Dual Use Goods and the European Community: Problems and Prospects in Eliminating Internal Border Controls on Sensitive Products

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INTRODUCTION

In its continuing attempt to create a single, unified market throughout the European Community (EC or Community), the European Commission (Commission) has sought to eliminate internal border controls on dual use goods and technology, including nuclear materials.1 "Dual use" goods are "any goods, related technologies, technical and scientific information, including know-how and engineering expertise, as well as certain nuclear products and technologies, which can be used for either civil or military purposes."2 While efforts to create a single market for goods are proceeding well,3 and many problems have been solved,4 the problem of eliminating internal border controls on dual use goods and technologies still remains.5 The Community, however, expects to eliminate most, if not all, internal border controls on these goods by the end of March, 1993.6

This Comment discusses the regulation proposed by the Commis-

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4 Id.
5 Id.
6 Id. According to the General Affairs Council, the gap in removing these border controls was supposed to be filled by the end of March, 1993. Id.
sion7 to eliminate internal border controls on dual use goods and technologies. It examines the problems and prospects of removing internal controls, as well as the difficulties the Commission faces in drafting a regulation that both eliminates internal controls and ensures that dual use goods are not exported to countries and groups that pose a threat to global stability. Part I provides the backdrop for the effort to control dual use goods. This part examines the growing threat posed by radical regimes and terrorists obtaining dual use technology and products and explores the EC's efforts to prevent diversion of dual use goods. Part II examines developments in the Community prior to the Commission's proposal for the control of dual use goods and technologies. Part III analyzes the proposed regulation, setting out in detail the Commission's proposals to eliminate interior border controls while preventing the diversion of dual use technology and products. Part IV discusses the effectiveness of the proposed regulation. This Comment concludes that while there is a compelling need to eliminate all internal border controls in order to complete the internal market, the Community and the Commission must also ensure that the EC's external customs regulations are sufficiently stringent and uniform to prevent dual use goods from being exported to "trouble spots."

I. THE QUEST FOR A POLICY ON DUAL USE GOODS AND TECHNOLOGY

A. The Growing Threat of Radical Regimes and Terrorists Obtaining Dual Use Technology

Preventing dual use goods and technology, particularly nuclear goods and technology, from falling into the hands of radical regimes and terrorist groups has long been a national policy of many members of the international community. It is relatively easy to prevent the export of weapons and ordnance to particular countries.8 Dual use goods, however, are much more difficult to control, because governments can always maintain that they are being exported for an innocent purpose.9

7 See generally Proposal on the Control of Exports of Certain Dual-Use Goods, supra note 2.
9 Id.
Several incidents in the past several years underscore the need for international cooperation in controlling exports of dual use goods and technology, including nuclear products. In 1988, four scientists charged that at least two tons of British plutonium, enough to make 400 nuclear warheads, were unaccounted for, and may have been diverted from civilian to military use. While not confirmed by the Central Electricity Generating Board, which controls nuclear power stations in the United Kingdom, the possibility that as much as two tons of plutonium could have been diverted from civilian to military use shows that the need for an international policy on dual use goods and technology is urgent.

In the summer of 1991, Hungarian detectives broke up a major uranium smuggling ring when they discovered enriched uranium pellets stolen from a Rumanian nuclear reactor. A few months later, more enriched uranium pellets from the same Rumanian reactor were found in Italy, being sold by another group of Hungarians. In March 1992, German officials arrested two Russians for allegedly trying to sell enriched uranium for $1.1 million. In April 1992, Hungarian customs officers seized a shipment of hafnium shipped in from Russia. The size of the shipment was enough to supply a nuclear industry—or a nuclear weapons program—for several years. Finally, in July 1992, police in Austria arrested four Hungarians, three Czechoslovaks, and an Austrian as they were about to sell 1.3 kilograms of weapons-grade uranium to an Austrian middleman. It is thus imperative that the EC implement an export policy for dual use goods to ensure that, once internal barriers are eliminated, these goods and technologies will not be exported to terrorists or other radical governments.

While the end of the Cold War has seen the United States and Russia pledge to cut their nuclear forces by as much as two-thirds, a new and potentially more dangerous threat has replaced that of

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11 British Plutonium Allegedly Missing, supra note 10, at C12.
12 Id.
13 Kaufman, supra note 10.
14 Id.
15 Id.
16 Id. Hafnium is a material used to absorb nuclear radiation. Id.
17 Id.
18 Kaufman, supra note 10.
superpower nuclear confrontation. A black market for nuclear material, nuclear weapons, and nuclear scientists is emerging, and government officials and intelligence analysts say this black market poses one of the greatest risks of the next decade. Authorities fear that materials from dismantled nuclear weapons, plus nuclear technology and nuclear specialists from eastern Europe and the former Soviet Union, could go on sale in the newly emerging nuclear black market. This flow of nuclear materials and knowledge could bolster the nuclear weapons programs of Iran and Syria, and increase the possibility that Libya, Algeria, or North Korea will develop a nuclear weapon. Furthermore, this new flow of brain-power and bomb-making technology may provide terrorist organizations with a new, and even more devastating, weapon.

Despite efforts by both Russia and the United States to retrain and find new occupations for weapons designers inside the former Soviet Union, it is only a matter of time before these scientists offer their services to the Middle East or to other countries interested in building nuclear weapons. Nuclear scientists in Russia are leaving their jobs and taking new ones at a rapid rate, indicating a dissatisfaction with working conditions in the field. The turnover rate for such jobs in the former Soviet Union used to be less than 1 percent. Some estimates now put the turnover rate at 20 to 30 percent. Yet, despite all of these reasons for growing concern, the International Atomic Energy Agency (IAEA), the agency designed to be the world's nuclear policeman, is practically helpless, as it finds itself burdened by Cold War structures and attitudes. Critics of the IAEA believe it is incompetent to stop the growing proliferation of nuclear materials, technology, and know-how.

B. The European Community and Dual Use Exports

To combat the threat of the exportation of dual use technology to undesirable countries, and to implement the single market fully,
the Commission is working on a regulation that would eliminate intra-Community border controls, while at the same time strengthening controls over exports from the Community to third countries. The Treaty Establishing the European Economic Community (EEC Treaty) allows Member States to maintain as many restrictions on weapons trade as they deem necessary. Dual use goods, however, are not considered weapons. Until recently, Member States imposed their own regulations on the export of dual use goods because the Community had not developed common rules on exports toward third countries. As a result, national controls applied not only to exports to third countries, but also to exports to other Member States.

National policies vary tremendously from country to country, as do the penalties for violating the rules. Some Member States impose fines of £11,400, while others place no limits on the fines, or recommend imprisonment of up to seven years for violations. Moreover, Member States differ as to which countries should receive the exports. For example, Germany does not export weapons to Saudi Arabia, whereas the United Kingdom considers the Saudis a key weapons market. Differences on export licenses, the list of products subject to restrictions, and the list of countries of destination, also vary from Member State to Member State. As a result of all of these differences, a product refused for export in Britain, for example, may be allowed to be exported from another country, such as Portugal.

II. DEVELOPMENTS PRIOR TO THE PROPOSED REGULATION

To bring dual use goods and technologies into the single market, the Commission sought a regulation that would impose common

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30 See generally Proposal on the Control of Exports of Certain Dual-Use Goods, supra note 2.
31 TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 223.
32 Commission to Appeal for Abolition of Export Controls, supra note 1.
33 Torres, supra note 3.
35 Id.
36 At an exchange rate of £1.52 to the dollar, this would be equivalent to a fine of $17,328.
37 Hill, supra note 34, at 4.
38 Johnson, supra note 8.
export policies throughout the EC. The Commission wanted to abolish internal frontier controls on dual use goods by the end of 1992. On July 17, 1992, the Commission proposed a framework agreement on export controls of dual use goods. The Commission based the proposal on the mutual recognition of current national regulations in Member States. The proposal was designed to eliminate intra-EC frontier controls on dual use goods and technologies, including some nuclear products.

The Commission's proposal rested upon four elements. First, there had to be approval of common criteria to be fulfilled before an export license for export outside the EC would be granted. Second, a precise list of products qualifying as dual use goods had to be drawn up. Third, a list of potential destination countries had to be drafted. Finally, there had to be a comprehensive list of cooperation procedures between the Member States. The Commission believed that, in addition to lifting the obstacles to a single market, removing internal frontier controls on these products would also help to strengthen controls over exports to third countries.

Although the Member States agreed that dual use goods would not be subject to internal border controls after January 1, 1993, other difficulties have prevented the EC from adopting a policy on the export of these products. The European Parliament postponed a final vote on the regulation twice since January 1, 1993 because of problems in drafting the list of products to be considered as dual use goods and the list of countries to which export would be banned. The European Council is having difficulties drafting the

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43 Common System for Controlling Sensitive Exports, supra note 40. This framework agreement would eventually become the proposed regulation, after some modification. See id.
44 Id.
45 Commission to Appeal for Abolition of Export Controls, supra note 1.
46 Id.
47 Id.
48 Id.
list of countries to be banned from receiving exports because of the political and diplomatic problems such a list may pose. Moreover, because of these political and diplomatic concerns, the European Parliament does not have the same powers as it has on other Community matters.

For the regulation to be effective, Member States must establish a "contract of trust." Some Member States, however, notably Germany and the United Kingdom, do not believe that other EC countries will be able to improve their export controls rapidly enough. To resolve this problem, the Commission requires application of common criteria throughout the EC, a mechanism for coordinating licensing and enforcement, administrative cooperation between Member States, as well as establishing a common list of dual use goods subject to control and a list of proscribed destination countries.

III. THE COMMISSION'S PROPOSAL FOR THE CONTROL OF CERTAIN DUAL USE GOODS AND TECHNOLOGIES

In its proposed regulation, the Commission recognized that intra-EC export controls on dual use goods and technologies pose a problem for the completion of the single market. Such internal frontier controls pose a problem because, in an effort to prevent these goods and technologies from being diverted for unauthorized uses, Member States apply controls on trade between Community countries as well as on trade to third countries. As a result, the Commission sought to break down internal barriers to trade in dual use goods, while at the same time preventing such products from being more easily exported to sensitive or proscribed locations. The Commission concluded that an effective solution must be based on the following considerations: (1) export controls on such goods and technologies are subject to the EEC Treaty; (2) these products

54 Id.
55 Common System for Controlling Sensitive Exports, supra note 40.
56 Dual Use Goods, supra note 42, at 2.
57 Id.
58 Proposal on the Control of Exports of Certain Dual-Use Goods, supra note 2, at 2.
59 Id. "[T]o eliminate or minimise the risk of diversion, controls are generally applied on trade between the Member States themselves in addition to the controls which are applied on trade between the individual Member States and proscribed or sensitive destinations." Id.
60 See id.
should move as freely between Member States as they do within each Member State; (3) an indispensable prerequisite for the elimination of internal controls is the establishment by all Member States of effective controls based on common standards; (4) the means used to eliminate internal frontier controls on dual use goods should not contravene the EEC Treaty; and (5) the controls applied on dual use goods and technologies under management such as the Coordination Committee for Multilateral Export Controls Concerning Missiles (COCOM) and the Nuclear Non-Proliferation Treaty, as well as foreign policy controls applied by the Member States, must be covered by the regulation. 61

Moreover, the Commission identified five requirements that must be met so that internal border controls on trade in dual use goods could be eliminated. 62 First, the Member States must draw up a common list of dual use goods and technologies which are subject to control. 63 Although individual Member States currently are working on this list, the Community must implement it at the Community level, so that all Member States execute the regulation in a uniform and direct way. 64 Second, the Community must draft a common list of destinations, although the Commission did not address whether this list proscribes or permits exports to certain countries in its proposed regulation. 65 Third, the Community must institute common criteria for issuing export licenses for export from the Community. 66 Fourth, there must be some mechanism to coordinate licensing and enforcement policies and procedures. 67 Finally, there must be explicit procedures for administrative cooperation between the customs and licensing offices throughout the EC. 68 While the proposed regulation has met most of these requirements, the lists of products subject to control and the list of destination countries are not complete yet. 69

The Commission recognized that controls on intra-Community trade only can be dismantled if all Member States have confidence in the other Member States’ controls of exports to third countries. 70

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61 Id.
63 Id.
64 Id.
65 Id. at 3.
66 Id.
67 Proposal on the Control of Exports of Certain Dual-Use Goods, supra note 2, at 3.
68 Id.
69 Parliament and Council Still Have Diverging Views, supra note 53.
70 Proposal on the Control of Exports of Certain Dual-Use Goods, supra note 2, at 3.
Thus, a regulation instituted at the Community level is necessary to achieve the twin objectives of eliminating internal controls on dual use goods and applying effective controls on dual use goods exports to third countries.\textsuperscript{71} The proposed regulation provides the environment within which each Member State will apply controls on the exports of dual use goods to third countries.\textsuperscript{72} To ensure that the regulation will be applied effectively once adopted, the Commission has established a coordinating group with the tasks of examining any questions on the export of dual use goods, facilitating the execution of the regulation, and collecting all useful information for applying the regulation in the Member States.\textsuperscript{73}

The proposed regulation's purpose is to ensure that Member States apply the necessary controls, according to common standards, on exports or re-exports from the Community of certain dual use goods and technologies and of certain nuclear products.\textsuperscript{74} To achieve this objective, the proposed regulation requires an authorization for the export of any goods appearing on the common list of products subject to control.\textsuperscript{75} In addition, article 4 of the proposed regulation requires an export license for the export of a product not contained in the common list of products, if the exporter knows, or has been informed by the government, that the goods to be exported will be used, in whole or in part, for developing, producing, maintaining, detecting, identifying, or disseminating any conventional, chemical, biological, or nuclear weapon, or for developing, producing, maintaining, or storing any missile capable of delivering such a weapon.\textsuperscript{76} In other words, if the exporter or government becomes aware that any goods to be exported could be used for military purposes, the exporter must apply for an export

\begin{itemize}
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Id. at 4.
\item \textsuperscript{73} Id.
\item \textsuperscript{74} Id. at 11.
\item \textsuperscript{75} Proposal on the Control of Exports of Certain Dual-Use Goods, supra note 2, at 12. As noted above, this list has not been completed yet. See supra text accompanying note 69.
\item \textsuperscript{76} Proposal on the Control of Exports of Certain Dual-Use Goods, supra note 2, at 12. Article 4 provides:

\begin{verbatim}
An authorization shall be required for the export or re-export of any goods not listed in the complementary regulation provided for in Article 3 if the exporter is aware, or has been informed by his government, that the goods in question are, in their entirety or in part, intended for use in connection with the development, production, maintenance, detection, identification or dissemination of conventional, chemical, biological or nuclear weapons and the development, production, maintenance or storage of missiles capable of delivering such weapons.
\end{verbatim}

Id.
\end{itemize}
license and must comply with the requirements for getting an export license.\textsuperscript{77}

Aside from being able to prevent the export of goods not on the common list of controlled products, licensing authorities in the Member States also may prohibit, in their discretion, the export of products not covered by the common list.\textsuperscript{78} The Commission included article 5 in the proposed regulation to allow Member States to prevent the export of goods not listed on the common list where officials have reason to believe that the products could be used for a purpose incompatible with commitments to international agreements.\textsuperscript{79} Thus, while creating a Community-wide system of controls on exporting dual use goods, the proposed regulation also vests each Member State with at least some authority to apply its own restraints, although the European Council can overrule a Member State's refusal to grant a license.\textsuperscript{80}

The competent authorities\textsuperscript{81} of the Member State in which the exporter is established grant export authorizations.\textsuperscript{82} Once issued, an export license is valid in any EC country, no matter which country issued it.\textsuperscript{83} For example, a security export license granted by United Kingdom authorities to a British company would be valid in Greece

\footnotesize
\begin{itemize}
\item[77] See id. For a full discussion on the requirements for an export license, see \textit{infra} text accompanying notes 101—08.
\item[78] Id. at 13. Article 5 provides:
\begin{quote}
Notwithstanding Article 4, the competent authorities may prohibit the export or re-export of goods not listed in the complementary regulation provided for in Article 3; they shall immediately so inform the Commission and the other Member States, who shall consider the matter.
\end{quote}
A decision on the repeal or continuation of this measure shall be taken by the Council on a proposal from the Commission.

\item[79] Proposal on the Control of Exports of Certain Dual-Use Goods, \textit{supra} note 2, at 5. For example, if a Member State is a party to an international agreement banning exports to a third country, say, Libya, then that Member State has the authority to deny permission to export because of that international agreement. See \textit{Common System for Controlling Sensitive Exports}, \textit{supra} note 40.
\item[80] See Proposal on the Control of Exports of Certain Dual-Use Goods, \textit{supra} note 2, at 13.
\item[81] “Competent Authorities” are defined in the proposed regulation as “the authorities in each Member State given responsibility for ensuring that this Regulation is implemented.” \textit{Id.} at 12.
\item[82] Id. at 13.
\item[83] Id. Article 6(1) states that “[a]n export authorization shall be granted by the competent authorities in the Member State in which the exporter is established. The authorization shall be valid throughout the Community.” \textit{Id.}
\end{itemize}
or any other Member State.\textsuperscript{84} The license is valid, however, only if the exporter meets the requirements attached to it.\textsuperscript{85}

The proposed regulation requires that an exporter obtain an export license for each item to be exported.\textsuperscript{86} The competent authorities in each Member State may, however, grant simplified formalities to exporters who request them.\textsuperscript{87} Member States may issue a general authorization for a particular type or category of dual use goods, as well as a general authorization for export to one or more third countries.\textsuperscript{88} In addition, general authorizations may be granted to an exporter who is exporting goods to countries which appear on a list to be drawn up.\textsuperscript{89} While the Commission welcomes and encourages such simplified procedures,\textsuperscript{90} article 7(4) prohibits such simplified procedures for a select list of goods.\textsuperscript{91}

To ensure uniform application of the regulation throughout the Community, the Commission drafted a list of common criteria that the licensing authorities in each Member State must consider.\textsuperscript{92} First,

\begin{itemize}
  \item[85] Proposal on the Control of Exports of Certain Dual-Use Goods, \textit{supra} note 2, at 13. For a more complete discussion of these requirements, see infra text accompanying notes 101--08.
  \item[86] Proposal on the Control of Exports of Certain Dual-Use Goods, \textit{supra} note 2, at 14.
  \item[87] Id.
  \item[88] Id. For example, if a British exporter sought to export microchips to the United States, British licensing authorities could grant a general authorization for the entire shipment, presumably because the risk that the microchips would be diverted to military use is much less when the exports are to the United States. \textit{See id.}
  \item[89] Id. Presumably, this list would include only "friendly" countries, where there was little or no risk that the goods exported would fall into the wrong hands. \textit{See id.}
  \item[90] Proposal on the Control of Exports of Certain Dual-Use Goods, \textit{supra} note 2, at 5.
  \item[91] Id. at 14. While the list is not yet complete, it does include cryptographic equipment, sound navigation systems for submarines, and super computers. \textit{Common System for Controlling Sensitive Exports}, \textit{supra} note 40.
  \item[92] Proposal on the Control of Exports of Certain Dual-Use Goods, \textit{supra} note 2, at 14--15. Article 8 provides:

  In deciding whether to grant an export authorization the competent authorities shall have regard to the following criteria:
  \begin{itemize}
    \item[(a)] respect for the international commitments of the Member States of the Community, in particular the sanctions decreed by the Security Council of the United Nations, agreements on non-proliferation and other subjects, as well as other international obligations;
    \item[(b)] respect of human rights in the country of final destination;
    \item[(c)] the internal situation in the country of final destination, with reference to the existence of tensions or internal armed conflict;
    \item[(d)] the preservation of regional peace, security and stability;
    \item[(e)] the national security of the Member States and of territories whose external relations are the responsibility of a Member State as well as that of friendly and allied countries;
    \item[(f)] the behaviour of the buyer country with regard to the international community,
  \end{itemize}
the competent authorities must take into account the international commitments of the Member States. In particular, the sanctions established by the United Nations Security Council and the Community, agreements on non-proliferation, and other international agreements are important considerations for each country's competent authorities. Next, respect for human rights in the country of final destination must be taken into account. In addition, the internal situation of the country to which the goods are being exported must be considered, including the existence of tensions or internal armed conflict. Member States must be conscious of the preservation of regional peace, security, and stability. Furthermore, the national security of the Member State and of territories under the control of the Member State, as well as territories under the control of friendly and allied countries must be examined. The behavior of the buyer country regarding the international community, particularly its attitude on terrorism, the nature of its alliances, and respect for international law is also important. Finally, Member States must evaluate the existence of a risk that the products exported will be diverted within the buyer country or re-exported under undesirable conditions. Thus, the criteria are designed to minimize the risk that dual use goods will be diverted or exported to proscribed countries, while at the same time preserving some autonomy for the Member States.

Exporters must comply with certain conditions before licensing officials grant an export license. They must fully disclose to the competent authorities in the Member State all information in their possession regarding an application for an export license. An export license may be suspended or revoked by the issuing Member State if the competent authorities have sufficient reason to suspect

as regards in particular its attitude to terrorism, the nature of its alliances, and respect for international law;

(g) the existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions.

Id.

93 Id. at 14.
94 Id.
95 Id.
96 Proposal on the Control of Certain Dual-Use Goods, supra note 2, at 14.
97 Id. at 15.
98 Id.
99 Id.
100 Proposal on the Control of Certain Dual-Use Goods, supra note 2, at 15.
101 See generally id.
102 Id. at 15.
that the license was granted based on false information, or where
the exporter has not fully disclosed all information.\textsuperscript{103} Moreover, the
officials responsible for implementing this regulation may deter­
mine that customs formalities for exporting dual use goods may be
completed only at certain customs offices, thus limiting the ports
from which such goods may be shipped.\textsuperscript{104}

Appropriate documentation must support any export of dual use
goods under the proposed regulation.\textsuperscript{105} The exporter must provide
documents such as invoices, manifests and other dispatch and trans­
dport documents.\textsuperscript{106} These documents must contain enough informa­
tion to identify with certainty the type, quantity, and weight of the
goods, as well as the name and address of the exporter and the
consignee.\textsuperscript{107} In addition, exporters must keep these documents for
at least three years from the end of the calendar year in which the
export took place.\textsuperscript{108} The exporter must produce these documents
to the competent authorities upon request.\textsuperscript{109}

Although the punitive measures are not described in the pro­
posed regulation, the Commission has given some guidance in this
area as well.\textsuperscript{110} Under the regulation, each Member State shall de­
termine the penalties imposed for a violation of any provision of the
regulation, or any national measure enacted to implement the regu­
lation.\textsuperscript{111} These penalties must be “effective, proportionate, and dis­
suasive” in nature.\textsuperscript{112}

\textsuperscript{103} Id.
\textsuperscript{104} Id. at 16.
\textsuperscript{105} Proposal on the Control of Exports of Certain Dual-Use Goods, \textit{supra} note 2, at 17.
\textsuperscript{106} Article 13(1) provides:

1. Any export or re-export transaction covered by this Regulation must be supported
by appropriate documentation. In particular, commercial documents such as in­
voices, manifests and other dispatch and transport documents must contain
sufficient information to allow the following to be identified with certainty:
— the description of the goods;
— the quantity and weight of the goods;
— the name and address of the exporter, and of the consignee.

\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 18.
\textsuperscript{10} Proposal on the Control of Certain Dual-Use Goods, \textit{supra} note 2, at 18.
\textsuperscript{11} See \textit{id.} at 19.

\textsuperscript{111} Id. Article 18 states that “[e]ach Member State shall determine the penalties to be
imposed in the event of breach of the provisions of this Regulation and, where appropriate,
of any national measures relevant to its application; such penalties must be effective, propor­
tionate, and dissuasive.” \textsuperscript{Id.

\textsuperscript{112} Id.
Finally, recognizing that immediate implementation of the regulation would pose problems for those EC countries whose customs controls are more lax than others, the Commission allows a one-year transition period in which the Commission shall take additional implementing measures.\textsuperscript{113} This transitional period is designed to reduce the risk that dual use goods exported under the new regulation will be diverted to undesirable locations.\textsuperscript{114} These transitional control measures, however, will not apply to intra-Community trade, and internal frontier controls on dual use products trade are to remain unhindered.\textsuperscript{115} Thus, the Commission has taken several important steps to insure that intra-EC trade in dual use goods will remain unhindered, while at the same time ensuring that exports to third countries must pass a rigorous export procedure in every Member State.\textsuperscript{116}

Despite these steps, as of September 6, 1993, the Member States still had not voted on the proposed regulation.\textsuperscript{117} The Community Ministers sent the proposed regulation to the European Parliament for an opinion, but the Parliament postponed the vote on the regulation at least four times.\textsuperscript{118} The Parliament refused to give its opinion on the proposed regulation because it has not received a list of products and countries to which exports of dual use goods and technologies would be permitted.\textsuperscript{119} Until some sort of resolution is passed, dual use goods and technologies will be exported from one Member State to another only if the exporter is satisfied that the end-user is legitimate and will not later forward the goods or technology to an undesired country or group.\textsuperscript{120} Community sources identified four main problems of the proposed regulation: (1) the legal basis for the legislation; (2) the length of the transition period before the new regulation would take effect; (3) the procedure to be followed in relation to products which are capable of dual use but which do not appear on a list of dual use goods; and

\begin{itemize}
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Proposal on the Control of Certain Dual-Use Goods, supra note 2, at 19.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} See generally text accompanying notes 72—116.
\item \textsuperscript{118} Luxembourg: Ministers Give Parliament an Ultimatum on Dual Use Goods, Reuters News Serv., Apr. 27, 1993, available in LEXIS, World Library, TXTWE File.
\item \textsuperscript{119} Amelia Torres, Belgium: Ministers Have Another Go On Dual Use Goods, No Deal Seen, Reuters News Serv., June 11, 1993, available in LEXIS, World Library, TXTWE File.
\item \textsuperscript{120} Belgium: GAC Unlikely to Progress Far on Dual Use Goods, Reuters News Serv., July 16, 1993, available in LEXIS, World Library, TXTWE File.
\end{itemize}
(4) the need to avoid license-shopping. As for the procedure to be followed regarding goods not on a dual use list but capable of either civilian or military use, it has been posited that a "blacklist" of countries could be drawn up, so that a country such as Libya, for example, might not be permitted to receive fertilizer or fertilizer manufacturing equipment. Whether the Member States will have the political nerve to create such a list remains to be seen.

IV. Effectiveness of the Proposed Regulation

The effect of requiring an authorization for exporting dual use goods is so obvious little comment is necessary. Requiring export licenses allows Member States to track such exports and to control, to some extent, where dual use goods are exported. Requiring authorization for goods not listed on the common list of controlled products when it becomes known that the goods to be exported could be used for military purposes also permits the Member States to control where dual use products go. These are important safeguards in preventing dual use goods from being diverted to proscribed countries or groups. Moreover, allowing Member States some discretion in prohibiting the export of goods not listed on the common list of controlled products gives each country some autonomy in dealing with products which potentially could be used for military purposes.

Allowing for universal validity of export licenses throughout the Community serves the dual purpose of breaking down internal border controls and minimizing the risk of diversion of trade in dual use goods. First, universal validation allows a British export company to obtain a license from the United Kingdom, and then ship goods from another EC country in which the goods may be located. The British company would not have to fight the bureaucracy of the country in which the goods are located. Secondly, the Member State from which the goods will be shipped can be confident that the issuing country properly issued the license be-

\[121\] Id.

\[122\] Id.

\[123\] See Proposal on the Control of Exports of Certain Dual-Use Goods, supra note 2, at 12.

\[124\] Id.

\[125\] See id. at 13.

\[126\] See id.; Commission to Appeal for Abolition of Export Controls, supra note 1.

\[127\] See Proposal on the Control of Exports of Certain Dual-Use Goods, supra note 2, at 13.

\[128\] See id.
cause all EC countries must apply the same criteria and comply with the same list of proscribed shipping destinations. 129

Requiring export authorization for each individual export transaction serves the important purpose of preventing exporters from lumping prohibited dual use goods together with goods permitted for export, thus evading the export requirements. 130 At the same time, allowing Member States to apply simplified procedures for some dual use goods and third countries reduces the administrative burdens placed on Member States. 131 Of course, such simplified procedures only should apply to certain goods, and to a limited number of third countries, most notably friendly and allied countries.

The Commission designed the criteria for issuing export licenses to minimize the risk of diversion of dual use goods to proscribed destinations. Enacting these criteria at the Community level ensures uniform publication and direct application in all Member States. 132 Moreover, the language of article 8, which sets out the criteria, is mandatory in nature, rather than precatory, thus guaranteeing that all EC countries will apply the criteria in a uniform manner. 133 Requiring the Member States to take into account obligations under international agreements will prevent the EC countries from being sanctioned by the international community for violating such agreements. 134 Considering the human rights and the internal situation of the destination country will allow Community members to determine on a case by case basis whether it is in the best interests of the people of the destination country to allow the export of dual use goods, as well as to prevent exacerbating what already could be a tense or hostile situation, such as if the destination country is engaged in internal armed conflict. 135 Allowing Member States to take into account their national security interests will prevent the goods exported from being used against the Member States. 136 Indeed, a

129 See id. at 12, 14—15.
130 See id. at 14.
131 See id.
132 Proposal on the Control of Certain Dual-Use Goods, supra note 2, at 2.
133 Id. at 14. The relevant language of article 8 states that “[i]n deciding whether to grant an export authorization, the competent authorities shall have regard for the following criteria. . . .” Id. (emphasis added). For the full text of article 8, see supra note 92 and accompanying text.
134 See id.
135 See id.
136 See id. at 15.
recent report concluded that armed forces from EC countries on peace keeping missions with the United Nations are being fired on by weapons manufactured in the Community.  

The Member States also must take into account the behavior of the country buying the goods, especially regarding the country’s attitude toward terrorism and respect for international law. This standard will help to prevent dual use goods from being exported to those regimes that support and encourage terrorism and consistently flout international law. Finally, Member States must take into account the risk that the products exported will be diverted within the destination country or re-exported for a prohibited use. This will further the objective of the regulation of avoiding deflection of trade.

The proposed regulation also sets up a one-year transitional period in which Member States may impose additional implementing procedures to reduce the risk of diversion of dual use goods. This is an important safeguard to ensure that such goods are not exported to a prohibited country during the initial implementation period while some Member States’ customs controls are not yet up to standard. This transitional period is designed to give each Community country enough time to adapt their customs controls to the dismantling of the EC’s internal borders. This is an important provision because not all Member States apply the same controls to exports outside the Community, and removing internal barriers will result in at least some adjusting by Member States.

Although the Commission has taken great steps toward abolishing internal border controls on dual use goods, while simultaneously strengthening controls on exports to third countries, more work is necessary. A comprehensive list of products subject to control must be drawn up if the Commission has any hope of enforcing this
regulation.\textsuperscript{148} It is particularly difficult to regulate trade in dual use goods because governments can always argue that the purpose of their export is strictly for civil use.\textsuperscript{149} Providing a comprehensive list of goods subject to control will eliminate this argument,\textsuperscript{150} and ensure universal and consistent application of the regulation throughout the Community. In addition, a common list of either proscribed or permitted destinations is essential if this proposed regulation is to be more than an empty shell.\textsuperscript{151} Community countries often differ in their opinions on which countries should receive sensitive exports. For example, Germany currently restricts arms sales to Saudi Arabia, while the United Kingdom views Saudi Arabia as a fertile market.\textsuperscript{152} While diplomatic concerns make it probable that any list will be a “positive” one, comprising the permitted destination countries rather than a “negative” list of proscribed countries,\textsuperscript{153} such a list is necessary to ensure consistent application of the regulation throughout the Community.\textsuperscript{154}

In addition, the Commission must work with the Member States to strengthen the external borders in all EC countries. While often it is the less-developed members of the Community that get blamed for lax export controls,\textsuperscript{155} even the more industrialized and developed nations of the EC are prone to loose enforcement of controls on exports to third countries. For example, the Churchill-Matrix affair, in which Iraq was provided with machine tools worth $93 million and military equipment totaling $200 million between 1987 and the invasion of Kuwait in 1990, recently tainted the United Kingdom.\textsuperscript{156} Between 1986 and 1990, Germany exported dual use goods worth about $198 million to Iraq.\textsuperscript{157} Thus, it is apparent that the Commission must work to upgrade the external borders of all Member States, not merely the less developed ones.

Greece, Portugal, and Belgium have been identified as the Community countries with the weakest customs controls.\textsuperscript{158} The Commis-

\textsuperscript{148} See Common System for Controlling Sensitive Exports, supra note 40.
\textsuperscript{149} See Johnson, supra note 8.
\textsuperscript{150} See id.
\textsuperscript{151} See Common System for Controlling Sensitive Exports, supra note 40.
\textsuperscript{153} Common System for Controlling Sensitive Exports, supra note 40.
\textsuperscript{154} See Proposal on the Control of Exports of Certain Dual-Use Goods, supra note 2, at 11.
\textsuperscript{155} See Common System for Controlling Sensitive Exports, supra note 40.
\textsuperscript{156} Report on Implementation of EC Policy on Arms Exports, supra note 137.
\textsuperscript{157} Id.
\textsuperscript{158} EC Could Become Arms Exporters’ Paradise, supra note 152.
sion must work with these countries to improve their customs controls, or exporters simply will export goods from those countries rather than other countries. The Member States must work together, share information, and not favor exporters from their own countries, if exports on dual use goods are to be controlled.

**CONCLUSION**

As the Community works toward achieving a single, unified market, the need to eliminate internal frontier controls on trade in dual use goods is compelling. Eliminating the internal export controls should not, however, be done without strengthening controls on exports to other countries at the same time. The Commission has done much to accomplish this objective in its proposed regulation. The regulation requires individual export authorizations for each transaction, provides common criteria to be applied uniformly by each Member State, requires full disclosure by exporters, requires supporting documentation, mandates that exporters retain these documents for three years, and allows a one-year transitional period for Member States to adjust to the removal of internal barriers, all of which act to strengthen external border controls on dual use goods exports. The Commission must, however, also produce a common list of products subject to control, as well as either a list of proscribed destinations or a list of permitted destinations. In addition, the Commission must work together with the Community countries to strengthen the customs controls of all EC nations, particularly the less developed countries, to prevent dual use goods from being exported to a prohibited country via a country with weaker export controls.

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159 See Johnson, *supra* note 8.