



The legal framework for the control on trade in dual-use items in Flanders

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Background note

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Synopsis

The control of trade in strategic goods covers principally two categories of products, for which different policies are applied: control of trade in military equipment (or defence-related products), and control of trade in dual-use items. The present background note focuses on the second category of products controlled, namely dual-use items. Unlike military equipment these items have not been specifically designed for military use. They are civilian products, which can be used in their entirety or in part in military applications: both for conventional military purposes, and for weapons of mass destruction. As a result, dual-use items are also considered as strategic goods, trade which needs to be controlled by the authorities under international agreements. The trade in dual-use items, unlike that in military products, falls within the scope of the European Union's Community legislation as part of the common trade policy. This trade is governed by Council Regulation (C) 428/2009 on the control of exports, transfer, brokering and transit of dual-use items, which is directly applicable in all EU Member States. In Belgium, however, the regional authorities are responsible for implementing this policy; and the Flemish Government still requires to take a number of implementing measures to this end. The present note provides an overview of the applicable legislative framework for (foreign) trade in dual-use items, the division of competences, the policy on control as currently applied in Flanders, and the implementing measures that the Flemish Government is still obliged to or may take in order to ensure the correct application of the regulation. Given that the legal basis for the current control measures and sanctions related to dual-use items is the Belgian Act of 11 September 1962, which governs the import, export and transit of such products, and that all implementing measures currently take the form of administrative procedures, it would seem appropriate to create a Flemish Act of Parliament or a set of implementing regulations on the trade in dual-use items, which would – as a minimum – provide a legal foundation for the most essential implementing measures.

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1 Introduction

Control on trade in strategic goods comprises the control of military equipment (or defence-related products) and the control of dual-use items. This note focuses on the latter category. Dual-use items are items which in principle were developed for the civilian market, but which may potentially have a military end use, including all products and technologies which can be used for the manufacture, operation or maintenance of weapons of mass destruction (WMD). Since the transfer of competence for the control of import, export and transit of military equipment and of dual-use items, the Flemish Government has been planning to create its own Act of Parliament to control the trade in military equipment.¹ Control over trade in dual-use items, however, comes under a different legal framework. In contrast to the control of military equipment, this control is governed at EU level by Regulation (EC) 428/2009 which is directly applicable in all EU Member States. This means that the regulation applies directly to all legal entities (private individuals, companies or member states), and it is not compulsory to transpose it into national legislation as in the case of European Directives. Nevertheless, the Member States are responsible for the implementation of this regulation. A number of implementing measures may be necessary to achieve this, as provided for in the regulation. Sometimes these measures are mandatory, and in other cases they are facultative. Hence the need to examine precisely what regulating measures are needed at national or sub-national level to allow controls on trade in dual-use items to be implemented.

A recurring problem when studying the control of trade in strategic goods is that there are no clear and precise definitions of 'weapons', or of 'military' or 'defence-related' equipment. Nor is there a clear definition of dual-use items. Instead of a comprehensive definition, documents trying to delimit this category usually refer to lists of military equipment and of dual-use items that have been made subject to control in EU or national legislation. For this purpose the European Union bases itself on the lists used by international control regimes (cf. below) in which expert working groups determine which products and technologies should be included in military and dual-use lists.¹ The boundary between strategic goods and non-strategic goods is not always clearly defined, nor is the boundary clear between military items and dual-use items and technologies. Sometimes military items have been specifically and exclusively developed for military use, such as stealth ships or mine sweepers, and differ significantly from their civilian counterpart (military helicopters for example are quite different from civilian helicopters). Other technologies, however, are quite similar and in some cases are even identical in military or civilian applications - such as certain ICT applications.²

Products and technologies that have been specifically developed for military use, and which are considered to be strategic goods, are included in lists of military equipment. Civilian products and technologies that have not been specifically designed for military purposes but may have a military application are included in dual-use lists of products and technologies that need to be controlled - if their strategic value is estimated to be sufficiently high. With a view both to safeguarding national and international security and avoiding anti-competitive practices, states have established international control regimes in order to develop joint lists of dual-use items and technologies needing to be controlled.

¹ In connection with the the Flemish legislature's intent to draft a decree for the control of trade in military equipment, the Flemish Peace Institute published a 'Background note on a Flemish decree concerning foreign trade in military goods', which discussed the main aspects of such a decree.

The focus on trade controls for dual-use items increased exponentially after the 9/11 attacks. Although these attacks in no way used WMD, fears arose that terrorist groups would at some point in the future succeed in acquiring such weapons. The United States convinced the international community to adopt UN Security Council Resolution 1540, which provides for a stricter control of dual-use items that may contribute to the proliferation of WMD.

At the time of 9/11, joint legislation was already in place in the European Union. While the United Nations defines the need for control of dual-use items in the perspective of WMD non-proliferation, the European definition of dual-use items extends beyond this scope. Dual-use items do not only include products that may potentially be used for the manufacture of WMD, but also products with a conventional military end-use. There are no statistics available to provide a more detailed idea of the scope of the trade in dual-use items, but the European Commission has underlined the importance of dual-use legislation as something that affects a significant share of commercial exports from the EU. Estimates of this share vary between 5%³ and 13%¹ of all EU exports.⁴

The scale of dual-use items traded by Flemish companies is also difficult to gauge because trade in dual-use items with EU Member States and major first-world countries, including the United States, does not require an individual or global licence - except for the most sensitive items. The number or the value of licences granted thus cannot indicate the total scale of the trade in dual-use items. Reporting on licences approved and denied shows that the principal industries in Flanders for which dual-use licences were issued are the chemical industry, the nuclear industry, electronics and telecommunications.⁵

In view of the large market share of dual-use items and technology, there is a trend among public authorities to apply simplified licensing procedures, while at the same time working to make companies aware of their responsibilities ("know your customers") and incorporating catch-all clauses (see below) in order to be able to intervene at any time when essential security interests are at stake.¹¹ In the light of new high-tech forms of warfare, an increasingly large number of civilian products have a potentially strategic use. At the same time, the intention is not to unnecessarily hamper the massive flow of trade in these products on the civilian market. Technological progress has undoubtedly made some techniques commonplace that only a few years ago were seen as "strategic" in nature. Conversely, it is also important to assess the strategic importance of the newest technologies and where necessary, add them to control lists. All this makes the control of trade in dual-use items a notably complex policy area.⁶

Flemish policy in terms of dual-use items is largely determined at European level. In this note we provide an overview of how control of trade in dual-use items is organised in Flanders, focusing especially on the details of the division of competences (section 3). We shall then zoom in on the legal framework, which is largely defined at EU level. In that context we shall note what provisions have been laid down in Council Regulation (EC) 428/2009 regarding trade in dual-use

I In 2006 the European Commission estimated that the EU trade policy for dual-use goods has an impact on approximately 13% of all (commercial) exports from the EU. This estimate is based on the community goods codes applied by Customs, in which dual-use items are usually classified in subcategories. This percentage thus exaggerates the true situation, but more specific figures are not available. Documents of the European Parliament refer to 'more than 10%'.

II See also the initiative taken by US President Barack Obama to reform the export control regime in the United States. The aim of the reform is formulated as follows: 'to build high walls around a smaller yard', which indicates the wish to simplify export control procedures. See among others: <http://www.whitehouse.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative>.

items, and where Member States have room for manoeuvre to take additional measures; and will also indicate what implementing measures are required.

The current legal basis for implementing - and for punishing violations of - this regulation consists of the (more general) Federal Act of 11 September 1962 concerning the import, export and transit of goods and related technology.⁷ In view of the new European legislation, the regionalisation of competence in 2003 and the intent of the Flemish Government and the Flemish Parliament to adopt their own decree for the controlled trade in military equipment, it would seem appropriate also to adopt a decree specifically implementing Council Regulation (EC) 428/2009 to control the trade in dual-use items. This note aims, accordingly, to give a clear overview of policy on the control of trade in dual-use items with a view to making clear what aspects of policy still need to be covered by a Flemish parliamentary Act.

2 *Division of competences for control of trade in dual-use items*

2.1

The international control regimes

The control of trade in strategic goods is *par excellence* a policy area shaped at the international level. During the Cold War, various international control regimes were established where states who joined them undertook to regulate and control the export of strategic goods on the basis of joint agreements. These regimes cover various types of products. The most important of them were established to combat the proliferation of conventional arms (Wassenaar Arrangement), nuclear weapons (NSG and Zanger Committee), biological and chemical weapons (Australia Group) and the technology for launching WMD (MTCR). The European Union has defined an export control policy for trade in dual-use items, which incorporates the international obligations of various control regimes and of the United Nations.⁸

2.2

The competence of the European Union

In the early 1990s the Member States of the European Union decided to establish a joint control regime for the trade in dual-use items. This was not only targeted at greater effectiveness in the cause of security, but was also seen as desirable to create a level playing field for industry, as it would impose the same trade barriers on all interested companies.

The first initiatives to regulate the trade in dual-use items at EU level were taken in 1992. At the time, all members of the European Community (EC) were also members of COCOM (the Coordinating Committee on Multilateral Export Controls),¹ and all enforced a national export regime for military equipment and dual-use items which also applied to the intra-Community trade. Looking ahead to the creation of the EC's Single Market on 1 January 1993 (Single European Act of 1987), the European Commission in 1992 issued a Communication arguing that national control of the trade in dual-use items was an obstacle to the completion of the internal market. The Commission proposed to develop a joint control regime by regulation, replacing the controls at intra-EC borders which would be abolished from 1993 onwards. The control regime would

¹ CoCom (1949-1994) preceded the Wassenaar Arrangement. All NATO members except Iceland were also CoCom members, as well as a number of like-minded non-NATO countries. CoCom was an informal regime led by the United States and was aimed at preventing communist countries in Eastern Europe, Asia and the Soviet Union from acquiring sensitive technologies.

cover intra-Community and extra-Community traffic and would liberalize the intra-Community trade in dual-use items. This first regulation was adopted in 1994 and entered into force in 1995.⁹

From the very beginning the European control regime incorporated all the commitments of the international control regimes. The regime was composed of a regulation and a decision (Council Decision 94/942/CFSP), which included the lists of products and recipient countries to be controlled.¹ This list comprised all the dual-use items listed in the framework of the MTCR, the NSG, the Chemical Weapons Convention, the Australia Group and the Wassenaar Arrangement. This regime was revised for the first time in 2000. The European control policy for trade in dual-use items now consisted of one Regulation (EC) 1334/2000, which also incorporated the lists.¹⁰ In 2009 the European dual-use control regime was reviewed for a second time and updated in Regulation (EC) 428/2009. This regulation is currently directly applicable in all EU Member States.¹¹ The Member States are, however, still responsible for carrying out controls and issuing licences. In other words, only the legal framework is identical and its implementation is still in hands of (sub)national authorities.

The entry into force of the Lisbon Treaty on 1 December 2009 has had important consequences for the EU's internal decision-making process relating to dual-use items. While draft legislation was previously submitted to the Commission and ratified by the Council without consulting the European Parliament, with the entry into force of the Lisbon Treaty the European Parliament has become part of the decision-making procedure. The legal basis of Council Regulation (EC) 428/2009 is now art. 207 §2 TFEU. This states that the European Parliament and the Council shall establish the measures defining the framework for implementing the Union's common trade policy in accordance with the ordinary legislative procedure¹² for regulations.

The consequences of the European Parliament's involvement in the consultation process were immediately felt. In connection with a European Commission proposal to amend the dual-use regulation, it has already become clear that the European Parliament's involvement will provide a counterweight to the Commission's approach, which is generally focussed on economic interests. In December 2008 – before Council Regulation (EC) 428/2009 and the Lisbon Treaty entered into force – the European Commission suggested amending Council Regulation (EC) 1334/2000 which was applicable at the time.¹³ The Commission proposal provided for six new Community General Export Authorisations (CGEAs, see below) which would substantially reduce trade barriers for a number of products in all Member States. Before the Council pronounced itself on the proposal, the Lisbon Treaty entered into force, so that the European Parliament was now involved in the decision-making process. The draft report of the (Parliamentary) Committee on International Trade¹³ and the opinion of the (Parliamentary) Committee on Foreign Affairs¹⁴ made clear that the European Parliament questioned the classification of certain products and recipient countries as non-sensitive. The European Parliament also proposed new amendments aimed at making the European control regime for dual-use items more democratic and more transparent: for example by setting up a system for sharing information about denied permits, and reporting on the implementation and application of the Regulation to the European

I The lists of products and recipient countries subject to control were adopted in the then second pillar of the Union, the Common Foreign and Security Policy: thus the European Commission had no say in related decisions. Member States considered decisions about the lists too strategic to be willing to transfer this competence as part of the common trade policy.

II The ordinary legislative procedure is the new name for what is known as the co-decision procedure under the TEC (Art. 251). This procedure is laid down in Article 294 TFEU.

Parliament. While earlier proposals for amendment were limited to the contents of the CGEAs, the European Parliament's participation has opened the way for a more far-reaching revision of Council Regulation (EC) 428/2009 (which itself is still very recent). The European Commission has since announced that it will publish a green paper^I by summer 2011 on the operation of the European export control regime for trade in dual-use items.¹⁵ This review provides evidence that the European Parliament's participation in the decision-making procedure has cast a new light on the European control regime for dual-use items: one that pays greater regard to products' sensitivity and stresses the need for democratic control and transparency.

2.3

The division of competences in Belgium

The EU Member States are responsible for implementing policies within the European legal framework. At internal Belgian level the competence for dual-use items was transferred in 2003 to the regions, simultaneously with the control of the trade in military equipment.^{II} The regional authorities are thus responsible for issuing permits for the import, export and transit of dual-use items and technologies in Belgium.

Nevertheless, there are two considerations about this regional competence that need to be taken into account. First, as just noted, export control policy for dual-use items is an exclusive competence of the European Union.^{III} This means that only the EU has legislative powers and can enshrine legally binding actions in legislation. The Member States can only take measures as empowered by the Union or in order to implement the Union's actions (Art.2 TFEU). In Belgium, the regions are thus responsible for the implementation of European legislation enshrined in Regulation (EC) 428/2009, and their room for manoeuvre is correspondingly limited.

Secondly, there have been some discussions about how competence on controls on trade in nuclear equipment and associated technologies is divided at internal Belgian level. Nuclear products form a sub-category of dual-use items for which a stricter control applies according to the European control regime. In Belgium additional federal legislation also applies. Before the European legislation, nuclear material was already controlled under the Belgian Act of 9 February

I A green paper is a document published by the European Commission in which it examines a problem and makes recommendations as to the policy to be implemented. Based on the green paper and the response of governments and other organisations to this text, a white paper may be drafted containing a more concrete strategy or a draft proposal for legislation, which may then lead to draft legislation being submitted to the Council and the European Parliament after consultation with all stakeholders.

II The special act of 12 August 2003 amending the special act of 8 August 1980 for the reform of the institutions in Article 2 4° transfers competence relating to "The import, export and transit of weapons, ammunition and special equipment for military or law enforcement purposes and the associated technology, as well as of dual-use items and technologies, without prejudice to the federal competence in terms of the import and export for the army and the police, and in compliance with the criteria established in the Code of Conduct of the European Union in terms of weapons imports;" to the Regions (in accordance with Art. 39 of the Coordinated Constitution). See also Article 3 of the Special Act of 12 August 2003.

III The Community arrangement for control on the export, transfer, brokering and transit of dual-use items is part of the EU's common trade policy, an exclusive competence of the Union (Art. 3 TFEU).

on the export conditions for nuclear material and equipment and technical information.¹⁶ This act was created in compliance with the international agreements on the non-proliferation of nuclear weapons. Based on the 1981 Act, trade in nuclear materials (nuclear equipment and nuclear technical information) thus requires an additional authorisation by the Federal Minister of Energy in addition to the import, export or transit licence issued by the regional authorities under the EU Regulation. The Federal Minister bases his decision on the recommendation of CANVEK, the Advisory Committee on the Non-proliferation of Nuclear Weapons, which involves various federal public services.¹⁷

In connection with a recent amendment to the Act of 9 February 1981 (on the export conditions for nuclear material and equipment^I and technical information), the Council of State – based on the parliamentary proceedings leading to the transfer of this competence in 2003 – stated that it is safe to assume that the special legislator did not intend also to regionalise the authorisation system laid down in the Act of 9 February 1981. In November 2010 the Flemish Government, however, tabled an appeal against the amendment of this Act at the Constitutional Court, which must now clarify the division of competences relating to trade in nuclear materials.¹⁸

Given that Council Regulation (EC) 428/2009 is more comprehensive in its provisions than the Act of 9 February 1981 and the related Royal Decree of 12 May 1989¹⁹ (even after the amendments to the Act), the question arises whether the additional federal authorisation is a useful or redundant step in the procedure and whether it complies with Regulation (EC) 428/2009.

I Amended in Art. 25 of the Act on various provisions of 28 April 2010 (Belgian Official Gazette 10 May 2010). The Act of 9 February 1981 was amended to meet obligations undertaken in the IAEA and NSG by, on the one hand, adding a catch-all clause to the act referring to the control of products not included in nuclear export lists but which can be linked to a nuclear weapons programme, and, on the other hand, extending the licensing obligation for exports to nuclear states by deleting the words 'non-nuclear states' from Article 1. The export and transfer of nuclear material to nuclear states as well as the catch-all clause are also covered by Council Regulation (EC) 428/2009.

3 *Control policy for foreign trade in dual-use items*

3.1

The legislative framework

As stated above, the regulatory framework of the Flemish export control policy is largely determined by Council Regulation (EC) 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.¹ The regulation's provisions are directly applicable in Member States' legal systems. It is not compulsory to embody a regulation in national law, although implementing provisions are required (in national legislation or in national practice) for the regulation's implementation.

The legal basis for implementation and for sanctions against violations of this EU regulation consists of the Act of 11 September 1962 concerning the import, export and transit of goods and related technology.²⁰ The trade in military products is not governed by this Act, but instead is separately regulated in the Act of 5 August 1991.²¹ Dual-use items are not considered an exception and therefore are still governed by this law. The Act of 1962 is somewhat outdated and has not been amended in response to the specific measures provided for in Council Regulation (EC) 428/2009 for the control of trade in dual-use items. In terms of sanctions, the Act of 1962 refers to Customs legislation. Bearing in mind the recommendation that dual-use legislation (including penalties) needs to be regularly updated and should be accessible and clear, there seems to be a case for reviewing the Act of 1962 for the purpose of implementing Council Regulation (EC) 428/2009.²²

The Flemish legislature can only take legislative action in order to implement the regulation, or insofar as it is so empowered by the European Union. In general terms, Art. 24 of the Regulation stipulates that each Member State shall take appropriate measures to ensure the correct implementation of all the provisions of this Regulation; each Member State shall also establish sanctions that are effective, proportionate, and have a deterrent effect. Each Member State shall inform the Commission of the regulatory and administrative provisions made for implementation of the regulation. There are no fixed criteria that indicate unequivocally what needs to be done by way of legislation, in implementing decrees, or in administrative practices. The basic principle is that the regulator has a residual competence. In other words, the regulator decides the regulation's scope and also decides how much of the action will be delegated to the executive branch. In the context of proposals for an Act on the control of trade in military equipment, the Council of State advised that the essential procedures needing to be followed when applying for licences and the associated decision-making process should be established by Act of Parliament. Were sanctions to come into question, these should also be enshrined in an Act.²³ This logic applies equally to the trade in dual-use items.

¹ In addition, the federal Act of 9 February 1981 as well as the related Royal Decree of 12 May 1989 are applicable to nuclear goods.

In the following sections we will discuss how the regulation organises and regulates the controlled trade in dual-use items, indicating where the Flemish legislature has some policy room for manoeuvre, and/or where the law-giver is obliged to adopt provisions in implementation of European legislation.

3.2

Scope

Council Regulation (EC) 428/2009 starts by defining the legislation's scope. In Article 1, the nature of the trade transactions which are controlled by this regulation is defined: these include the export, transfer, brokering and transit of dual-use items. Elsewhere in the text, definitions are provided (Article 2) and the concrete field of application is referred to; a list of controlled products and catch-all clauses (Article 3) is also provided.

3.2.1 Definitions

According to Council Regulation (EC) 428/2009, dual-use items are defined as all 'items, including software and technology, which can be used for both civil and military purposes, and include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices'. This category thus does not merely comprise products and technologies that may be related to weapons of mass destruction, but also includes products that can be used for a conventional military end use.²⁴ The EU list of dual-use items, after all, also includes the lists of the Wassenaar Arrangement, which controls dual-use items significant for the development, production or support of conventional military products.²⁵

Further, Art. 2 of Regulation (EC) 428/2009 defines in detail the terms 'export', 'exporter', 'export declaration', 'brokering services', 'broker', 'individual, global, community and national general export authorisations', 'customs territory of the European Union' and 'non-Community dual-use items'. These definitions are adequate for implementing the legislation at (sub-)national level and consequently need not be repeated in a parliamentary Act.

3.2.2 Material field of application

3.2.2.1 Listed products

Article 3 of Council Regulation (EC) 428/2009 lists exactly which products are controlled. Article 3 states that it applies to the items listed in Annex I. The products have been divided into ten categories.

category 0: nuclear materials, facilities and equipment
category 1: special materials and related equipment
category 2: materials processing
category 3: electronics
category 4: computers
category 5: telecommunications and information security
category 6: sensors and lasers
category 7: navigation and avionics
category 8: marine
category 9: aerospace and propulsion

The products in every category have been further classified according to their nature:

A: systems, equipment and components
B: test, inspection and production equipment
C: materials
D: software
E: technology

Since the introduction of the new regulation in August 2009, the transfer of software and technology by electronic media (including fax, phone, e-mail or any other electronic medium, programme, or technology) to a destination outside the EU, or the making available of such software or technology, is also governed by this regulation. Usually this is referred to as 'intangible technology transfer'. This is based on the assumption that a technology transfer needs to be monitored, regardless of whether a physical or digital border is crossed.²⁶ The regulation does not apply to the provision of services or the transmission of technology if this supply or transmission involves the cross-border movement of persons (Article 7). In 2000 the Council of the European Union did, however, adopt a joint action requiring a mandatory licence for all verbal forms of technical assistance - with certain exceptions – such as training, repairs, maintenance, etc. when this assistance is provided outside the EU. This applies however only to situations in which the provider of such assistance is aware of the fact that it is related to the use or development of WMD, or is being delivered in countries that are the subject of an arms embargo.²⁷

Each product on the list is numbered according to these ten categories and the five letters, followed by another number which shows under which control regime this product was placed on the list¹, and finally an identification number relating to the EU list.

¹ O: Wassenaar Arrangement, 1: MTCR, 2: NSG, 3: Australia Group, 4: Chemical Weapons Convention

Number 6A005.a.b.6.b, for example - a specific type of laser also included in the control lists of the Wassenaar Arrangement - was included in the EU list because of that fact and is considered to be strategic due to the possible use of this technology in conventional weapons. Under Art. 15 of Council Regulation (EC) 428/2009 the lists are regularly updated so that they are always in accordance with lists of the international control regimes.

Based on Art. 8, Member States have the option of adding additional products to the list.^I According to the latest available information from 2008, France, Germany, the United Kingdom and Latvia have added more dual-use items^{II} to the list.²⁸

3.2.2.2 Unlisted products: the EU catch-all clauses

A licence obligation may be imposed for products that are not included in the list in Annex I in accordance with Art. 4 and Art. 8 of the Regulation: namely, under the dual-use catch-all clause as described in Art. 4, or for reasons of public security or based on human rights considerations as provided in Art. 8.

A catch-all clause means that the government can impose a licence obligation in certain circumstances, to protect its security interests, for products that do not require a licence pursuant to the regulation. Such a clause is needed because of the existence of a whole range of products, widely traded without need for a licence, that may - in their entirety or in part - potentially be used in WMD or for illegitimate conventional military purposes. Controlling all these products would place a heavy burden on the industry and on the authorities issuing the permits. A catch-all clause allows for ad hoc action, when security interests are at stake, without imposing permanent trade restrictions.²⁹ A second reason for incorporating catch-all clauses is that the lists of products to be controlled, as specified in the regulation, are constantly being overtaken by technological developments. A catch-all clause can deal with the potential risks of new technologies.

The catch-all clause in Art. 4 of the regulation has been worded very restrictively. A licence is required for the export of dual-use items that are not on the list if:

- the competent authorities of the Member State in which the exporter is established have informed the exporter that the items 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 other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons'. (Art.4.1).
- an arms embargo adopted by the EU, the OSCE or the UN Security Council is in force for the purchasing country or the recipient country, and if the competent authorities have informed the exporter that the items are or may be intended, in their entirety or in part, for a military end use. The term 'military end use' shall be understood in this paragraph as the incorpora-

I Art. 8.1: 'A Member State may prohibit or impose an authorisation requirement on the export of dual-use items not listed in Annex I for reasons of public security or human rights considerations.' Art. 8.2: 'Member States shall notify the Commission of any measures adopted pursuant to paragraph 1 immediately after their adoption and indicate the precise reasons for the measures.' Art. 8.3: 'Member States shall also immediately notify the Commission of any modifications to measures adopted pursuant to paragraph 1.' Art. 8.4: 'The Commission shall publish the measures notified to it pursuant to paragraphs 2 and 3 in the C series of the Official Journal of the European Union.'

II This includes helicopters and their components, tear gas, flow-forming machines, road vehicles with one or more military features, and others.

tion into military items listed in the military list of Member States, the use of production, testing, or analytical equipment for the development of these products, or the use of any unfinished products for their manufacture (Art 4.2).

- the competent authorities have informed the exporter that the items in question are or may be intended, in their entirety or in part, for use as parts or components of military items listed in the national military list that have been exported from the territory of that Member State without authorisation (Art. 4.3).

If an exporter is aware that dual-use items which he proposes to export are intended, in their entirety or in part, for any of the above purposes, he must notify the competent authorities who will then decide whether a licence obligation should or should not be invoked (Article 4.4).

The Regulation gives Member States the *option* to:

- adopt legislation imposing a licensing obligation for exporters if the exporters themselves have reasonable suspicion that the products may be intended, in their entirety or in part, for use in relation to WMD (Art. 4.5). This article transfers the responsibility for the evaluation of the proliferation risk to the companies concerned.
- extend the application of Art. 4.1 and Art. 4.2 of the catch-all cause to brokering services (Article 5) and the transit (Article 6) of dual-use items.
- establish national measures under Article 11 of Council Regulation (EEC) No 2603/69 (Art.4.8).¹

At the time of publication, these provisions allowing further extension of the catch-all clause in Council Regulation (EC) 428/2009 had not yet been transposed into legislation in Flanders. The Flemish legislature may decide to do this. In practice, however, an additional “military” catch-all clause with more far-reaching consequences is in effect in Flanders on the basis of the Royal Decree of 8 March 1993 (see 3.2.2.3). As a result of the application of this military catch-all clause, which also makes it possible to impose a licence obligation on (unspecified) dual-use items, the scope of catch-all clauses in Flanders is much more far-reaching than the regulation strictly requires.

To allow the application of catch-all clauses, exports of certain product categories to sensitive recipient countries (e.g., Iran, North Korea or Syria) are systematically stopped by Customs in Flanders, Customs then contacts the Strategic Goods Monitoring Unit about the need for licensing of these products. The government can thus invoke a catch-all clause where necessary.³⁰ This practice strengthens control but also has an effect on the administrative burden for Customs and companies. This implementing measure has not been formally laid down, and could thus easily be changed.

In addition to the catch-all clause in Art. 4, Member States can also enforce a ban or licence obligation on the export of dual-use items that are not the list of controlled products, on grounds of public security or because of human rights considerations based on Art. 8. If Member States apply Art. 8 to invoke a licensing obligation for certain products, they have to notify this to the

¹ Council Regulation (EEC) No. 2603/2009 of 20 December 1969 on the establishment of a joint arrangement for exports. Article 11: “The present regulation shall not preclude the adoption or application by Member States of quantitative export restrictions justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property without prejudice to other Community provisions.”

European Commission, which will publish this licensing obligation in the Official Journal of the European Union (see above). So far the regional authorities have not exercised this option.

3.2.2.3 The Belgian military catch-all clause

The Royal Decree regulating the import, export and transit of weapons, ammunition and special military or law enforcement equipment and the associated technology includes a catch-all clause in the annex where military products are listed. This clause allows the government to invoke a licensing obligation for ‘other equipment and other material, for the support of military action’. Without entering too far into the debate over this broadly defined catch-all clause, it does have a significant impact on the control of dual-use items. Thanks to this catch-all clause, dual-use items with a military end use can be subjected to licensing and where applicable can be considered as military products. This is clear from the Flemish Government’s reporting, in which all non-military products that are subjected to licensing (including dual-use items) with a military end use are categorised as military goods based on this catch-all clause (ML24 and ML25). The Flemish Government’s scope to impose licence obligations on unlisted dual-use items thus has a much larger scope than the catch-all clause (Art. 4) in the Regulation. This may be potentially justified based on Article 8, but at the same time it could be seen as an excessively broad application of the catch-all clause for dual-use items.

Another option would be to add certain dual-use items that are systematically controlled in Flanders based on the military catch-all clause, e.g., certain types of screens), to the list of dual-use items to be controlled for reasons of public security or because of human rights considerations, on the basis of Art. 8 of Council Regulation (EC) 428/2009. Currently the Flemish Region is not exercising this option.

3.2.2.4 Special measures for Iran and North Korea

The European Union has imposed additional restrictive trade measures for exports to Iran and North Korea. In addition to Council Regulation (EC) 428/2009 Flemish companies also need to take into account Council Regulation (EC) 423/2007³¹, Council Regulation (EC) 329/2007³², and Council Regulation (EC) 567/2010³³ for all exports to Iran and North Korea. These documents include new prohibitions and also impose licensing requirements for a number of additional transactions and products.

3.3

Trade transactions that are subject to licensing

The EU has outlined a common control policy for the foreign trade in dual-use items that is to be subject to a licence obligation. Regulation (EC) 428/2009 prescribes which trade transactions are controlled, and what types of licence can be granted for such transactions. This regulation sets up a Community regime for the control of exports, transfer, brokering and transit of dual-use items. The import of dual-use items is not subject to a licensing obligation. The licensing policy for trade in dual-use items is generally less stringent than that for the trade in military equipment. Companies wishing to trade dual-use items with other countries can make use of different types of licence depending on the product and the recipient country concerned. Roughly speaking, the European Union has sought to design a policy that keeps the administrative burden for less sensitive exports to a minimum, while the trade in sensitive products (such as nuclear products) is very strictly monitored, as is trade with sensitive recipient countries such as Iran or North Korea.³⁴

3.3.1 Transfer and exports

In principle, intra-Community trade in dual-use items – referred to as ‘transfer’ in the regulation – is not subject to licensing, save for a series of highly sensitive products which are enumerated in Annex IV to the regulation (these products are also included in Annex I). They include nuclear products, which require individual licences also for trade within the EU.

The export of dual-use items to countries outside the EU requires a licence for all the products listed in Annex I. Different types of permits have been created, however, making it possible to vary the level of control depending on the sensitivity of the exported product, as measured by the type of product and the recipient country. Thus (community or national) general export licences, global licences and individual licences are all used for trade in dual-use items, just as they are proposed to be used in the intra-Community system for military equipment under the ICT directive³⁵

Community General Export Authorisations are established in Annex II to the Regulation. Under certain conditions, for certain products to certain recipient countries, exporters can use this general export licence which takes effect at European level. A Community General Authorisation (CGEA) authorises all exporters in the European territory to export products listed under the CGEA, without further restriction, to certain recipient countries outside the EU.¹ For all other exports, a licence must be granted by the competent authorities of the Member States. The Member States may also issue national general export licences based on the same principle as the Community General Export Authorisations. Under a national general export licence, all exporters in the territory can ‘freely’ export products to certain recipient countries and under

¹ All the products in Annex I – with the exception of the products listed in part 2 of Annex II – may be traded under a Community General Export Licence with Australia, Japan, Canada, New Zealand, Norway, Switzerland and the United States. Companies have to meet a number of conditions which are included in Annex II to the regulation.

certain conditions. In addition, Member States can also grant global licences to specific exporters, who can thus use a single licence for different exports to a given recipient country. States may also issue an individual licence to a given exporter, where one licence is tied to a specific export. All licences are valid throughout the EU. Currently the Flemish Government does not exercise the option of issuing national general export licences, as global licences are considered sufficiently comprehensive. From a European perspective the aim is to limit national general export licences as much as possible, as they undermine the equal conditions of competition between companies.

For certain provisions, the regulation offers the Flemish legislature some policy scope – albeit limited – to go further than the European legislation. In relation to exports, the following options exist:

- To enforce a licensing obligation for intra-Community trade in dual-use items listed in Annex I (not only in Annex IV) in specific cases if:
 - the exporter knows at the time of transfer that the final destination of the items concerned is outside the European Community;
 - direct exports to this recipient country from the Member State where the products originate are not permitted under a general or global licence (but require an individual licence)
 - no economically significant processing of the products will take place in the recipient country (Art. 22)
- To issue national general export licences through the medium of national legislation or as part of national practice (through administrative procedures) (Art. 9.4, see above)
- To require, based on national legislation, that additional information be provided to the competent authority (Art. 22.9) for intra-Community transfers of the dual-use items in Annex I, Category 5, Part 2 ('information security' or cryptography), which are not included in Annex IV and for which no licence is required
- To extend export controls on dual-use items to unlisted products according to Art. 4 and Art. 8 (see above).

Member States that adopt legislation to provide for such measures must notify this to the European Commission, which will then publish the information in the C series of the Official Journal of the European Union. So far the Flemish Government has not taken any legislative initiatives in this connection.

Member States must also establish procedures for reporting by companies about the use made of the licences. In particular, exporters are obliged to keep detailed registers or records of their exports (Art.20), on the basis of national legislation or of the practice in their respective Member States. More will be said about this in Section 4.6.

3.3.2 Transit

Under the Regulation^I the transit of dual-use items may be prohibited if the country of origin and the recipient country are outside the EU *and* if there is evidence of special security risks related to WMD.^{II}

The Regulation also provides for the *possibility* for Member States to:

- impose a licensing requirement before arriving at a decision on whether or not the transit of products listed in Annex I (art.6.2) should be prohibited.
- extend the application of a transit ban to unlisted products when there is a reasonable suspicion of their use in the manufacture of WMD (as described in Art. 4.1), or to dual-use items with a military end-use that are exported to a recipient country subject to an arms embargo (as described in Art. 4.2).

Member States that take measures based on these additional options shall notify this to the Commission (Art. 6.4). At the time of publication the Flemish legislature has not yet exercised the options for extending the scope of controls on transit of dual-use items as described above.

In Belgium the transit of dual-use items is subjected by Ministerial Decree of 28 September 2000 – with a few exceptions – to the same control as exports, as defined in the then Council Regulation (EC) 1334/2000.^{III}³⁶ The latter regulation at the time did not provide for control on the transit of dual-use items. The scope of the EU export control regime for dual-use items was thus extended also to the transit of these goods in Belgium. Since Council Regulation (EC) 428/2009 entered into force, however, provisions on transit have been incorporated into EU legislation and it is worth examining whether the Belgian law now complies with European legislation.

3.3.3 Brokering

The control of brokering services for dual-use items has now been regulated for the first time in Belgium, through the regulation's direct effect, by EU Council Regulation (EC) 428/2009 (Art. 5 and 10). Brokering activities may only be subjected to licensing in certain cases; there is no systematic licence requirement. A licence is required for brokering services on the dual-use items listed in Annex I of the Regulation if the authorities have notified the broker that the products may be intended, in their entirety or in part, for the purposes specified in Art. 4.1 (involvement in WMD). When the broker is aware of such an involvement, he shall notify the competent authorities so that they can decide whether a licence is required (Art.5.1).

I Transit is defined in the Regulation as the "transport of non-Community dual-use items entering and passing through the customs territory of the Community with a destination outside the Community." (Art. 2.7).

II The transit of dual-use items listed in Annex I of Council Regulation (EC) 428/2009 may be prohibited under the Regulation by the competent authorities of the Member State when the products concerned at the time of transit may be – in their entirety or in part – used for or related to WMD (as described in Art. 4.1) (Art. 6.1).

III The Ministerial Order does not apply to the transit of goods to or from the Grand-Duchy of Luxembourg or the Netherlands, and does not apply to transit without transshipment or to transactions for which a Community export authorisation was issued.

As with transit, Member States have the *option* to:

- extend the application of the article to unlisted products to be used for the purposes defined in Art. 4.1 and 4.2;
- impose a licensing obligation in national legislation if the broker has a reasonable *suspicion* that the products concerned may be associated with WMD.

Here again the Member States are expected to notify the Commission when exercising these additional options. So far the Flemish legislature has not exercised these options.

Licences for brokering services based on Council Regulation (EC) 428/2009 shall be issued by the competent authorities of the Member State where the broker resides or is established. These licences shall be granted for a set quantity of specific items which are transferred between two or more third countries. The location of the items in the originating third country, the end user and his exact location shall be clearly identified. The licences shall be valid throughout the Community (Art. 10).

The federal and regional authorities in Belgium have agreed to leave the implementation of EU provisions relating to brokering of dual-use goods to the Regions, as they involve controlling the broker's activities (as opposed to the control of the individual, for which competence resides with the federal authorities), and because expertise on dual-use items is available at regional level. To date, no licences have been issued in the Flemish region for brokering activities.

3.4

Evaluation criteria

The criteria that Member States should take into account when evaluating applications for individual or global licences for the export of dual-use items are listed in Article 12 of Council Regulation (EC) 428/2009. When deciding whether to grant an individual or global export licence - or to license brokering services - Member States shall take into account all relevant considerations, including:

- the obligations and commitments of international regimes regarding non-proliferation and export control;
- sanctions adopted by the EU, the OSCE or the UN.
- considerations relating to national foreign and security policy, including the criteria of the Common Position 2008/944/CFSP (criteria for exports of military equipment¹).
- considerations about the intended end-use and the risk of diversion.

¹ These criteria relate to 1) compliance with international commitments, 2) compliance with human rights and international humanitarian law in the country of final use, 3) internal tensions or armed conflicts in the country of final use, 4) stability in the region, 5) national security of EU Member States and their allies, 6) the attitude of the procuring country vis-à-vis the international community, 7) risks of undesired re-export or deflection, 8) the technical and economic capacity of the procuring country and the ratio of military and social expenditure in view of sustainable development.

During evaluation of global licences Member States shall also take into account exporters' reliability, and the guarantees provided that they can comply with the regulation's provisions and objectives and with the conditions of the licence.

The nature of the wording of this article allows for additional considerations to be defined in legislation or to be applied when implementing the policy. The provisions of Article 12 are clearly worded as the minimum considerations that governments need to take into account. It is worth noting the emphasis on international commitments, on the control of end use and on the risk of diversion - compared with the European criteria for military equipment.

3.5

Control of end-use

Council Regulation (EC) 428/2009 requires exporters of dual-use items to provide all the information required for the application so that the competent authorities have all necessary information at their disposal, more specifically about the end user, the recipient country, and the end-use of the exported product. Where necessary, the authorisation may include an obligation to supply a declaration concerning the intended end-use to the competent authorities (Art. 9).

In order to control end-use for dual-use items, the Flemish Government uses – just as for the licensing of exports of military equipment - an end user certificate (EUC) and the (international) import certificate (IIC). The destination of the products determines which document will be used. No IIC or EUC is required for the Member States of the European Union and for the seven countries listed in Annex II of Council Regulation (EC) 428/2009 (Australia, Canada, Japan, New Zealand, Norway, Switzerland and the United States).

An (international) import certificate may be required for Andorra, Hong Kong, Malaysia, Singapore, Turkey, South Korea, Bosnia, Iceland, Croatia, Liechtenstein, Macedonia, Serbia and South Africa. An (international) import certificate is a declaration drawn up by the authorities in the country of final use, who thereby record the import, the quantity and the nature of the products. No further legalization or certification by the embassy or chamber of commerce is required in the country of final use (see below).³⁷

For all other countries an end user certificate (EUC) is required. An end user certificate is a declaration in good faith drawn up by the customer (the end user), indicating the intended end-use. The Council of the EU's Working Party on dual-use goods has established a template for the end-use certificate which can be downloaded from the website of the Strategic Goods Monitoring Unit.³⁸ The template includes a clause that explicitly states the products and/or technology will not be used in WMD, and in which the exporter indicates whether the products have a military end use. The document is sent to the Belgian diplomatic missions on the spot or to the local Chamber of Commerce for authentication and certification.¹ The Cooperation Agreement of July 17th, 2007 between the federal state and the regions with respect to the import, export and transit of military equipment and dual-use items prescribes this procedure in Art. 11. The

¹ This process may last up to 8 weeks.

regional authorities may also request more information in the case of sensitive exports. Within practical limits, diplomatic missions may carry out an investigation into the actual and stated end-use. Generally speaking, companies will send the end user certificate directly to diplomatic missions with the request for authentication and legalization, and the legalized document will be appended to the licence. The Strategic Goods Monitoring Unit may also send the end user certificate for authentication itself.³⁹

Irrespective of the type of end-use document, the exporter shall clearly state - when applying for a dual-use licence - whether he is aware of any connection of the transaction with WMD. The exporter shall also commit to exporting the goods in accordance with the licensing application and also shall submit proof of arrival in the recipient country to the competent authorities. Finally, the exporter shall also declare that he is aware of all applicable legislation.⁴⁰ Under the European control regime for dual-use items, Member States (under certain conditions) have the option to make the decision about exports to a non-EU country themselves if the end destination is known at the time of the application, even when the first recipient country is another Member State (Art. 22).¹

Monitoring end-use is a hotly contested element of the application procedure. However, it is also the most crucial element, as such findings will determine the sensitivity of the export. When exporting dual-use items, the government largely depends on the responsible behaviour of companies trading in such items, especially with regard to access to information on their product, the end-use and the product's end user. Companies are legally obliged to disclose all information. However, it remains unclear to what extent companies have to actively search for the last known end use if several 'links' are involved in the trade and production chain. Companies undoubtedly stand to benefit from maximum transparency and cooperation with the authorising authorities. Pursuant to Art.12.2 of Council Regulation (EC) 428/2009, the Flemish Government has to take into account, when granting (global) export licences, the internal procedures existing in a company for ensuring compliance with the objectives of the regulation and the conditions of the licence.

3.6

The licensing procedure

Traders first and foremost need to understand the procedure that they should follow in order to transfer, export or import dual-use items or when they act as brokers for such products, in compliance with the regulation. Member States decide themselves how they organise the licensing procedure.

¹ Article 22 of the Regulation states that a Member State may impose a licensing obligation for the transfer of dual-use items (which are usually freely traded) if the exporter is aware that the final recipient country is outside the EU, if the direct export of the products to that state is subject to an individual licence requirement and if the products are not to undergo economically significant processing in the recipient Member State (see section 4.2.1).

When a Belgium-based trader wishes to trade dual-use items that are subject to licensing (and when they do not fall under a general licence), s/he shall submit an application for authorisation to the competent authorities of the region where the trader's registered office is located.⁴¹ For the Flemish Region the competent body is the Strategic Goods Monitoring Unit, which is part of the Flemish Department of Foreign Affairs.⁴²

Exporters are legally obliged to supply all the necessary information when applying for individual and global export licences so that the competent authorities receive complete information about the following: the end user, the recipient country, and the end-use of the exported product. Where necessary, the licence may also include a requirement to issue a declaration on the product's end-use (Art. 9.2) (see 3.5). The administration will then check whether the application file is complete, after which the Strategic Goods Monitoring Unit will carry out a technical analysis of the products concerned. Where necessary in the case of individual licences, end user certificates will be checked.^I An (international) import certificate is sufficient for exports to listed friendly countries.^{II} Then a geopolitical analysis is conducted, based on Art. 12 of the regulation and using among others the evaluation criteria of the Common Position 2008/944/CFSP. Following this technical and political analysis, the Strategic Goods Monitoring Unit issues an opinion. This opinion is then sent to the competent minister: currently the Minister-President of the Flemish Government, who is competent for foreign policy and foreign trade.

For licensing dossiers where the Federal Act of 9 February 1981 applies (nuclear products), a prior authorisation must be requested (see Section 2.3). Either the applicant takes care of this directly, or the Strategic Goods Monitoring Unit does so by forwarding the application to the competent federal authority for an authorisation.

3.6.1 Written request regarding the licence obligation

Companies may submit a request for confirmation as to whether or not a given transaction requires a licence. This may be unclear because of the product's technical specifications, and/or because of specific end-uses that pose a certain risk set (catch-all clause) or for which additional restrictive trade measures are in place (such as Iran or North Korea). Customs may also request an opinion. Customs has agreed with the Strategic Goods Monitoring Unit that it will hold up the export of certain product categories (which may include dual-use items) to certain destinations in order to check whether they may be freely traded or whether they need a licence. This allows the Strategic Goods Monitoring Unit to invoke a catch-all clause where necessary and to apply a licensing requirement. The processing time for such applications is 3 to 5 days.⁴³

I The Belgian Embassy or Chamber of Commerce in the country of end use needs to certify or legalise the document.
II These documents are not required for global licences.

3.6.2 Processing times

The dual-use regulation explicitly refers to the use of time-limits. According to Article 9.3. Member States shall process requests for individual or global licences within a period of time to be determined by national law or based on national practice. This also applies to the processing of licence applications for brokering services (Article 10.3).

The Flemish administration aims for a processing term for licence applications of 6 to 10 weeks, depending on the sensitivity of the exported products and the completeness of the dossier (for example, depending on whether the end-user certificates have already been certified/legalised).⁴⁴

3.7 Consultation with other EU Member States and with the European Commission

When EU Member States deny an application for the authorised export of dual-use items, or choose to suspend a previously granted licence, to cancel it or even block the actual export, they are obliged to inform the competent authorities in all other Member States of this as well as informing the European Commission (Art. 13). These notifications are shared in a secure electronic database managed by the European Commission (Art. 19), and the obligation to notify also applies to the denials of transfer or brokering transactions. Before a licence for the export, transit or brokering transactions of dual-use items is granted, Member States will have to check that the authorities of other Member States have not denied an essentially identical transaction. If so, the Member States concerned need to consult with one another. Should a Member State decide to grant a licence, it will notify the European Commission and all the other Member States of this and elaborate on its decision. Confidentiality of such information will be respected as stipulated in Art. 19 of the regulation.

Further, under Art. 11 of Council Regulation (EG) 428/2009 the Member States shall consult with other Member States when the dual-use items for which an individual licence is requested are located in the territory of another Member State. The consulted Member State may object to the issuance of the licence within a ten-day period (in exceptional cases this period can be longer) and such objections are binding. Under the same article (Art. 11.2) Member States may also request that other Member States do not issue an export licence if essential security interests are at stake. In this case Member States shall consult with each other, although this consultation is not binding.

If a Member State invokes a catch-all clause under Art. 4 to impose a licensing requirement for a given product, it shall also notify the other Member States and the European Union of this requirement so that they may take it into account in their own licensing policy (art.4.6).

In accordance with Art. 19, Member States shall take the necessary measures to ensure direct cooperation and the direct exchange of information between the competent authorities, specifically with the aim of preventing a diversion of trade as a consequence of possible differences in the terms of control on dual-use exports. This information shall include:

- details of exporters who have been deprived of the right to use national general export licences or Community General Export Authorisations;
- data on sensitive end users and actors involved in suspicious procurement activities.

The necessary precautions concerning the confidential nature of certain information are provided for in the Regulation (Art. 19.3-19.6)

3.8

Transparency

Transparency is a crucial - and often underestimated - aspect of any legitimate export control policy. The democratic control of a government's licensing policy is the ultimate test of a responsible policy. Parliamentary control is impossible if there is no transparency as regards the licences that have been approved or denied.

The European regulation contains no provisions on the transparency of government policy vis-à-vis parliament because it considers this to be a subsidiary competence of the Member States. The regulation does, however, include very specific obligations for companies as regards detailed registers or records of their exports. The implementing measures, however, need to be issued at national (or regional) level. Art. 20 states that exporters of dual-use items shall keep detailed registers or records of their exports, in accordance with the national law or practice in force in the respective Member States. Such registers or records shall include in particular commercial documents such as invoices, manifests, freight certificates and other transport papers containing sufficient information to allow the following to be identified:

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

Brokers also have to keep detailed registries (Article 20.2). These registries shall be kept for at least three years and shall be submitted upon request to the competent authorities of the Member State in which the exporter or broker has his registered office (Art. 20.3). Commercial documents and files relating to intra-Community transfers of the products included in Annex I shall be kept for three years after the year in which the transfer took place and shall be submitted to the competent authorities upon request (Art 22.8).

These provisions enable governments to collect all the necessary information, not only for individual and global licences (about which they automatically collect data given their licensing competence), but also for exports under a general licence and even for intra-Community trade. Under the regulation, however, governments are not required to request this information. This

may be a task for the Flemish legislature. Since 2007, the Flemish Government in its monthly reports has been publishing data on the import, export and transit of dual-use items, but without a legal obligation to do so. For each individual and global licence, the recipient country, the country of final use (if not the same as the recipient country), a description of the products (according to the categories of Annex I of the regulation) and the value of the authorisation are provided. This reporting is essential with a view to public and parliamentary oversight, but it has not been enshrined in law.

3.9

Monitoring of compliance and penalties

Council Regulation (EC) 428/2009 states in Art. 21 that “in order to ensure that this Regulation is properly applied, each Member State shall take whatever measures are needed to permit its competent authorities:

- to gather information on any order or transaction involving dual-use items;
- to establish that the export control measures are being properly applied, which may include in particular the power to enter the premises of exporters.

Further, “Each Member State shall take appropriate measures to ensure proper enforcement of all the provisions of this Regulation. In particular, it shall lay down the penalties applicable to infringements of the provisions of this Regulation or of those adopted for its implementation. Those penalties must be effective, proportionate and dissuasive” (Art. 24).

Currently in Belgium, the monitoring responsibilities and penalties for violations relating to the import, export and transit of dual-use items are enshrined in Art. 10 and 10a of the Act of 1962 and the General Customs and Excise Act of 18 July 1977 (Art.231, 249-253, 263-284).⁴⁵

Attempts to evade a declaration or declarations based on false or fraudulently obtained licences in Belgium may be punished with four months to one year of imprisonment. This penalty can be doubled for a second conviction, and increased to 2 to 5 years with each subsequent repetition. Additionally, the goods concerned shall be confiscated and a fine of ten times the evaded duties shall be imposed. In the case of prohibited products, to which by definition no rights apply, the penalty shall amount to two times the value of the goods. The fine shall be doubled for subsequent violations. Parties involved in or insurers of a smuggling offense shall be punished in the same way as the actual smuggler.

If the declaration is made in connection with a licence but is contrary to the terms of use or the validity of this licence, then the goods shall be confiscated and a fine equivalent to the value of these goods shall be imposed.

Extenuating circumstances or the recognition that the offence is due to omission or error may lead to a settlement. When the offence can be sufficiently proven and when deliberate fraud is clearly involved, a more lenient settlement is excluded.

An additional punishment consists of denying every kind of import, export or transit licence for a period of one to six months to any person importing, exporting or transferring dual-use items without a valid licence or attempting to do so; any person trading prohibited weapons or taking part in the diversion of trade; any person who provides incorrect or incomplete information to obtain a licence, or who fails to cooperate with an audit or investigation.

Without prejudice to the competence of the judicial police to control compliance with the applicable legislation, the supervision and monitoring of compliance with all the aforementioned obligations is in practice mainly carried out by the officials of the Department of Customs and Excise. They check whether the declaration corresponds to the transported goods and demand to see the required import, export or transit licence. This means that the licences issued by the regions are checked by federal officials. Conversely, customs officials can also call on the expertise available from the issuing authorities of licences for the purpose of such monitoring. In addition, the officials of the General Economic Inspectorate and the officials appointed for this purpose by the competent minister, or officials authorised to track down and report infringements, can also carry out such checks.⁴⁶

The Flemish legislature is entitled to establish its own penalties by Act of Parliament for violations of Council Regulation (EC) 428/2009. Up to that point, the federal penalties foreseen in the Act of 1962 remain applicable.

3.10

Customs and intelligence services

The Customs are allowed - without prejudice to the powers granted them and pursuant to the Community Customs Code - to suspend or stop the export of dual-use items for which a valid export licence has been issued (by their own or another Member State) if there is a reasonable suspicion that:

- relevant information was not taken into account when the licence was granted
- circumstances have materially changed since the licence was granted (Art. 16).

In this case the authorities of the Member State that issued the licence shall be immediately consulted, so that, based on Art. 13.1 the licence can be either revoked, suspended or annulled. If this Member State, however, decides to maintain the licence then the dual-use items will have to be released. The Member State that granted the licence shall notify the other Member States and the European Commission of this (Art. 16).

Governments depend on highly focussed information in order to stop potentially problematic dual-use transactions within a whole stream of trade transactions. EU states' licensing authorities exchange information on (potentially) problematic transactions with one another. In addition, governments rely on information from domestic and/or foreign intelligence. The licensing authorities themselves have no overall view of the transactions for which a licence is requested. For transactions that do not require a licence, tips from intelligence services and other similar bodies are crucial for stopping problematic dual-use transactions.⁴⁷

There are no cooperation agreements between the federal intelligence agencies of the Federal Public Service (FPS) Justice (and potentially the FPS Defence) and the regional governments with respect to trade in military equipment and dual-use items. Nor is there a cooperation agreement relating to cooperation between the Flemish licensing authority and Customs. In practice, however, this cooperation does happen and all the authorities are in contact with one another based on their own competences.

4 Conclusion

Control on trade in dual-use items is a prominent part of the security policy of states and of international organisations such as the UN, the EU and various export control regimes that mainly focus on preventing the proliferation of weapons of mass destruction (WMD). In the aftermath of 9/11 the possibility that 'terrorist groups' would be able to acquire chemical, biological or nuclear weapons was pushed to the fore. While this concern may have calmed down, the focus on exports to state actors in Iran or North Korea remains a hot topic. Dual-use items may potentially be used in connection with WMD, but may also be of strategic use for conventional weapons. In the current context of high-tech and network-centric warfare, the military capacity of a state or an armed group is no longer merely determined by traditional military guns, tanks or fighter planes. A range of products and technologies used in support of military action, such as imaging equipment, lasers or night vision goggles, and applied civilian technologies such as ICT functions, are now also of military strategic relevance. The list of dual-use items that have been included in lists of strategic goods by international control regimes is quite extensive. Each product included in the list is considered a strategic product because of its potential use – in its entirety or in part – for/in WMD or for a conventional military end-use.

At the same time, governments try to avoid imposing too many trade barriers for a large range of civilian products that are often indeed used for civilian purposes. Increasingly, control regimes try to take effective measures to strictly control the trade in the most sensitive products, while simultaneously lowering the trade barriers for less sensitive products: not by deleting products from control lists, but rather by diversifying licence types. The European Union's control regime is a good example of this approach. In its licensing policy the EU makes a major distinction between sensitive and less sensitive transactions. The sensitivity depends on the nature of the product as well as on the country of final use. Trade in dual-use items is free among all EU Member States and the major industrialised countries, with the exception of trade in the most sensitive products. Member States are responsible for issuing individual and global licences - the latter also offering greater trade freedom to exporters - for exports and transfer activities to all other countries, and also for brokering transactions.

The legal framework for the trade in dual-use items has been enshrined at European level in Council Regulation (EC) 428/2009, which has a direct effect. Member States are responsible for implementing the control policy. In Belgium, the regional governments are responsible for policy implementation. The legislation is directly applicable and does not require transposition into national law, but a series of measures need to be taken to implement the Regulation.

Since the regionalisation of this competence in 2003, the Flemish Government has not yet adopted any decrees relating to dual-use items. Until it does, the Federal Act of 11 September 1962 remains in force and provides the legal base for imposing sanctions for violations of the Regulation. This law is now outdated, and not adapted to the provisions of Regulation 428/2009 which specifically address the trade in dual-use items. Nevertheless, the law provides for penalties, unquestionably the most important legal measure that needs to be provided for in (sub-)national legislation. Additional (federal) legislation also applies in Flanders, as in the other regions. It provides for a stricter control than the control outlined in Council Regulation (EC) 428/2009. First, an additional prior authorisation is required for certain transactions relating to nuclear products based on the Federal Act of February 9, 1981. Secondly, the application of the

catch-all clause has a wider scope than that of the European Regulation because dual-use items also fall within the scope of the military catch-all clause of the Royal Decree of 8 March. The scope of the latter is wider than that of the EU dual-use catch-all clause. Thirdly, in Belgium, a ministerial decree of 28 September 2000 is in force which provides for more extensive controls on the transit of dual-use items than are provided for in the Regulation.

Conversely, the Regulation provides options for Member States to elaborate even more stringent provisions, in their national legislation, on a number of specific points than are laid down in Council Regulation (EC) 428/2009 itself. So far the Flemish legislature has not yet exercised these options. The most important options (in no particular order) are:

- an extension of the catch-all clause
- an extension of the licensing requirement for brokering activities
- an extension of the licensing requirement for transit activities
- the possibility to impose a licensing requirement for additional dual-use items
- the possibility (in clearly defined circumstances) to maintain export controls on products to be transported through another Member State to a third country
- the possibility of issuing national general export licences.

Furthermore, each Member State shall take the appropriate measures to ensure the proper implementation of all provisions of the regulation. Member States must thus provide for the ability to issue individual and global licences, establish mandatory reporting for exporters and brokers; and regulate the flow of this information (in our case) to the Flemish Government and transparency by the Government towards the Flemish Parliament. They must also implement measures aimed at facilitating the exchange of information with other EU Member States and with the European Commission; enable the competent authorities to monitor the correct application of the Regulation, and impose effective, proportionate and deterrent sanctions for violations of the Regulation. All these elements are crucial to ensure the effectiveness and enforceability of this European Regulation.

Most implementing measures - with the exception of penal provisions and monitoring functions - in Flanders are based on administrative procedures published by the competent government service - the Strategic Goods Control Unit - on its website. The requirements for licensing applications, including information about the documents that need to be supplied, the control procedure in terms of end use, etc. are clearly explained on the website. Nevertheless, it is advisable that a number of implementing measures provided for/allowed in the regulation, and which need to be transposed into national legislation or national practice, should be embodied in a Ministerial Order and/or by a Flemish Act of Parliament. With a view to effectively combating the illegal trade in dual-use items and efficiently organizing the legal trade in these items, the essential steps in the authorisation procedure – as a minimum – should be enshrined in legislation.

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