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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

Report on export authorisation in 2017 and 2018 pursuant to the Regulation concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment

1. Introduction

Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment[1], imposed certain restrictions on trade. These restrictions concerned in particular a near absolute prohibition on exports from and imports into the European Union of goods included in Annex II, and a prior authorisation requirement for exports of certain other goods listed in Annex III or in Annex IIIa.

Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (hereinafter "Regulation (EU) 2019/125")[2] codifies and repeals Council Regulation (EC) No 1236/2005[3].

Article 26(3) of Regulation (EU) 2019/125 provides that Member States shall make a public, annual activity report, providing information on the number of applications received, on the goods and countries concerned by these applications, and on the decisions they have taken on these applications. Article 26(4) provides that the Commission shall prepare an annual report comprised of the annual activity reports published by the Member States and make it publicly available.

This first report provides information on Member States' authorisation activities concerning exports of goods which could be used for torture or for capital punishment, in 2017 and 2018.[4]

All 28 Member States reported on the number of export authorisations that were granted and refused under Articles 11(1) and 16(1) and on the goods and countries of destination concerned by them. Except for one Member State, they also reported the numbers or quantities of goods authorized for export and the category of end-user to which those goods would be supplied.

1 OJ L 200, 30.7.2005, p. 1.
2 OJ L 30, 31.1.2019, p. 1.
3 See Annex X to Regulation (EU) 2019/125 for a list of the amendments.
4 This report does not provide information on exporters' use of the Union General Export Authorisation for export of goods listed in Annex IV (Annex V to Regulation (EU) 2019/125).

Authorisations under Regulation (EU) 2019/125

Articles 11(1) and 16(1) of Regulation (EU) 2019/125 require an authorisation for exports[5] of goods listed in Annex III and in Annex IV, respectively. Annex III concerns certain goods that could be used for the purpose of torture or other cruel, inhuman or degrading treatment or punishment. Annex IV lists certain goods that could be used for the purpose of capital punishment. Except where the Union General Export Authorisation set out in Annex V is used for exports of goods listed in Annex IV, the authorisation has to be obtained from the competent authorities in the relevant Member State, as listed in Annex I.

Exports to destinations listed in the Union General Export Authorisation can usually take place pursuant to the Union General Export Authorisation without the need to obtain an individual or global authorisation granted by a Member State. These destinations are countries that have abolished capital punishment for all crimes and confirmed that abolition through an international commitment. However, if there is reasonable suspicion about the exporter's ability to comply with the terms of the authorisation or with a provision of the export control legislation, the competent authority may prohibit the exporter from using the Union General Export Authorisation.

Article 20(2) of Regulation 2019/125 provides that an authorisation for exports granted by a Member State can be an individual authorisation (an authorisation for exports to one end-user or consignee in a third country) or a global authorisation (an authorisation for exports to one or more specified end-users or distributors in one or more specified third countries)[6].

Articles 3, 4 and 5 of the Regulation prohibit exports, imports and transit of the goods listed in Annex II. Competent authorities may grant a derogation from the prohibition, but only if it is demonstrated that the goods concerned will be used exclusively for public display in a museum (either in a third country or, as regards Article 4, in a Member State) in view of their historic significance.

5 Article 2(d) of Regulation (EU) 2019/125 defines ‘export’ as ‘any departure of goods from the customs territory of the Union, including the departure of goods that requires a customs declaration and the departure of goods after their storage in a free zone within the meaning of Regulation (EU) No 952/2013 of the European Parliament and of the Council’.

6 Full definitions for the terms ‘individual authorisation’ and ‘global authorisation’ are set out in Article 2 (p) and (q), respectively.

2. Authorisations granted and refused

2.1 In 2018, the total number of reported authorisations amounted to 231, with 11 Member States reporting that they had granted authorisations. In 2017, the total number of reported authorisations was 292, granted by 12 Member States. The remaining Member States informed the Commission that they have not received any applications for authorisations pursuant to Regulation (EU) 2019/125.

As the definitions of individual authorisation and of global authorisation given in Article 2 of the Regulation do not include a quantitative element, an indication of the number of authorisations granted does not give an indication of the number or quantity of goods concerned by these authorisations. Furthermore, the calculated number or quantity of authorized exports from the entire EU gives an incomplete picture because one Member State did not provide any information on the number or quantities of goods and the categories of end-users concerned.

2.2 Some Member States reported that they had not received any applications. The following facts may explain why some Member States have not received any applications for individual or global export authorisations.

In the first place, the list of goods requiring an export authorisation, which is set out in Annexes III and IV to Regulation (EU) 2019/125, is quite limited and the export authorisation requirement of the Regulation does not apply to supplies of goods to customers in the customs territory of the Union.

In the second place, Article 20(2) of the Regulation provides that an exporter needs to obtain an authorisation from the competent authority of the Member State where that exporter is resident (natural person) or established (legal person or entity).

Finally, a portion of exports of certain anaesthetic agents listed in Annex IV takes place pursuant to the Union General Export Authorisation set out in Annex V to Regulation (EU) 2019/125. Exports of those goods to the countries listed in Annex V can usually take place without an individual or a global export authorisation.

2.3 Regulation (EU) 2019/125 imposes an export authorisation requirement in order to have the competent authorities check whether there are indications that, if exported, the goods might be used for torture or other cruel, inhuman or degrading treatment or punishment (Annex III) or for capital punishment (Annex IV). To that end, Article 20(8) of the Regulation provides that the competent authority should receive "complete information in particular on the end-user, the country of destination and the end-use of the goods".

During the two-year period, nine applications for an export authorisation were reported as dismissed: five in 2018 and four in 2017. The reported cases of dismissal in 2018 concerned certain intended transactions with customers in Bangladesh, China (Macao), Egypt, Moldova and Vietnam, whereas in 2017

the rejections concerned certain intended transactions with customers in Côte d'Ivoire, Kazakhstan, Togo and Moldova. The unauthorized transactions primarily concerned goods listed in Annex III; those with Bangladesh and Egypt, however, would have involved goods listed in Annex IV.

Such a dismissal, also known informally as a 'denial', typically means that the exporter has not provided the competent authority with sufficient information to show that, in the case at hand, the goods concerned were going to be used for a legitimate purpose. In other words, a denial does not necessarily imply that there was evidence that the goods were going to be used for torture or for capital punishment.

2.4 The information Member States provided to the Commission typically does not distinguish between individual authorisations and global authorisations. One Member State mentioned that it had granted three global authorisations concerning goods listed in Annex III; they concerned exports of goods that certain national authorities were going to use to fulfil their duties abroad.

2.5 Articles 3, 4 and 5 of Regulation (EU) 2019/125 prohibit the export, import and transit of the goods listed in Annex II, respectively. The Regulation allows the competent authorities to grant a derogation from the prohibition, but only if it is demonstrated that the goods concerned will be used exclusively for public display in a museum (either in a third country or, as regards Article 4, in a Member State) in view of their historic significance. The competent authorities reported that they have not granted such authorisations in 2017 and in 2018.

2.6 Annex 1 to this report provides information on the number of export authorisations granted by Member States in 2017 and 2018. Exports pursuant to the Union General Export Authorisation (Annex V to Regulation (EU) 2019/125) are not included in the information on the number of authorisations granted by Member States.

3. End-users

3.1 The information received by the Commission allows making a distinction between end-use for law enforcement, end-use by security firms, medical end-use (hospitals and, veterinary use) of goods listed in Annex IV, industrial use (in particular of oleoresin capsicum listed in Annex III) and exports to trading firms.

3.2 The information that was provided indicates that trading firms represent an important part of the exports of portable electric discharge weapons, of portable weapons or equipment for administering a dose of an incapacitating or irritating chemical substance, and of thiopental sodium salt. It is unclear whether the second paragraph of Article 12(3) of Regulation (EU) 2019/125, which provides how the competent authority should assess exports of

pelargonic acid vanillylamide (PAVA) and of oleoresin capsicum (OC)[7] to a distributor, was applied by analogy when assessing those exports.

3.3 As stated above, one Member State did not provide information on the category of end-users concerned by its authorisations.

3.4 Annexes 2 and 3 to this report summarise the information provided to the Commission on trade volume and end-use of authorized exports in 2017 and 2018, respectively.

4. Goods and countries of destination concerned by the export authorisations

4.1 The information provided by the competent authorities sometimes includes authorisations for exports to destinations listed in the Union General Export Authorisation (Annex V to Regulation (EU) 2019/125) of goods listed in Annex IV. Such exports can usually take place pursuant to the Union General Export Authorisation without obtaining an individual or global authorisation granted by a Member State. It is not clear whether in those cases the terms of the Union General Export Authorisation were not met or whether there is another explanation. For example, it is possible that the exporter preferred to obtain an individual or a global authorisation.

4.2 One Member State did not specify to which of the goods listed in Annex IV the reported authorisations relate. The destinations of the exports that were authorized by that Member State are included in the summary under the heading 'Other or no Annex IV specification'.

4.3 Another Member State reported that goods had been 'exported' to one of the Channel Islands. This information was not taken into account for the purposes of the present report, since such a supply does not qualify as an export defined in Article 2(d) of Regulation (EU) 2019/125.

4.4 Annexes 4 and 5 to this report provide information on the destinations of the exports that Member States authorized in 2017 and 2018, respectively. If a particular name is used in the list of destinations, it should not be construed as going beyond referring to a (customs) territory commonly known by that name.

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[7] See points 3.2 and 3.3 of Annex III to Regulation (EU) 2019/125.