



Dual-Use Regulation 428/2009 – Series (5) – Cyber-surveillance items

Cyber-surveillance items will be subject to stricter export controls in the Dual-Use Regulation. They are defined as being dual-use items specially designed to enable the covert surveillance of natural persons by monitoring, extracting, collecting or analysing data from information and telecommunication systems.

For such cyber-surveillance items, even if they are not listed in Annex I, an authorisation shall be required for the export if the **exporter has been informed** by the competent authority that the items in question are or may be intended, in their entirety or in part, for use in connection with internal repression and/or the commission of serious violations of international human rights and international humanitarian law.

The new regulation obliges **exporters who are aware** according to their due diligence findings that such use is intended, to notify their competent authority, which shall decide whether or not to make the export concerned subject to authorisation. Guidelines for that purpose shall be issued by the European Commission and the Council.

Items used for purely commercial applications such as billing, marketing, quality services, user satisfaction, network security are considered to generally not entail the risk of being misused by persons complicit in or responsible for directing or committing serious violations of human rights or international humanitarian law.

The new Regulation will introduce an EU-level coordination mechanism which allows for information exchange among Member States. EU Member States may adopt or maintain national legislation imposing an authorisation requirement on the export of cyber-surveillance items not listed in Annex I if the **exporter has grounds for suspecting** that those items are or may be intended, in their entirety or in part, for any of these uses.

For such national measures, the new text defines proceedings for a Member State to inform the other Member States and the EU Commission, in particular as regards the items and entities concerned, unless it considers it not appropriate in light of the nature of the transaction or the sensitivity of the information concerned. The other Member States may review these measures, and suggest that an authorisation requirement should be imposed for essentially identical transactions.

Note: This contribution is based on the full provisional agreement reached on 9 November 2020 on a final compromise text to amend the EU Dual-Regulation 428/2009 of 5 May 2009. The entry into force

of this text is still subject to an approval by the Council and the Parliament and a publication in the EU Official Journal.

