureaucratic burden. The Commission fails to perceive in its proposal that catch-all interventions would only in the rarest of cases trigger a realistic risk of future circumvention procurement through other Member States. In such exceptional cases, it is already today possible for any EU member state triggering a catch-all intervention to inform the EU member states where a tangible, justified follow-up procurement risk is deemed to exist.

[2] Draft Article 4(4), second and fourth paragraph.

## 2. The Commission draft provides for an inclusion of all Member States in national individual interventions in the context of the so-called catch-all control in the future[3].

VDMA entirely rejects this draft provision, because it adversely affects the functioning of the previous rule and because it adds no further benefit, whilst increasing bureaucracy.

The reasons for a restriction are nearly always restricted to the Member State affected. If this is exceptionally not the case, the triggering Member State would already today be free to include other Member States. A mandatory involvement of each and any Member State, however, offers no additional benefit. To the contrary: Processes are delayed, substantially more time is needed and individual processes become less predictable for the individual company.

Such mandatory harmonisation and over-generalisation furthermore fails to identify that the opportunities inherent to immediate reaction to individual cases as they come up are a major element of the catch-all controls. This important goal would be disabled by the Commission draft.

## 3. The Commission draft provides for the introduction of an obligation to perform 'due diligence' in the assessment of the exporter's own (positive) awareness in the 'catch-all' control[4].

VDMA rejects this proposed rule because it systematically contradicts the basic principle of 'autonomous positive awareness' in the catch-all clause.

The term 'due diligence' is used in the legal environment to refer to a project or case-related evaluation procedure for legal transactions, which needs to take account of external facts that are potentially relevant to the case. This approach is a gross violation of the fundamental principle of the catch-all rule established in Germany in 1991, which was not to introduce any obligation for businesses to carry out research, but rather to concentrate exclusively on the information which a company would normally have at its disposal in routine business operations (in other words not in connection with export control), and which could be used without further research for export control.

The term 'due diligence' in common parlance means 'adequate care' and - interpreted in that way - only signifies a generally applicable principle, without any explicit reference. The risk of an interpretation contrary to the system, i.e. as an ‘obligation to carry out research' is far too great. Such an 'obligation to carry out research' would leave the door wide open to bureaucratic, inefficient and very time-consuming checking schemes, which would at the same time overshadow the essence of the provision and cancel it out within the company. The 'obligation to carry out research' is also grossly unfair to companies which already have to meet enough expenses and liability risks for the organisational implementation of the core purpose of the rule - responsibility (exclusively) for their own, in-house facts and information.

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[3] Draft Article 4(4), first paragraph.

[4] Draft Article 4 second paragraph.

## 4. The Commission draft provides for an extension of catch-all controls by the new control target of "terrorism"[5]

VDMA rejects this proposed provision, because it would disproportionately burden the industry, whilst producing no discernible factual benefit.

Catch-all controls, from their very nature, assign the responsibility to identify cases of critical use to the company. This, inherently, must be based on facts and parameters that a company can understand and handle and which a company has available in its ordinary course of business.

The actual arms-related control fulfils these criteria. "Terrorist acts", however, do not fulfil this requirement. The Commission draft in this respect refers to a definition in Article 1(3) of Council Common Position 2001/931/CFSP. It lists 11 different types of acts or groups of types of acts that, moreover, must serve one of three defined terrorist aims. Looking at the definitions, it is clear that all this is far beyond the competency and information available to companies, so that the process is impossible to implement.

## 5. The Commission draft provides for an extension of the catch-all control by the new control target "human rights"[6]

VDMA rejects this proposed provision, because it would disproportionately burden the industry, whilst producing no discernible factual benefit.

Also in this respect, companies neither have the competency nor the relevant information available to implement such a catch-all control.

Whether human rights are jeopardised is a political assessment, but in this context it is used as a requirement for a legal obligation to act. A company cannot be expected to make such assessment in its daily business and accept the liability risks that ensue.

Irrespective of the above, the Commission draft does not include a definition of "human rights". As an alternative, additional element required, the term "international humanitarian law" is being used without definition. The next element is "country of final destination, as identified by relevant public international institutions, or European or national competent authorities". It is not discernible who these institutions actually are.

From a structural perspective, the Commission combines in its proposal the recipient-related approach of export control with the application-related approach, which clearly opposes the basic principle of an application-related control in all respects.

Irrespective of the above, dual-use export control is an inappropriate instrument in human rights policies. It does not only put excessive strain on companies with respect to the implementation, but also shifts the responsibility for human rights risks fully from the political stage onto the economy. Such approach does not make a discernible contribution to the protection of human rights. It is primarily the task of politics to (a) identify human rights violations or risk scenarios for human rights violations, then (b) describe them precisely and in a comprehensible manner after having (c) reached a political consensus with the economic stakeholders affected The issue therefore belongs to the sphere of political sanctions, and certainly not to the sphere of everyday export control.

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[5] Draft Article 4(1)(e).

[6] Draft Article 4(1)(D).

## 6. The Commission draft provides for restriction of the provision of 'technical assistance' under the preconditions of the catch-all control for supply of dual use goods.[7]

VDMA accepts this proposed rule to the extent that it relates to catch-all matters connected with armaments. VDMA rejects introduction for purposes going beyond that (human rights, terrorism) for the reasons set out above. VDMA suggests supplementing the draft regulation with exemptions for basic research and for the transfer of widely-available (public domain) technology.

The control of technical assistance in a similar way to the control of exports of goods objectively makes sense. As the businesses provide technical assistance under the same practical and (at least predominantly) the same internal administrative constraints as for exports of goods, the concept of armaments-related catch-all controls can be implemented just as practically as at the level of goods exports.

In the context of technical assistance, transfer of unlisted technology may be involved. If technology already appears on the dual-use items list (and therefore is classified as more sensitive than unlisted technology), the dual-use items list contains two general exemptions: basic research and widely-available (public domain) technology. These exemptions should also apply to the control of unlisted technology, since there would appear to be no reason for controlling less sensitive unlisted technology more tightly than listed technology.

## 7. For the control of trafficking and brokering, the Commission draft provides for extending the restriction to the EU dual-use items list.[8]

VDMA emphatically rejects this proposed rule due to the massive increase in control bureaucracy that it would involve, particularly for technologically low-value matters dealt with by brokers.

Catch-all controls, by their very nature, are aimed at firms whose normal business activity generates reliable usage information, i.e. without external research. This is usually not the case for brokering transactions. The catch-all approach for brokering is therefore an inappropriate system even today.

Due to the current reference to the EU dual-use items list, the risk of trafficking is relatively low which means that the provision is irrelevant for the routine business of most companies. The proposed tightening of control vastly widens the group of companies potentially affected, without enabling the detection of a significantly greater number of critical cases. At the same time, the risk of legal violations is increased, because the chance of overlooking usage-related information in routine trading operations is comparatively high.

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7 Draft Article 7.

8 Draft Article 5.

### 8. The Commission draft provides for an application of brokering restrictions also with respect to non-EU companies if they are controlled by an EU company or EU person[9].

VDMA emphatically rejects this proposed provision, because of the inherent violation of international law and the conflict of interest for subsidiaries abroad it entails.

For the first time, the Commission suggests in this respect export control with extra-territorial effect, which constitutes a violation of international law. Irrespective of the above, it has not been taken into account that respecting the political sovereignty of other countries is a basic requirement for sustainable, successful foreign trade of the EU. And the EU does depend on successful exports to ensure its wealth in the long term.

### 9. The Commission draft provides for the introduction of an 'anti-circumvention clause'[10].

VDMA rejects this abstract proposed rule unconditionally since it opens up a multitude of possible interpretations, and will cause considerable uncertainty in everyday practice (as comparable, objectively completely unnecessary provisions in various sanctions rules have already shown).

The 'anti-circumvention clause' could theoretically be interpreted in such a way that it does (or would) cover situations whose control would clearly infringe the territoriality principle under international law. Since the European Commission is already proposing to tighten brokering controls through a rule with extra-territorial effect, and which therefore contravenes international law, an unspecified anti-circumvention clause with the risk of extra-territorial effect is also unacceptable.

The EU dual-use regulation has managed without an anti-circumvention provision for over twenty years now. The European Commission does not provide any reasons at all why this situation is no longer tolerable. Such a provision is unnecessary to deter involvement of non-exporters in illegal exports, e.g. by supplying the goods to exporters operating illegally. Here the existing state aid rules in criminal and administrative offence law are quite sufficient.

### 10. The Commission draft proposes limiting the validity of export licences throughout the EU to one year.[11]

VDMA rejects this proposed rule emphatically since it complicates the practical handling of export licences unnecessarily, and because the bureaucratic burden will be increased significantly due to the rising number of renewal applications.

At present in Germany, companies are obliged to register for use of EU general authorisations with the export control authority no later than 30 days after the first use. Under German legal practice, this is a condition for the general authorisation, which – instead of being a prerequisite - is irrelevant to the legal validity of general authorisations.

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9 Draft preamble No. 10, draft Article 11 (2).

10 Draft Article 23.

11 Draft Article 10 third paragraph.

### 11. The Commission draft provides for a tightening of registration obligations for EU general authorisations[12].

VDMA rejects this proposed rule unconditionally since it will make the practical management of general authorisations more difficult as well as increasing the risk of infringements unnecessarily.

At present, companies are obliged to register for use of EU general authorisations with the export control authority no later than 30 days after the first use. This is a condition for the general authorisation, which – instead of being a prerequisite - is irrelevant to the legal validity of general authorisations.

The European Commission now wishes to introduce an obligation to register in advance, and an advance notification of the first use no later than 10 days before this first use. That is pure bureaucracy, and no objective reason for tightening this rule is apparent.

Furthermore, tightening of the content of the obligation to register will lead – from a technical legal perspective – to the legal character of registration obligations also being tightened to make them a prerequisite. This would automatically lead to illegal exports due to the absence of a valid registration. No objective reason for such a massive change in the law is apparent here either. It will inevitably lead to a preventive mass registration for general authorisations, irrespective of the actual need, in order to minimise the risk of illegal exports in comparison with the current legal situation.

General authorisations take account of the fact that there are situations where the granting of an export licence is legally (or politically) compelling, making the procedure allowing the exercise of discretion superfluous. In such cases, there is no longer any objective requirement for control, but at most a requirement by the authorities for statistical information, which is completely impossible to collect at the time of registration.

### 12. The Commission draft provides for a new empowerment of the Commission to modify, by way of delegated legal act, the new dual-use goods list according to Annex I, Section B in its own discretion[13]

VDMA rejects this proposed provision, because the Commission does not have the required competence and political legitimisation.

Other than in the case of the normal dual-use goods list pursuant to Annex I, Section A, the proposed processes lack the upstream international expert groups where experts make the required preparations and the Member States make the political decisions. In such cases, the Commission only ensures accelerated administrative implementation of measures previously decided on an international level. The ex-ante and ex-post participation rights of Member States provided for in the event of delegated legal acts14 are not sufficient to ensure a stable legislative procedure.

**Note**: The equally *new empowerment of the Commission to be able to modify lists of privileged goods or privileged groups of countries in the EU general export authorisations through delegated legal act in their*

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[12] Draft Annex II, letter A (General Export Authorisation EU001), Part 2, numbers 3 and 4

[13] Draft Article 16(2)(b).

[14] Draft Article 16(4)-(8), and also draft Article 17.

*own discretion still requires further analysis.*

### 13. The Commission draft prepares the way for further, future bureaucracy scenarios: Post-shipment verification, end-user verification programs[15].

VDMA unreservedly rejects this proposed provision, because such measures are absolutely unreasonable to demand in the area of dual-use goods.

Post-shipment verification and end-user verification programs trigger massive, disproportionate expenditure. They do not only burden administration and exporters, but also the customers affected. And the added benefit of decision security is low, at best.

Both measures trigger additional competitive disadvantages for the European export industry compared to their international competitors and domestic producers in the country of destination. Actually, non-tariff trade barriers are created against the own industry – this is not acceptable.

**Contact**

Ulrich Ackermann
Head of Foreign Trade Division
phone: +49-69-6603-1441
email: ulrich.ackermann@vdma.org

Klaus Friedrich
Legal Advisor Export Control
phone: +49-69-6603-1677
email: klaus.friedrich@vdma.org

[15] Draft Article 27(2)(b) + (c)