

## **Between Trade and Security: EU's Export Control Regime and Its Global Role**

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### Paper Abstract:

The EU's strategies for contributing international security and promoting global trade often contradict each other. On the one hand, EU is enhancing its role in global security issues such as Iranian nuclear development or peacekeeping in the Middle East, but on the other hand, it is encouraging European industry to export high-tech products which might be used for both civil and military purposes. The control on dual-use technology products seems to prevent some concerned parties from acquiring higher military capabilities, but at the same time, prevent European industry from enlarging its market share. Between the Commission and the Member States, who controls the dual-use goods is a crucial question for promoting their industrial and security interests. Currently, the EU sets a single rule and procedure for export control, but Member States own the full capacity to implement these rules. Because of that, the interpretation and exercise of EU rules on export control are not coherent among Member States.

This paper examines the difficulties and problems of EU for ensuring its global responsibility for export control on dual-use items. Three aspects of export control should be discussed in this paper. First, how does the EU structure the roles and responsibilities for the Commission and Member States? The Regulation 1334/2000 defines the role of the Commission, but it does not outline the obligations and responsibilities of Member States. Second, how does EU's strategy for improving international competitiveness through defense R&D coordinate with its strategy for export control? The launch of security R&D programs, development of European Defense Technological and Industrial Base (DTIB), and establishment of European Defense Agency (EDA) calls for more prudent approach for controlling the export of high-tech goods. Third, what is the consequence of EU enlargement in 2004? Including states without the experience of COCOM regime may undermine the relatively successful export control system in the EU, and would increase the risks of exporting controlled goods.

Through these three aspects, this paper aims to provide analysis of EU's export control and to find whether EU would be able to fulfil its international responsibility for improving security through trade. This study would also have some implication about the troubling relationship between the Commission and the Member States in trade issues as well as security matters.

## Introduction

Export control is to control the export of dual-use technology and the goods with those technologies for improving international security while increasing the cost of export and restrict activities of companies in the market. In a globalized market, the increase of international transaction of economy might encourage the exchange of goods with high-technology which can be used to develop Weapons of Mass Destruction (WMD), and eventually threatens international security. But at the same time, companies seek more technologically sophisticated products which would provide higher value-added, international competitiveness and market share. Some governments consider that their policy goals are to support companies to achieve international competitiveness of their domestic industry. The problem of export control is to find the right balance between the interests of international security and economic interest.

The European situation is quite complicated in this regard. First, it is extremely difficult to think this question in the framework of "Europe". On the one hand, the export control rules are made at EU level exclusively. Since 2000, the competence of export control rule-making was simplified to the Council under common trade policy. But on the other hand, the implementation and enforcement of those rules are exclusively done by the Member States. In other words, Member States have discretion for interpretation of those rules, and there is always a possibility that the rules are not applied uniformly. Second, although European Council has the right to make rules on dual-use technology for striking the balance between the economic and security interests, Member States have sole decision-making competence on the arms trade. The Council adopted the code of conduct on arms trade, but it is not legally binding.

This duality of export control is, of course, a reflection of the complexity of the governance of EU. Although the economic affairs – trade and market regulation in particular – are decided at the European level, the issues related to security are jealously protected in the hands of Member States. The development of European Security and Defence Policy (ESDP) since 1998 progressed the convergence of defence and security policy of Member States, but it has not yet achieved to a point where the Member States have "single" policy on security issues. Thus, the export control policy as "trade policy" is decided at EU level while the export control policy as "security" policy remained as national policy.

However, the international community is increasingly concerned the proliferation of WMD, and it is strongly required for European countries to take major steps to improve their export control system. Particularly since the A.Q. Khan's nuclear black market network was revealed in 2003, European export control system attracted international attention because the source of Khan's network involves several European countries. Furthermore, the accession of twelve Member States in 2004 and 2007 raised concerns for effectiveness of border control and customs management.

This paper will discuss the problems associated with the duality of export control policy

and analyze the governance of dual-use technology export control system. In the first section, it will discuss the development of export control system at EU level and how the balance of economic and security interests are struck. Second section will discuss several issues concerning today's export control system. Third section, it will discuss the problems associated with the accession of 12 Member States.

#### I. Establishing single EU regulation

The Treaty of European Union, or Maastricht Treaty, provided a legal foundation for common foreign and security policy. Before 1993, the export control was exclusively dealt by Member States. Member states were the signatory of international regimes such as Nuclear Suppliers' Group (NSG), Australian Group (AG) for chemical and biological weapons, Missile Technology Control Regime (MTCR) and Cocom (Coordinating Committee for Export Controls) during the Cold War, which became Wassenaar Arrangement (WA) after 1994, for conventional weapons. But European Commission showed enthusiasm for developing its own policy competence on export control since it is considered as a window of opportunity for the Commission to involve in the security issue. Thus, the Commission proposed and the Council adopted the Regulation No.3381/94 based on the Article 113 (as it was then) of EC Treaty. Meanwhile, the Council within the Common Foreign and Security Policy (CFSP) framework adopted Joint Action document (94/942/CFSP) in 1994. Both documents were almost identical, but because of the separation of power and legal sources, these two documents coexisted altogether.

The European Court of Justice (ECJ) regarded this two-tier approach as legally contestable, and recommended to solve the legal complication as soon as possible. Commission, following the recommendation by ECJ, proposed to unify two approaches based on the EC Treaty in 1998<sup>1</sup>, but this problem was not solved until 2000. The major difficulty for unifying these two approaches was the difference of decision-making procedure. If the Article 113 of EC Treaty is applied, the decision-making on certain sensitive subjects such as definition of "friendly states" would be decided under Qualified Majority Voting (QMV). Member States were quite reluctant for putting these sensitive security questions under QMV.

However, the developing of ESDP since 1998 created a favourable condition for both Commission and Member States to reconsider the two-tier approach. Member states began to ease the tension concerning the security issue and realized the necessity to have single European strategy for export control as a stepping stone for common security policy, and the Commission became more aware of the necessity for providing necessary legal infrastructure for common policy for Eastern enlargement. According to the Commission, the necessity of having EU level export control is as

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<sup>1</sup> Commission of the European Communities, *Proposal for a Council Regulation (EC) Setting up a Community Regime for the Control of Exports of Dual-use Goods and Technology*, Com(98) 257 final, 1998.

follows<sup>2</sup>:

- Following the completion of the single market, it is necessary to have common and effective "fence" outside the single market, and comply with international regimes;
- While maintaining the security interests of Member States, the export control must be conducted under common regulation for reducing the burden for exporters and providing level playing field;
- As claimed by ECJ, the issue of export control is under the Article 133 of EC Treaty, and the Union has the exclusive competence even though there is a concern for military use of technologies.

Based on these shared understandings, the Council adopted Regulation 1334/2000 which unified two legal documents in one, and provided certain authorities to the Commission to conduct and implement this Regulation. The most significant aspect of this regulation was the introduction of Community General Export Authorization (CGEA). This was introduced for facilitating authorization process at national level, and providing authority of issuing CGEA to the Commission. This was a remarkable change from the past because the Member States gave up a part of controlling authority and transfer its competence to the Commission<sup>3</sup>. Under this rule, an exporter which was granted CGEA would not need to apply export authorization for exporting items on the Annex I<sup>4</sup> to the "friendly countries" listed on the Annex II (Australia, Canada, Czech Republic, Hungary, Japan, New Zealand, Norway, Poland, Switzerland and the United States<sup>5</sup>) once they applied for CGEA to the Commission.

The CGEA was designed to reduce the cost of exportation for exporters in order to improve international competitiveness of European industry and facilitate the external trade. Among the Member States trade volume, 61.8% of goods were traded within EU internal trade, and 19.2% of trade was done with "friendly countries"<sup>6</sup>. This statistics will tell us that only 20% of trade are the subject of control if the exporter is granted CGEA, thus it would significantly reduce the export control cost for European industry. This is exactly the Commission was aiming at when it proposed the single regulatory framework.

However, member state governments were fiercely resisted to transfer the authority to

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<sup>2</sup> Commission of the European Communities, "Dual-use Export Controls", [http://ec.europa.eu/trade/issues/sectoral/industry/dualuse/index\\_en.htm](http://ec.europa.eu/trade/issues/sectoral/industry/dualuse/index_en.htm).

<sup>3</sup> Member states would have discretion for requiring registration of exporters with CGEA and some additional requirements of information when the non-national exporter utilizing their ports (e.g. German exporter exports from Rotterdam).

<sup>4</sup> CGEA will not be applied to those items listed in Annex IV and the second part of Annex II (sensitive items). See *Community General Export Authorisation EU001* [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_131577.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_131577.pdf)

<sup>5</sup> Among these countries, Czech Republic and Poland were omitted from the list as soon as they joined EU. Council Decision No 885/2004.

<sup>6</sup> *Eurostat Yearbook 2003*

issue export authorization except CGEA to the Commission, and protected their rights to define individual authorization process under the common Regulation. Furthermore, although the decision-making process is based on Article 133, the decisions were mostly taken by consensus of all Member States on the agenda items related to the control list and negotiating position in the meetings of international regimes<sup>7</sup>. Although the Commission demanded to issue not only CGEA but all individual licences under Common External Trade Policy<sup>8</sup>, Member States categorically denied for letting Commission to monopolize the competence of authorization. As a result, the competence of Member States remained to a large extent, but the Commission became a recognized partner to share the strategic authority.

In addition to that, Member states can add items which are not listed in the Regulation (but not deduct from the list) under Article four and five. It would make exporters confused because some items such as tear gas are required to acquire authorization from the national authority in one Member State (France in this case), but not required if the exporter ship the item from other Member States<sup>9</sup>. The idea of setting up a unified Regulation under Common Trade Policy was to provide level playing field, but certain states add particular items for their security concerns.

In this way, the export control system in Europe is complicated by the rivalry between Member States and the Commission, largely due to the duality of the nature of export control, namely the "trade" and "security" aspects. At the same time, Member States are not willing to give up their authorities for export control not only because of the security interests, but also domestic industrial interests. Although the system is unified and simplified, it is necessary to investigate thoroughly how the export control system is operated by the Commission and Member States. We shall see it in the next section.

## II. Characteristics of EU Export Control System

Currently, the Council Regulation 1334/2000 (Hereafter "Regulation") is the effective rules of export control, though there were several amendments on the items of the list. The Regulation, 300 some pages long, is a very technical and complex document on technology, but there are various aspects that highlight the interesting feature of European particularity of export control.

### 1. Controlling intangible transfer

The majority of dual-use goods are tangible items that can be controlled at the customs.

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<sup>7</sup> Interview with Commission official, 24/11/06

<sup>8</sup> Commission of the European Communities, *Report to the European Parliament and the Council on the Application of Regulation (EC) 3381/94 Setting up a Community System of Export Controls Regarding Dual-use Goods*, Com(98) 258 final, 1998.

<sup>9</sup> See *Information Note: Council Regulation 1334/2000, as last amended by Regulation 1504/2004 : Information on measures adopted by Member States in conformity with Articles 5, 6, 13 and 21.*  
[http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc\\_126488.pdf](http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc_126488.pdf)

However, for the purpose of export control – preventing proliferation of technologies for WMD –, it is equally important to control intangible technology transfer. The Article 2(b)(iii) defines that transfer of information through telephone, fax or email should also be the subject of export control. The control of intangible transfer is already introduced in Wassenaar Arrangement, so this article is to internalize international agreement. However, there was a big debate over how to implement this article. Many Member States argued that the transfer of information through telephone conversation (oral transmission) and the movement of people. This issue is deeply involved the question of privacy and associated Human Rights, in addition to the technical difficulty of monitoring the transfer of information. As a result, the Regulation states that the exporters of information should seek authorization if he/she "reads out on phone" or equivalent actions. Also, the information which became publicly available, the transfer would not be controlled.

The intangible transfer has been a big issue in the community of export control experts and practitioners for a long time. Even the most advanced export controlling countries, United States and Japan, are struggling to hold a grip on the intangible transfer, but the "Article 18 Group" which is composed by Commission and Member States' officials on export control issued a report that development of communication technology would provide means for strengthening the control, and it can be expected that the companies would not be willing to provide sensitive information to third party because those technical information would have a high value of intellectual property<sup>10</sup>.

This statement raised a few eyebrows because it is quite optimistic about the intangible transfer, and some considered irresponsible. But at the same time, it would be very difficult to step in the sphere of privacy and Human Rights in the name of security in European political context. Thus, only Commission and Member States can do is to expect the internal compliance of the companies would function properly.

## 2. "Catch-all" control

So-called "catch-all" clause, defined in Article 4 and 5 of the Regulation, allows Member State governments to demand exporters to acquire authorization for exporting items which are not listed in the Annexes of the Regulation to the countries where arms embargo by United Nations Security Council or Organization for Security and Cooperation in Europe (OSCE) resolutions are applied. This is to prevent the development and production of WMD or using exported dual-use goods militarily in those destinations. The decision on when and which item the "catch-all" clause should be applied will only be made by Member State governments, but the destination of the export should be to those countries under embargo (however, the Article 5 allows Member States to add the list of countries which can apply "catch-all" clause). In other words, the "catch-all" provisions gave

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<sup>10</sup> European Commission, *Report to Parliament and the Council on the Implementation of Council Regulation (EC) No 1334/2000 Setting up a Community Regime for the Control of Exports of Dual-use Items and Technology: October 2000-May 2004*, September 2004.

a very strong authority and discretion to the government for deciding when the government can intercept the export of any items.

The conditions for establishing the case for "catch-all" in Europe is relatively than that of United States or Japan. Usually, there are three conditions for enacting "catch-all" clause: when the exporters are informed by the authority that the item might be used for development or manufacturing WMD; when exporters have knowledge that the item will be used for WMD related activities; and when exporters have suspicion that it might be used for WMD. In these three cases, exporters must seek for authorization from national government. But in EU, it is not required to acquire authorization in the case when the exporter has suspicion. The Article 4 and 5 allows Member States to establish national legislation for strengthening the application of "catch-all" control.

However, none of the Member States are willing to imply these articles to add more burdens onto the exporters. It is largely due to the fact that the "catch-all" provisions are putting enormous cost and pressure on the industry since the exporter would not know when and if their items which are not listed in the Annexes might become the target of control.

### 3. No-undercutting rules

One of the most sensitive issues concerning the export control is the sharing of denial information or no-undercutting rules. This means that the Member States have obligation to notify other Member States the details of the exporters and items. Without no-undercutting rules, an exporter would be able to export from a Member States even if it was denied in other. Given the freedom of the movement of goods within internal market, there would be no way to stop the exporter to ship their goods to other Member States and export from them with legitimate authorization. The no-undercutting rules would encourage Member States not only operate under single Regulation but also common implementation practice.

The Article 9 of the Regulation demands the Member States to notify the information concerning the denial of the exporters shipping items on the Annex I or on the ground of "catch-all" control to Commission and all Member States. However, the denial information would contain very sensitive data. Member States have to provide the specific information about the product specs, types, destination, and the reasons of denial. These data would not only reflect the strategic interest of the Member States but also the technological capability of particular company. Thus, Member States are reluctant to make those data publicly available. When the Regulation was implemented in 2000, the notification concerning no-undercutting rules was very limited in numbers, but gradually trust and confidence among the officials of Commission and Member States were building, together with a development of communication network among them, and the information

flow is becoming "satisfactory"<sup>11</sup>.

Interestingly, there is no obstacle for a Member State to grant authorization for the exporter whose export was denied by other Member States. Although the authorization-issuing Member State may have the denial information from the original Member State, the issuing Member State has discretion to issue on the condition of careful scrutiny of exporter's action. This tells us how strong the authority of Member States is.

Since the denial information is so sensitive, the Commission takes a step away from encouraging Member States to open and share those data<sup>12</sup>. Thus, the data is transmitted among a small community of export control circle around Brussels and Member States capitals discreetly. As far as I found out through interviews, there were sufficient volume of information circulated within this community, but most of information is general outline of the denial info without detail of specifications.

#### 4. Internal Compliance Programme

Although there is no specific provision on the promotion of internal compliance programme (ICP), the community of European export control is strongly promoting ICP for reducing administrative cost of the government. Some countries in particular are strongly promoting for companies to self-regulate the items of export by establishing a standard procedure and check list for companies to follow the export control procedures. In this way, the relevant authorities can avoid checking up all the items which may include items and destinations that do not necessarily require authorization. Companies may submit their application only those questionable items that may require authorization.

There are several Member States employing ICP as a part of their export control system, particularly those states with large volume of Trade. But more importantly, smaller countries such as Denmark provide incentives for companies to encourage companies to adopt ICP by giving preferential treatment of those companies with ICP when they export<sup>13</sup>. The industry (UNICE or BusinessEurope) is also encouraging the government to develop more systematic approach for incorporating ICP as a part of comprehensive export control scheme.

#### 5. Dialog with industry

The most important element of successful export control is a dialog with industry. No matter how government tries to impose export control, it would be impossible for the government to check every single item exported in such a heavy trade volume. Thus, ICP programme is indispensable for the government, so as the dialog with industry to communicate the problems and

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<sup>11</sup> Interview with French export control officials at the Ministry of Foreign Affairs, 21/3/07.

<sup>12</sup> Commission of the European Communities, *Report on the Implementation*.

<sup>13</sup> Danish National Agency for Enterprise and Construction. <http://www.naec.dk/complianceprogram>



improvement of public-private relationship for comprehensive export control. Some countries such as Japan and South Korea established public-private organization for export control for institutionalizing this dialog, but on the other hand, the United States government invest huge resource for controlling the exported items by government agencies. In European Union, it is substantially the role of Member States to communicate with industry, but European Commission is also involved in the dialog with industrial organizations such as BusinessEurope and ASD (Aeronautics, Space and Defence industrial organization).

According to the Commission's report published in 2004, there are several issues that industry is complaining about the current form of export control<sup>14</sup>. First, the time consuming process of export authorization. Some Member States such as Britain set up a law to issue authorization within certain period of time (two weeks in general) but other countries may take much longer time. For exporters, the timing is quite important for concluding business deals, and it would harm their business opportunity if there is no indication how long it would take to clarify the export. This would undermine the basic principle of the Regulation, which is to set "level playing field".

The second issue is the lack of transparency of "catch-all" provisions. The decision when and what items that should be controlled is defined by Member States, so that it would be extremely difficult for exporters to predict whether they need to acquire authorization. Thus, exporters have to take extra measures for double checking whether the items to certain destination require authorization. Furthermore, since the decision on "catch-all" is defined by Member States, it would benefit for the companies in the Member States which apply looser condition for "catch-all". It would eventually undermine the idea of "level playing field" and disadvantage for exporters in rigid export control.

## 6. Impact of Iraqi War

In a globalized economy, it would be useless only Europe or some industrialized countries apply export control system. The illicit exporter would find countries with loosely controlling countries and export from there to the customers who are illicitly develop WMDs, which would eventually threaten the international peace and security. This was one of the reasons why the United States and Britain strengthened the inspection in Iraq and eventually led to the invasion. However, the failure of finding WMD in Iraq showed that the inspection has certain limits to control the use of dual-use technology, and thus, it is discussed that the best course of action is to strengthen the national export control of all countries so that the illicit trade would be more difficult to take place. Furthermore, the A.Q. Khan's affair added a sense of urgency for developing international standard for export control.

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<sup>14</sup> Ibid.

In this spirit, the Resolution 1540 of United Nations Security Council (UNSC) was adopted in April 2004. This Resolution requires UN Member States to submit reports on the status of export control regulations for peer review at sub-committee of the UNSC, called 1540 Committee. The 1540 Committee would issue recommendation for Member States to improve the regulation and provide technical assistance to those countries which have difficulties for implementing regulations.

It was conceived that countries with long history of export control since Cocom era and strong administrative machinery for implementing those regulation, such as EU Member States, would not be the subject of 1540 Committee's scrutiny. However, the EU Regulation (1334/2000) was criticised the lack of certain elements of export control which is the issues of transit and transshipment control. The transit control is to require authorization for the vessels and aircraft which passes the EU Member State's territory and transshipment is to require authorization for those who temporarily unload cargo onto Member State's soil for changing vessels. In both cases, the effectiveness of the control is regarded questionable because most of the transporters have little knowledge about what they are carrying, and often those cargos have authorization from the origin of transport. Thus, the Commission and many Member States take a position that it is unnecessary for EU to adopt the transit and transshipment regulation. However, some countries such as Britain consider that it would be necessary for complying international regime and impose transit and transshipment regulations.

#### 7. Thessaloniki Action Plan

The impact of Iraqi War also influenced the intra-EU politics of security and export control. Since one of the reasons why Europe was divided over the Iraqi War was the difference of understanding of the way in which Europe deals with the proliferation issues. This concern has led to issue Solana paper, *A Secure Europe in a Better World*<sup>15</sup>, and in this document, the role of export control was treated as one of important measures to prevent proliferation of WMD. From this perspective, the export control at EU level became a subject not only within the Common Trade Policy but also an EU security policy.

Along side with Solana Paper, the European Council at Thessaloniki adopted a document titled "Action Plan for the Implementation of the Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction"<sup>16</sup> or otherwise called "Thessaloniki Action Plan". This action plan calls for strengthening international regimes such as NPT and NSG, active cooperation with IAEA, and EU taking the leadership for export control regime. In particular, four points were listed as immediate actions required: (a) establishing single global control list and clarify

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<sup>15</sup> Council of European Union, *A Secure Europe in a Better World: European Security Strategy*, Brussels, 12 December 2003

<sup>16</sup> Council of European Union, *Action Plan for the Implementation of the Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction*. Brussels, 10 June 2003.

EU's position in the global regime; (b) supporting new Member States of EU to improve export control administration and strengthening the role of the Commission; (c) improving the implementation of "catch-all" provisions; (d) strengthening the information sharing scheme on concerned countries, users and their procurement methods.

For mid- and long-term issues, six issues are listed: (a) establishing simple and easy system for application and authorization which may facilitate the adjustment for new Member States to comply with existing EU rule; (b) establishing communication channels among Member States to share denial information; (c) further strengthening dialog with industry; (d) setting up a guideline the application of the common EU Regulation for minimizing the differences; (e) encouraging peer review of application and support for new Member States; (f) providing technical assistance to those Member States needed.

The Thessaloniki Action Plan was indeed a leap forward from traditional binary contest of the competence between the Commission and the Member States. The enlargement cast a huge shadow over the capability of EU to implement effective export control, and therefore, it was regarded that the competence of Member States (particularly of those new states) would undermine the achievement and reputation of the European states on international export control regime, particularly when EU wanted to claim the international leadership. As a result, this Action Plan gives a lot of responsibility for the Commission to deal with the situation of New Member States and unified approach for the implementation of the Regulation. And the logical consequence of this new development was to encourage existing Member States to share denial information and unified form of the application of "catch-all" provisions.

The decision at Thessaloniki Council was remarkable in a sense that the export control was no longer the issues of balancing the "security" and "commercial" interests. The launch of ESDP and Iraqi War marked a new phase of export control in Europe that the unified approach is indispensable for establishing European leadership in the international forum and necessary condition for securing European and international security, as well as setting up a level playing field for industry.

### III. Enlargement and Problems of Export Control

The enlargement of 2004 and 2007 has been a serious concern for the old Member States of the EU. The new Member States, of which most of them was on the other side of Cocom regime during the Cold War, were considered that they don't have any common heritage of the principle of, nor technical and administrative capacity for export control at the same level of old Member States. Some of them were not the member of international regimes by the time of accession, and although they accepted the *acquis communautaire* including the Regulation 1334/2000, but the effectiveness of implementing the Regulation was seriously doubted. Furthermore, some Member States share

the borders with former Soviet Union republics such as Russia, Ukraine and Moldova, where export control and arms control are much looser than those of EU. Cyprus in particular is in a very unique situation where it is still a party of internal conflict, and therefore, the trade of arms and dual-use technology may not fully controlled by the central government.

The Commission argues that new Member States have accepted and adopted acquis communautaire to a large extent, and they have incorporated the rules and regulations for intangible transfer of technology and "catch-all" in their domestic legal system. Furthermore, the level of their domestic technology concerning WMD is not high, and the application of authorization is limited to relatively small number (on average 300 applications annually, and 1,300 applications at maximum, compared to 30,000 in larger old Member States), so individual licensing is good enough for effective control<sup>17</sup>. Furthermore, the Commission considers that the Thessaloniki Action Plan is effectively improved the technical capability of new Member States<sup>18</sup>.

However, what is certain through the process of enlargement and accommodating new Member States is that it would be more and more difficult to rely on the good will of the Member States to adopt and implement the Regulation. For a long time, export control system was based on the willingness of the Member States to implement the control because it serves for the interest of Member States. But today, the Member State's interest may not lie in safeguarding international security but promoting their short-term economic interests for exporting the goods to concerned destinations. It is still difficult to say that the norms and patterns of behaviour is shared with new Member States for implementing effective control, and thus, further institutionalization of the Regulation and intervention by Commission are considered to be a necessity. Otherwise, it would not be able to achieve the goals that were demonstrated in the Thessaloniki Action Plan.

#### IV. Evaluation

Institutionally, the Council Regulation 1334/2000 and Thessaloniki Action Plan brought "security" and "commercial" interest closer, and the Member States were gradually accepting greater role for the Commission to play. However, whether this new system of export control is working properly or effectively should be analyzed. In this regard, the annual peer review, issued by Council as defined in the Thessaloniki Action Plan, would provide good landscape of what has achieved in recent years, particularly after the enlargement.

##### 1. Annual Peer Review

With two annual peer reviews in 2005<sup>19</sup> and 2006<sup>20</sup>, it can be said progress can be seen in

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<sup>17</sup> Commission of the European Communities, *Report on the Implementation*.

<sup>18</sup> Interview with Commission official, 24/11/06

<sup>19</sup> General Secretariat of the Council, *Implementation of the recommendations of the Peer Review of Member States' export control systems for dual use goods: Report on progress made in 2005 noted by Council on 12 December 2005*,

the following issues:

- Establishment of an electronic database recording denial notices;
- Systematic and timely notification on information by Member States to the Commission on national legislation;
- Pooling technical experts to assist in recognition of dual-use items subject to control and increasing cooperation between Member States;
- Coordinating the implementation of "catch-all" based on the agreement by Member States and EU institutions on coordinated and efficient implementation of "utmost vigilance" for exports of certain items to certain destinations.

However, there are many items which left without little, if any, achievements. Those are:

- Aspects related to transit, transshipment and brokering of dual use items which was supposed to be aligned with the UNSC Resolution 1540;
- Controls of intangible technology transfer;
- Creating level playing field for exporters and consistency of application of the Regulation;
- Promoting the competitiveness of EU industry by easing regulatory burdens;
- Adoption of best practices and administrative measures.

As far as we can understand from these peer review reports, the institutional arrangement has made some progress to facilitate better coordination among Member States and Commission, but the concerns for difficult measures, particularly the questions on the item selection, intangible transfer, and relationship with industry, were still unsolved. This analysis indicates that the old "security" and "economic" interest dichotomy has shifted towards more on "security" side, and Member States have gave up their jealously guarded national control authority to EU level to a greater extent, while industry was unsatisfied the ways in which the application of the export control system was implemented.

Although Member States still own the authority for rule-making and implementation of the export control system, the normative understanding has changed dramatically as the importance of preventing proliferation of WMD technology became an international concern though the cases of Libya, Iran, North Korea, and A.Q. Khan's network. Without these changes in external environments, it would have taken more time for EU to develop a coherent normative ground on the export control system.

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151826/05 PESC 1171, 15 December 2005.

<sup>20</sup> General Secretariat of the Council, *Implementation of the recommendations of the Peer Review of Member States' export control systems for dual use goods: Report on progress made in 2006 noted by Council on 11 December 2006*, 16507/06 COMER 226, 12 December 2006.

## 2. Commission's communication and impact assessment

Following the Annual Peer Review of 2006, the Commission issued a communication document<sup>21</sup> with extensive recommendations for improving export control environment in Europe. What is interesting in this communication was that the Commission conducted "impact assessment" of the modification of the Regulation on to the main actors of export control<sup>22</sup>. The focus of this impact assessment was the cost-effectiveness of the Regulation changes, which meant that any changes in the Regulation should not increase burden for exporters and industry but to facilitate for improving international competitiveness.

In this regard, the Commission's document argues that transit and transshipment control, although it was required by UNSC resolution 1540, should be conducted only when the intelligence source notify the necessity of controlling the transactions. In other words, the implementation of transit and transshipment control would be based on *ad hoc* application, which might lead to a situation where the exporters have to bear extra cost for meeting the requirement as in the case of "catch-all". Also, the document concludes that the brokering (i.e. intermediation services of dual-use items disguised in legal trade but transfer to proliferators) would be difficult to control if the operation is conducted abroad. Thus, the Regulation should be applied only when the activities are taken place within EU and to the cases where the broker is aware that the items in question could be used for proliferation purposes.

Other interesting recommendations noted in the communication were introducing "global export authorizations" and introduction of "comitology" procedure. The idea of global export authorizations would imply that the Commission and the Member States would provide wider authorization to companies with good practice. This means if a company firmly establishes ICP and good record of compliance to the Regulation, the exporter would receive a "global" authorization to allow certain items to export any countries except countries of arms embargo. It would reduce burden on the exporter's shoulder as well as administrative cost of Member States. However, the crucial problem is how to define the "good" practice, and which items that should be granted the global authorization.

The introduction of "comitology" procedure is another interesting proposal. Since 2000, most of dialog was taken place at the "Article 18 Committee" where the officials of export control from Member States and the Commission gather and discuss for consultation only. But the idea to introduce "comitology" procedure is to upgrade the Article 18 Committee to a "comitology" with law-making competence. This would speed up the decision-making of the changes of control list and practices of export control, but at the same time, some Member States, particularly France and

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<sup>21</sup> COM(2006) 828 final, *Communication from the Commission on the Review of the EC Regime of Controls of Exports of Dual-use Items and Technology*, 18 December, 2006.

<sup>22</sup> Interexport Management Systems, *Impact Assessment Study on Possible Options for the Modification of the EU Regime on Export Control of Dual-use Goods and Technologies*, released 20 February 2006.

Germany, concerned the difficulty of maintaining national control over the decision-making<sup>23</sup>. Although there has been a significant convergence among the Member States on "security" interests, there remains the difference of "economic" interests. The competition within the single market is getting intensive in the globalized economy, and recent change of the mood toward European market, demonstrated as "economic patriotism" in France, suggests the Member States are concerning the competitiveness of their domestic industry. Most of the companies that applies authorization of dual-use technology are the ones with high technological capability, and needless to say, strategically important industries. Thus, some Member States are strongly concerned with the competitiveness and employment of those strategically important industries, and therefore, they are sensitive about maintaining the final say on the decision on export control regulation. Given the fact that Member States would be able to send their representatives to the "comitology" process, but it may incline to make technical judgement rather than strategic one. This is what Member States are concerned about. Although we don't know what would be the reaction and outcome to the proposal, but it can be assumed that a rocky road is ahead.

#### V. Conclusion

This paper discussed the current status of EU export control with a focus on institutional arrangement. From this discussion, it became clear that the export control system in Europe is based on a very delicate balance. First, it needs to balance between the competences between the Commission and the Member States. Since the Regulation 1334/2000 and Thessaloniki Action Plan, the balance is shifted towards Commission side. However, Member States are still trying to maintain the final say on certain issues, and the balance should be struck at certain point.

Secondly, there is a delicate balance between large and small Member States. The technological capability between these Member States is significantly different, and therefore, the "economic" interest in export control system is difficult to converge. This can be clearly seen in the balance between the old and new Member States. Most of the new Member States are not the main actors of export control with current technological standards. However, there is a continuous flow of investment from old to new Member States, and the movement of goods are also guaranteed. If any proliferators want to export from Europe, they would find a loop hole of the system, and they may use the loosely controlling state as a stepping stone for exporting to third countries in concern. It is necessary for both old and new Member States to share information, practice, and notably the normative understanding of export control system, in order to strengthen the effectiveness of export control system.

Finally, there is a delicate balance between "security" and "economic" interests. The export control is inherently located in both "trade" and "security" issues. EU and Member States

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<sup>23</sup> Interview with French export control officials at the Ministry of Foreign Affairs, 21/3/07.

are vigorously promoting international competitiveness in high-tech industry (e.x. Lisbon Strategy) while promoting more comprehensive export control rules. From European industry's perspective, it seems contradictory that on the one hand, EU is promoting export and international competition while regulating and refraining the exports.

In these ways, the governance of export control is standing on delicate and multi-facet balances. However, as the Annual Peer Review and recent Communication document demonstrates, it would be difficult to imagine that the Member States will have a strong authority over export control as in the Cold War period, or Commission and Member States focusing on international competitiveness in the expense of export control to proliferators. What would happen is that the Commission and Member States will continue this gradual trend for shifting the competence to the Commission, while maintaining the final say of the Member States, to promote much stronger governance system of export control.

After all, what is needed for Europe is to have a firm and reliable export control system in order to satisfy the international community. If European system is not reliable, it would undermine the stability of international security. It is the responsibility for Europe, an important exporter of dual-use goods and technology, to export their goods in good hands. In short, it is the interest for Europe to strengthen export control system because it would authenticate exports of high-tech, dual-use goods and technologies.