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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending 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

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

In June 2005, the Council of the European Union adopted 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. The Regulation entered into force on 30 July 2006.

The Charter of Fundamental Rights of the European Union, which has become legally binding with the entry into force of the Treaty of Lisbon in December 2009, applies to the institutions, bodies, offices and agencies of the Union as well as to the member States when they are implementing Union law.

The European Commission amended Annexes II and III to this Regulation by means of Implementing Regulation (EU) No 1352/2011 which came in force on 21 December 2011, primarily with a view to establishing export controls on certain medicinal products to prevent the use of such products for capital punishment (execution by means of lethal injection). This amendment was accompanied by guidance for the application of Articles 5 and 6 of Regulation (EC) No 1236/2005, as set out in Commission Staff Working Paper SEC(2011)1624 of 20 December 2011.

The Commission also started a process to review Regulation (EC) No 1236/2005 in its entirety, responding in particular to a Resolution of the European Parliament of 17 June 2010 [1]. In spring 2012, the Commission issued a call for applications with a view to establishing a Group of Experts to assist it with this review. During the period from July 2012 to July 2013, the Group of Experts met six times in Brussels with relevant Commission services.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

Following publication of Commission Implementing Regulation (EU) No 1352/2011, a number of EU manufacturers of medicinal products expressed their opposition to the use of their products for capital punishment. The EU manufacturers of one medicinal product that is not subject to the export controls but might be used for lethal injections in the United States of America, have informed the European Commission of the measures they have taken in order to ensure that their distributors in third countries prevent supplies of this product from being used for capital punishment. Both the exporting manufacturers and the competent authorities have indicated that the current system of controlling exports of medicinal products, which represent a large number of export transactions per annum, is unnecessarily cumbersome.

The Group of Experts provided valuable input in the review process, mainly as regards case-law of the European Court of Human Rights and on the subject of goods marketed as suitable for law enforcement which might be used for the purpose of torture or other cruel, inhuman or degrading treatment or punishment. The experts were in favour of additional measures to help prevent violations of human rights, but also recognised that restrictions on trade have to be assessed on a basis other than just a prohibition on using equipment for law enforcement purposes.

[1] Resolution P7_TA(2010)0236, OJ C 236 E, 12.8.2011, p. 107.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1 Export controls targeting capital punishment

As of 21 December 2011 Annex III includes a section entitled 'Products which could be used for the execution of human beings by means of lethal injection'. The related export controls should be applied to prevent the use of such products for capital punishment in third countries. The current text of Regulation (EC) No 1236/2005 establishes an export control regime that aims to prevent goods exported from the EU from being used for torture or other cruel, inhuman or degrading treatment or punishment. A specific chapter dealing with export controls that should be applied with a view to preventing controlled goods from being used for capital punishment and a specific list of controlled goods, which will be referred to below as Annex IIIa, should be inserted in the Regulation to provide clarity on the purpose and modalities of these controls.

Torture and other forms of cruel, inhuman or degrading treatment or punishment tend to be unlawful and are in many cases not nation-wide occurrences, especially given that international instruments prohibit torture and other cruel, inhuman and degrading treatment or punishment without exception. By contrast capital punishment is usually provided for by law, if a country has not abolished it. It is therefore appropriate to address the question of whether any country should be exempt from controls aimed at preventing capital punishment.

In 1983, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the European Convention on Human Rights) was supplemented by Protocol No 6 prohibiting the death penalty. This Protocol allowed States to make statutory provision for the death penalty in respect of acts committed in times of war or of imminent threat of war. In 2003, Protocol No 13 prohibited the death penalty in all circumstances. These Protocols were ratified by the Member States of the EU and also by a number of other States that are members of the Council of Europe. Albania, Andorra, Bosnia and Herzegovina, Georgia, Iceland, Liechtenstein, FYROM, Moldova, Montenegro, Norway, San Marino, Serbia, Switzerland, Turkey and Ukraine have ratified them and abolished capital punishment in all circumstances. Armenia and Azerbaijan have only ratified Protocol No 6.

In 1989, the UN General Assembly adopted and proclaimed the Second Optional Protocol to the International Covenant on Civil and Political Rights which aims at abolition of the death penalty. The States Parties to this Protocol undertake to abolish the death penalty, but Article 2 allows them to make a reservation, at the time of ratification or accession, that provides for the application of the death penalty pursuant to a conviction for a most serious crime of a military nature committed during wartime. In addition to the Member States of the EU and a number of other European states, Argentina, Australia, Benin, Bolivia, Canada, Cape Verde, Colombia, Costa Rica, Djibouti, Ecuador, Guinea-Bissau, Honduras, Kyrgyzstan, Liberia, Madagascar, Mexico, Mongolia, Mozambique, Namibia, Nepal, New Zealand, Nicaragua, Panama, Paraguay, Philippines, Rwanda, Sao Tome and Principe, Seychelles, South Africa, Timor-Leste, Turkmenistan, Uruguay, Uzbekistan and Venezuela have become Parties to this Protocol without reservation. Azerbaijan, Brazil and Chile have also joined but made the Article 2 reservation.

Given these firm international commitments under either Protocol No 13 to the European Convention on Human Rights or, without having made the Article 2 reservation, the Second Optional Protocol to the International Covenant on Civil and Political Rights, exports to the States that are parties to one of them need not be subject to specific authorisation in order to prevent the relevant goods from being used for for capital punishment and can be covered by a general export authorisation. Such authorisation should be subject to appropriate conditions to avoid the diversion of the goods to a country that has not abolished capital punishment

without prior scrutiny by the competent authorities. The general authorisation should, therefore, only apply where the end-user of the exported goods is established in the country of destination and no re-export to another country takes place. If these conditions are not met, a request for a specific or global authorisation should be made to the competent authorities.

3.2 Additional measures concerning listed goods

As regards the current export controls applied with a view to preventing goods exported from the EU from being used for the purpose of capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, it has been suggested that the current trade restrictions should be supplemented by restrictions on brokering services, technical assistance and transit. In this regard, similar issues arise when examining whether such restrictions are necessary and proportionate to prevent goods listed in Annex IIIa from being used for capital punishment, on the one hand, or to prevent goods listed in Annex III from being used for torture and other cruel, inhuman or degrading treatment or punishment on the other. One single assessment can therefore be made, although the purpose and possible exemptions would differ, if additional restrictions are considered necessary and proportionate.

3.2.1 Brokering services related to goods listed in Annex II

As regards equipment or goods listed in Annex II, the current provisions (Articles 3 and 4) already cover the supply of technical assistance and the definitions of import and export ensure that the entry and departure of transiting equipment or goods fall under the prohibitions. The provision of brokering services in relation to such equipment or goods is not prohibited. Based on the definition of brokering services in Regulation (EC) No 428/2009, which sets up the EU regime for the control of exports, transfer, brokering and transit of dual-use items, brokering of equipment or goods that are not located in the EU could be prohibited. It would add a useful dimension to the current prohibition, which only extends to equipment or goods located in the EU. Since the only use to which equipment or goods listed in Annex II can be put is forbidden, a prohibition on the provision of brokering services is a necessary and proportionate measure to protect public morals.

3.2.2 Brokering services related to goods listed in Annex III or in Annex IIIa and transit of such goods

Exports of equipment or goods listed in Annex III or in Annex IIIa are subject to controls. Such equipment or goods have both legitimate and non-legitimate uses, a characteristic they have in common with dual-use items controlled by Regulation (EC) No 428/2009. That Regulation does not subject the provision of brokering services to comprehensive controls, nor does it control all transiting items in a comprehensive manner. The competent authorities may in a specific case inform the broker that the items in question are or may be intended, in their entirety or in part, for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons. On the same grounds they may prohibit transit of specific goods.

Whereas the prohibitions of torture or other cruel, inhuman or degrading treatment and punishment and of capital punishment have a basis in international law, the corresponding restrictions on trade are not regulated by any international norms. This distinguishes Regulation (EC) No 1236/2005 from Regulation (EC) No 428/2009, which gives effect to a number of international export control regimes. Since the 2009 Regulation relates to international security, intelligence gathering by the Member States and third countries as regards chemical, biological and nuclear weapons and their delivery systems is well

developed. However, as regards equipment or goods that could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, it is unlikely that such intelligence gathering takes place and the competent authorities probably lack the data they need to inform an exporter about the intended end-use.

Where trade restrictions are applied, they should not go beyond what is proportionate. This requirement is considered to stand in the way of applying comprehensive controls on transit and on the provision of brokering services related to equipment or goods listed in Annex III or in Annex IIIa, since the latter have legitimate uses but could be used for torture or other cruel, inhuman or degrading treatment or punishment or for capital punishment, respectively. Given that such acts are in breach of public morals, brokers based in the EU should not derive benefits from trade promoting or otherwise facilitating them. There should, therefore, be a prohibition on the provision of related brokering services by any broker who is aware that controlled equipment or goods that are to be delivered to a third country but are not located in the EU, are or may be intended for such use. This prohibition would also apply if, in an exceptional case, the competent authorities have sufficient data to inform the broker of the intended end-use.

Transiting goods which leave the customs territory of the EU for a destination in a third country are goods that were shipped from another third country. A ban on exports of such goods to a third country by an economic operator who is aware that the goods are or may be intended for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, would typically apply to an economic operator who is not based in the EU and therefore have to be enforced in a third country. Because information on the end-user will usually not be available to economic operators transporting the transiting goods within the customs territory of the EU, it is not considered proportionate to impose a prohibition on the transporter. Accordingly, a prohibition based on an economic operator's knowledge about the intended use of transiting goods listed in Annex III or in Annex IIIa would not be appropriate.

3.2.3 Technical assistance related to goods listed in Annex III or in Annex IIIa

As regards technical assistance relating to goods listed in Annex III or in Annex IIIa, there are currently no controls on the supply of such assistance to third countries. Regulation (EC) No 428/2009 does not contain an explicit provision on technical assistance, but includes transmission of (listed) technology and software items in the definition of exports. Although 'technical assistance' may have a slightly broader meaning than transmission of technology, such transmission is subjected to comprehensive controls. Regulation (EC) No 428/2009 gives effect to a number of international export control regimes and relates to international security. It seeks to prevent proliferation of chemical, biological and nuclear weapons and their delivery systems. The transmission of technology and software is therefore controlled in order to prevent a country from developing its own capacity to manufacture goods that the EU controls and would not export to it.

Regulation (EC) No 1236/2005 aims at preventing supplies to certain end-users who would use relevant equipment or goods from the EU for torture or other cruel, inhuman or degrading treatment or punishment or for capital punishment, not at preventing a third country's acquisition of technology relating to such equipment or goods. Comprehensive controls on the supply of technical assistance related to the listed equipment or goods are not considered proportionate. Given that capital punishment, torture and other forms of cruel, inhuman or degrading treatment or punishment are in breach of public morals, suppliers of technical assistance based in the EU should not derive benefits from trade promoting or otherwise facilitating them. There should, therefore, be a prohibition on the supply of technical assistance by anyone who is aware that the controlled equipment or goods to which the

assistance supplied to a third country relates, is or may be intended for such use. This prohibition would also apply if, in an exceptional case, the competent authorities have sufficient data to inform the supplier of technical assistance of the intended end-use of the goods to which such assistance relates.

3.3 Definition of torture and other cruel, inhuman or degrading treatment or punishment

The definition of torture used for the purpose of Regulation (EC) No 1236/2005 was taken from the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Although based on this international instrument, 'other cruel, inhuman or degrading treatment or punishment' is not defined in the UN Convention. The case-law of the European Court of Human Rights indicates that the definition in Regulation (EC) No 1236/2005 needs to be reconsidered. As stipulated in Article 52(3) of the Charter of Fundamental Rights of the EU, in so far as the Charter contains rights which correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

The definition in Regulation (EC) No 1236/2005 currently covers acts inflicting 'significant pain or suffering', whereas the definition of torture refers to 'severe pain or suffering'. Instead of being based on different levels of pain or suffering, the distinction between these types of acts should take account of the presence or absence of an intention to inflict pain or suffering and of the use of pain or suffering for a purpose included in the definition of torture. In its judgement of 13 December 2012, Khaled El-Masri v. FYROM (Application No 39630/09), the European Court of Human Rights held as regards Article 3 of the European Convention on Human Rights and with reference to earlier case-law:

> '196. In order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim … . Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it … .
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> 197. In order to determine whether any particular form of ill-treatment should be classified as torture, the Court must have regard to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering … In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating (Article 1 of the United Nations Convention) … .'

As regards the exclusion, from both definitions, of pain or suffering arising only from lawful penalties, a clarification is appropriate. Whereas deprivation of liberty is, in principle, a lawful penalty, the European Court of Human Rights holds that it is up to the relevant State to ensure that the conditions of detention are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the detained person to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his or her health and well-

being are adequately secured. The case-law shows that the cumulative effects of the conditions of detention may amount to a violation of Article 3 of the European Convention on Human Rights, in particular where cells are overcrowded and insanitary conditionsprevail. The following judgements of the European Court of Human Rights provide some examples of such violations:

15 July 2002, V. Kalashnikov v. Russia (Application No 47095/99),

4 February 2003, F. Van der Ven v. the Netherlands (Application No 50901/99),

11 March 2004, P. Iorgov v. Bulgaria (Application No 40653/98),

8 July 2004, I. Ilaşcu and others v. Moldova and Russia (Application no. 48787/99),

20 November 2008, A. Işyar v. Bulgaria (Application No 391/03),

2 July 2009, M. Kochetkov v. Estonia (Application No 41653/05),

16 July 2009, I. Sulejmanovic v. Italy (Application No 22635/03),

10 January 2012, S. Ananyev and others v. Russia (Applications Nos 42525/07 and 60800/08),

22 May 2012, T. Idalov v. Russia (Application No 5826/03).

3.4 Implementing or delegated powers

Regulation (EC) No 1236/2005 empowers the European Commission to amend the Annexes. Except for Annex I, the Commission is assisted by a Committee composed of Member State representatives. The examination procedure described in Regulation (EU) No 182/2011 applies (pursuant to Article 13(1)(c) of the Regulation).

The Commission has made proposals on the granting of delegated and implementing powers in the field of the common commercial policy (COM(2011) 82 and COM(2011) 349). In June 2013 the European Parliament and the Council reached an agreement on the way forward on these Commission proposals; they are expected to adopt a Regulation towards the end of 2013, which will, inter alia, amend Council Regulation (EC) No 1236/2005 in order to provide for delegated powers.

The question of whether an urgency procedure should be applied for amendments of certain Annexes to Council Regulation (EC) No 1236/2005 has, however, not been addressed. The Commission considers such a procedure appropriate where the lists of prohibited and controlled goods are amended, especially if new equipment or goods enter the market and it is imperative to apply the relevant measure immediately to prevent building of stocks during the period of two months (assuming it is not extended) that is allotted to the European Parliament and to the Council for expressing any objection they may have to the measure.

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amending 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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) Council Regulation (EC) No 1236/2005[2] was approved in 2005 and entered into force on 30 July 2006. In response to calls from the European Parliament in 2010 and indications that medicines exported from the Union had been used for capital punishment in a third country, the lists of prohibited and controlled goods in Annexes II and III to that Regulation were amended by means of Commission Implementing Regulation (EU) No 1352/2011.[3] The Commission, assisted by a Group of Experts, reviewed the need for further amendments to Regulation (EC) No 1236/2005 and its Annexes.

(2) The Charter of Fundamental Rights of the European Union has become legally binding with the entry into force of the Treaty of Lisbon on 1 December 2009.[4] The definition of torture in Regulation (EC) No 1236/2005 was taken from the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and continues to be valid. The definition of 'other cruel, inhuman or degrading treatment or punishment', which is not found in the Convention, should be amended to align it with the case-law of the European Court of Human Rights. It is also appropriate to clarify the meaning of the term 'lawful penalties' in the definitions of 'torture' and 'other cruel, inhuman or degrading treatment or punishment', taking into account this case-law and the Union's policy on capital punishment.

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2 Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, OJ L 200, 30.7.2005, p. 1.

3 Commission Implementing Regulation (EU) No 1352/2011 of 20 December 2011 amending 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, OJ L 338, 21.12.2011, p. 31.

4 OJ C 303, 14.12.2007, p. 1.

(3) Articles 5, 6 and 7 of Regulation (EC) No 1236/2005 establish an export licensing system designed to prevent the relevant goods from being used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

(4) These measures should not go beyond what is proportionate. They should, therefore, not prevent the export of medicinal products used for legitimate therapeutic purposes.

(5) Given the different characteristics of capital punishment, on the one hand, and torture and other cruel, inhuman or degrading treatment or punishment on the other, it is appropriate to establish a specific export licensing system with a view to preventing the use of certain goods for capital punishment. Such a system should take into account the fact that a number of countries have abolished capital punishment for all crimes and have made an international commitment on this issue. As there is a risk of re-export to countries that have not done so, certain conditions and requirements should be imposed when authorising exports to countries that have abolished capital punishment. It is, therefore, appropriate to grant a general export authorisation for exports to those countries that have abolished capital punishment for all crimes and confirmed it with an international commitment.

(6) If a country has not abolished capital punishment in this way, the competent authorities should, when examining a request for an export authorisation, check whether there is a risk that the end-user in the country of destination would use the exported goods for such punishment. Appropriate conditions and requirements should be imposed to control sales or transfers to third parties by the end-user. If multiple shipments between the same exporter and end-user take place, the competent authorities should be allowed to review the status of the end-user on a periodic basis, e.g. every six months, rather than every time an authorisation is granted, without prejudice to their right to annul, suspend, modify or revoke an export authorisation in accordance with Article 9(4) of Regulation (EC) No 1236/2005 where warranted.

(7) In order to limit the administrative burden for exporters the competent authorities should be allowed to grant an exporter a global authorisation for all shipments of medicinal products from the exporter to a specific end-user during a fixed period of time, specifying a quantity corresponding to the end-user's normal use of the goods, where deemed necessary. Such authorisation would, in accordance with Article 9(1) of Regulation (EC) No 1236/2005 be valid for not more than twelve months with a possible extension of up to twelve months.

(8) Granting a global authorisation would also be appropriate where a manufacturer needs to export medicinal products controlled by Regulation (EC) No 1236/2005 to a distributor in a country that has not abolished capital punishment, provided the exporter and the distributor have concluded a legally binding agreement requiring the distributor to apply an appropriate set of measures ensuring that the medicinal products will not be used for capital punishment.

(9) The medicinal products governed by Regulation (EC) No 1236/2005 may be subject to controls in accordance with international conventions on narcotic drugs and psychotropic substances, such as the 1971 Convention on Psychotropic Substances. Since such controls are not applied to prevent the relevant medicinal products from being used for capital punishment but to prevent illicit drug trafficking, the export controls of Regulation (EC) No 1236/2005 should be applied in addition to the international controls. Member States should, however, be encouraged to use a single procedure in order to apply both control systems.

(10) In order to limit the administrative burden for exporters the competent authorities should be allowed to grant an exporter a global authorisation in respect of goods that are controlled to prevent the relevant goods from being used for torture or for other cruel, inhuman or degrading treatment or punishment.

(11) The controls on exports in accordance with Regulation (EC) No 1236/2005 should not apply to goods whose export is controlled in accordance with Council Common Position 2008/944/CFSP[5], Council Regulation (EC) No 428/2009[6] and Regulation (EU) No 258/2012 of the European Parliament and of the Council[7].

(12) It is necessary to prohibit brokers in the Union from providing brokering services in relation to goods whose export and import are prohibited as such goods have no practical use other than for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. Prohibiting the provision of such services serves the purpose of protecting public morals.

(13) Where controls on exports are applied, the provision of brokering services and the supply of technical assistance in relation to any of the listed goods should be prohibited, if the broker or supplier of technical assistance is aware that the relevant goods are or may be intended for capital punishment, when the controls are applied to prevent use for such punishment, or for torture or other cruel, inhuman or degrading treatment or punishment, when the controls are intended to prevent such use. An economic operator shall have grounds for suspecting that the goods are or may be intended for such non-legitimate use, inter alia, if a competent authority has informed it that the goods are or may be intended for such non-legitimate use,

(14) In order to give economic operators and enforcement authorities some time to make the changes to their operational procedures that are needed to comply with and enforce these prohibitions, a short transitional period should be defined.

(15) It is appropriate to make it compulsory for customs authorities to share certain information with other customs authorities and, when they detect prohibited exports or imports of goods or exports of goods for which the required authorisation has not been granted, to inform the relevant authorities with a view to imposing penalties on the economic operator that committed the infringement.

(16) It is appropriate to clarify that, to the extent that it concerns personal data, processing and exchange of information should comply with the applicable rules on processing and exchange of personal data in accordance with the rules laid down in Directive

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5 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, OJ L 335, 13.12.2008, p. 99.

6 Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ L 134, 29.5.2009, p. 1.

7 Regulation (EU) No 258/2012 of the European Parliament and of the Council of 14 March 2012 implementing Article 10 of the United Nations' Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against Transnational Organised Crime (UN Firearms Protocol), and establishing export authorisation, and import and transit measures for firearms, their parts and components and ammunition, OJ L 94, 30.3.2012, p. 1.

95/46/EC of the European Parliament[8] and of the Council and Regulation (EC) No 45/2001 of the European Parliament and of the Council[9].

(17) In order to adopt the provisions necessary for the application of Regulation (EC) No 1236/2005, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of amending Annexes I, II, III, IIIa, IIIb, IV and V to that Regulation. It is of particular importance that the Commission carries out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

(18) It is appropriate to make provision for immediate application of the Commission act, where, in the case of amendment of Annex II, III or IIIa to Regulation (EC) No 1236/2005, there are imperative grounds of urgency for such amendment.

(19) The Commission does not procure equipment for law enforcement purposes since it is not responsible for maintenance of law and order, proceedings in criminal matters or the enforcement of judicial decisions in criminal matters. Therefore, a procedure should be established to ensure that the Commission receives information on non-listed law enforcement equipment and products marketed in the Union in order to ensure that the lists of prohibited and controlled goods are updated to take account of new developments. The Commission should inform the competent authorities of the Member States of any duly substantiated request to add goods to Annex II, to Annex III or to Annex IIIa it receives from a Member State, before it takes a decision to amend the relevant Annex,

HAVE ADOPTED THIS REGULATION:

Article 1

Council Regulation (EC) No 1236/2005 is amended as follows:

(1) Article 1 is replaced by the following:

‘*Article 1*

Subject matter

This Regulation lays down Union rules governing trade with third countries in goods that could be used for the purpose of capital punishment or for the purpose of torture or other cruel, degrading or inhuman treatment or punishment, and governing also the provision of brokering services and the supply of technical assistance related to such goods.’

(2) Article 2 is amended as follows:

(a) Points (a) and (b) are replaced by the following:

‘(a) ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from that

[8] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the movement of such data, OJ L 281, 23.11.1995, p. 31.

[9] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1.

person or from a third person information or a confession, punishing that person for an act that either that person or a third person has committed or is suspected of having committed, or intimidating or coercing that person or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted either by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. It does not, however, include pain or suffering arising only from, inherent in or incidental to, lawful penalties, but includes pain or suffering caused by the cumulative effects of deficiencies of the conditions of detention, such as cramped conditions of accommodation, lack of hygiene or of medical care and assistance, denial of contacts with the outside world, or an impoverished detention regime, irrespective of any specific or positive intention to inflict pain or suffering by those who are in charge of the prison or other place of detention, even if a natural person is deprived of his liberty in accordance with the law. Capital punishment is not deemed a lawful penalty under any circumstances;

(b) 'other cruel, inhuman or degrading treatment or punishment' means any act by which severe pain or suffering, whether physical or mental, is inflicted on a person, when such pain or suffering is inflicted either by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. It does not, however, include pain or suffering arising only from, inherent in or incidental to, lawful penalties, but includes pain or suffering caused by the cumulative effects of deficiencies of the conditions of detention, such as cramped conditions of accommodation, lack of hygiene or of medical care and assistance, denial of contacts with the outside world, or an impoverished detention regime, irrespective of any specific or positive intention to inflict pain or suffering by those who are in charge of the prison or other place of detention, even if a natural person is deprived of his liberty in accordance with the law. Capital punishment is not deemed a lawful penalty under any circumstances;'

(b) Point (h) is replaced by the following:

'(h) 'competent authority' means an authority of one of the Member States, as listed in Annex I, which in accordance with Article 8 is entitled to make a decision on an application for an authorisation;'

(c) The following points are added after point (i):

'(j) 'customs territory of the Union' means the territory within the meaning of Article 3 of Council Regulation (EEC) No 2913/92 *;

(k) 'brokering services' means:

(a) the negotiation or arrangement of transactions for the purchase, sale or supply of relevant goods from a third country to any other third country, or

(b) the selling or buying of relevant goods that are located in a third country for their transfer to another third country.

For the purposes of this Regulation the sole provision of ancillary services is excluded from this definition. Ancillary services are transportation, financial services, insurance or re-insurance, or general advertising or promotion;

(l) ‘broker’ means any natural or legal person or partnership resident or established in a Member State of the Union that carries out services defined under point (k) from the Union into the territory of a third country;

(m) ‘supplier of technical assistance’ means any natural or legal person or partnership resident or established in a Member State of the Union that supplies technical assistance defined under point (f) from the Union into the territory of a third country;

(n) ‘exporter’ means any natural or legal person or partnership on whose behalf an export declaration is made, that is to say the person who, at the time when the declaration is accepted, holds a contract with the consignee in the third country concerned and has the necessary power for determining the sending of the goods out of the customs territory of the Union. If no export contract has been concluded or if the holder of the contract does not act on its own behalf, the exporter means the person who has the necessary power for determining the sending of the item out of the customs territory of the Union. Where the benefit of a right to dispose of the goods belongs to a person established outside the Union pursuant to the contract on which the export is based, the exporter shall be considered to be the contracting party established in the Union;

(o) ‘Union General Export Authorisation’ means an export authorisation for exports to certain countries of destination available to all exporters who respect its conditions and requirements for use as listed in Annex IIIb;

(p) ‘individual export authorisation’ means an authorisation granted to one specific exporter for exports to one end-user or consignee in a third country and covering one or more goods;

(q) ‘global export authorisation’ means an authorisation granted to one specific exporter in respect of a type of goods valid for export to one or more specified end-users or, where the exporter is a manufacturer of goods included in Annex IIIa, a distributor;

(r) ‘distributor’ means an economic operator performing wholesale activities in relation to medicinal products or active substances, such as procuring medicinal products or active substances from manufacturers, holding, supplying or exporting such products; wholesale activities do not include procurement by either a hospital, a pharmacist or a medical professional for the sole purpose of supplying medicinal products to the public.

* Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ L 301, 19.10.1992, p. 1.’

(3) The following Article is inserted after Article 4:

‘Article 4a

Prohibition of brokering services

A broker shall be prohibited from providing to any person, entity or body in a third country brokering services in relation to goods listed in Annex II, irrespective of the origin of such goods.’

(4) In Article 5, paragraph 1 is replaced by the following:

‘1. For any export of goods listed in Annex III, an authorisation shall be required, irrespective of the origin of such goods. However, no authorisation shall be required for goods which only pass through the customs territory of the Union, namely those which are not assigned a customs approved treatment or use other than the external transit procedure under Article 91 of Council Regulation (EEC) No 2913/92, including storage of non-Union goods in a free zone of control type I or a free warehouse.

Annex III shall comprise the following goods that could be used for the purpose of torture or other cruel, inhuman or degrading treatment or punishment:

(a) goods which are primarily used for law enforcement purposes; and

(b) goods which, taking into account their design and technical features, present a material risk of use for torture or other cruel, inhuman or degrading treatment or punishment.

Annex III shall not include:

(a) firearms controlled by Regulation (EU) No 258/2012 of the European Parliament and of the Council;

(b) dual-use items controlled by Council Regulation (EC) No 428/2009; and

(c) goods controlled in accordance with Council Common Position 2008/944/CFSP.’

(5) In Article 6, paragraph 1 is replaced by the following:

‘1. Decisions on applications for authorisations in respect of the export of goods listed in Annex IIIa shall be taken by the competent authorities on a case by case basis, taking into account all relevant considerations, including in particular whether an application in respect of an essentially identical export has been dismissed by another Member State in the preceding three years and considerations about intended end-use and the risk of diversion.’

(6) After Article 7, the following Article is inserted:

‘Article 7a

Prohibition of certain services

1. A broker shall be prohibited from providing to any person, entity or body in a third country brokering services in relation to goods listed in Annex III, irrespective of the origin of such goods, if the broker knows or has grounds for suspecting that any part of a shipment of such goods is or may be intended to be used for torture or other cruel, inhuman or degrading treatment or punishment in a country that does not belong to the customs territory of the Union.

2. A supplier of technical assistance shall be prohibited from supplying to any person, entity or body in a third country technical assistance in relation to goods listed in Annex III, irrespective of the origin of such goods, if the supplier of such assistance knows or has grounds for suspecting that some or all of the relevant goods are or may be intended to be used for torture or other cruel, inhuman or degrading treatment or punishment in a country that does not belong to the customs territory of the Union.’

(7) After Article 7a, the following Chapter is inserted:

‘CHAPTER IIIa

Goods that could be used for the purpose of capital punishment

Article 7b

Export authorisation requirement

1. An authorisation shall be required for any export of goods listed in Annex IIIa, irrespective of the origin of such goods. However, no authorisation shall be required for goods which only pass through the customs territory of the Union, namely those which are not assigned a customs approved treatment or use other than the external transit procedure under Article 91 of Council Regulation (EEC) No 2913/92, including storage of non-Union goods in a free zone of control type I or a free warehouse.

   Annex IIIa shall comprise goods that could be used for the purpose of capital punishment and have been approved or actually used for capital punishment by one or more third countries that have not abolished capital punishment. It shall not include:

   (a) firearms controlled by Regulation (EU) No 258/2012 of the European Parliament and of the Council;

   (b) dual-use items controlled by Council Regulation (EC) No 428/2009 and

   (c) goods controlled in accordance with Council Common Position 2008/944/CFSP.

2. Where the export of medicinal products requires an export authorisation pursuant to this Regulation and the export is also subject to authorisation requirements in accordance with an international convention controlling narcotic drugs and psychotropic substances, such as the 1971 Convention on Psychotropic Substances, Member States may use a single procedure to carry out the obligations imposed on them by this Regulation and by the relevant convention.

Article 7c

Criteria for granting export authorisations

1. Decisions on applications for authorisations in respect of the export of goods listed in Annex IIIa shall be taken by the competent authorities on a case by case basis, taking into account all relevant considerations, including in particular whether an application in respect of an essentially identical export has been dismissed by another Member State in the preceding three years and considerations about intended end-use and the risk of diversion.

2. The competent authority shall not grant any authorisation when there are reasonable grounds for believing that the goods listed in Annex IIIa might be used for capital punishment in a third country.

3. The following guidelines shall apply to the verification of the intended end-use and the risk of diversion:

3.1. If the manufacturer of a medicinal product containing any active substance listed in Annex IIIa requests an authorisation for exporting such product to a distributor in a

third country, the competent authority shall make an assessment of the contractual arrangements made by the exporter and the distributor and the measures that they are taking to ensure that the medicinal products will not be used for capital punishment.

3.2. If an authorisation is requested for exporting goods listed in Annex IIIa to an end-user in a third country, the competent authority shall assess the risk of diversion taking into account the contractual arrangements that apply and the end-use statement signed by the end-user, if such a statement is provided. If no end-use statement is provided, it shall be up to the exporter to demonstrate who will be the end-user and what use will be made of the goods. If the exporter fails to provide sufficient information to assess the risk of diversion, the competent authority shall be deemed to have reasonable grounds for believing that the goods might be used for capital punishment.

Article 7d

Prohibition of certain services

1. A broker shall be prohibited from providing to any person, entity or body in a third country brokering services in relation to goods listed in Annex IIIa, irrespective of the origin of such goods, if the broker knows or has grounds for suspecting that any part of a shipment of such goods is or may be intended to be used for capital punishment in a country that does not belong to the customs territory of the Union.

2. A supplier of technical assistance shall be prohibited from supplying to any person, entity or body in a third country technical assistance in relation to goods listed in Annex IIIa, irrespective of the origin of such goods, if the supplier of technical assistance knows or has grounds for suspecting that some or all of the relevant goods are or may be intended to be used for capital punishment in a country that does not belong to the customs territory of the Union.'

(8) Article 8 is replaced by the following:

'*Article 8*

Types of authorisations and issuing authorities

1. A Union General Export Authorisation for certain exports as set out in Annex IIIb is established by this Regulation.

The competent authority of the Member State where the exporter is established can prohibit the exporter from using this authorisation, if there is reasonable suspicion about the exporter's ability to comply with the terms of this authorisation or with a provision of the export control legislation.

The competent authorities of the Member States shall exchange information on all exporters deprived of the right to use the Union General Export Authorisation, unless they determine that a specific exporter will not attempt to export goods listed in Annex IIIa through another Member State. A secure and encrypted system for exchange of information shall be used for this purpose.

2. An authorisation for exports other than those referred to in paragraph 1 for which an authorisation is required under this Regulation shall be granted by the competent authority of the Member State where the exporter is established, as listed in Annex I. Such authorisation may be an individual or a global authorisation, if it concerns

goods listed in Annex III or in Annex IIIa. An authorisation concerning goods listed in Annex II shall be an individual authorisation.

3. An authorisation for imports for which an authorisation is required under this Regulation shall be granted by the competent authority of the Member State where the museum is established, as listed in Annex I. An authorisation concerning goods listed in Annex II shall be an individual authorisation.

4. An authorisation for the supply of technical assistance related to goods listed in Annex II shall be granted by:

   (a) the competent authority of the Member State where the service supplier is established, as listed in Annex I, if the assistance is to be supplied to a museum in a third country; or

   (b) the competent authority of the Member State where the museum is established, as listed in Annex I, if the assistance is to be supplied to a museum in the Union.

5. Applicants shall supply the competent authorities with all relevant information required for their applications for an individual or global export authorisation or for an individual import authorisation so that the competent authorities have complete information in particular on the end-user, the country of destination and the end-use of the goods. The authorisation may be subject to an end-use statement, if appropriate.

6. By way of derogation from paragraph 5, where medicinal products are to be exported by a manufacturer to a distributor, the manufacturer shall provide information on the arrangements made and the measures taken to prevent these products from being used for capital punishment, on the country of destination and, if it is available, information on the end-use and the end-users of the goods.

7. Member States shall process requests for individual or global authorisations within a period of time to be determined by national law or practice.'

(9) In Article 11, the following paragraph is added:

'5 All notifications required under this Article will be made via a secure and encrypted system for exchange of information.'

(10) After Article 11, the following Article is inserted:

'*Article 11a*

Exchanges of information by customs authorities

1. For customs risk management purposes, the customs authorities shall share relevant information in accordance with Article 4g of Commission Regulation (EEC) No 2454/93. *

2. Customs authorities shall inform the competent authorities of the relevant Member State when exports or imports of goods which are prohibited by Article 3 or 4 occur. Customs authorities shall also inform such competent authorities in case of exports without authorisation as referred to in Article 5 or 7b.

* Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, OJ L 253, 11.10.1993, p. 1.'

(11) Article 12 is replaced by the following:

'Article 12

Amendment of Annexes

The Commission shall be empowered, in accordance with Article 15a, to adopt delegated acts to amend Annexes I, II, III, IIIa, IIIb, IV and V. The data in Annex I regarding competent authorities of the Member States shall be amended on the basis of information supplied by the Member States.

Where, in the case of amendment of Annex II, III or IIIa, imperative grounds of urgency so require, the procedure provided for in Article 15b shall apply to delegated acts adopted pursuant to this Article.'

(12) After Article 12, the following Article is inserted:

'*Article 12a*

Requests for adding goods to one of the lists of goods

1. Each Member State may address a duly substantiated request to the Commission to add goods designed or marketed for law enforcement to Annex II, Annex III or Annex IIIa. Such a request shall include

   (a) information on the design and characteristics of the goods;

   (b) information on all the purposes for which they can be used; and

   (c) information on the international or domestic rules that would be broken, if the goods were to be used for law enforcement.

2. The Commission may, within three months, ask the requesting Member State to provide supplementary information, if it considers that the request fails to address one or more relevant points or that additional information on one or more relevant points is necessary. It shall communicate the points on which supplementary information needs to be provided.

3. If it considers that there is no need to ask for supplementary information or, where applicable, upon receipt of the supplementary information it has requested, the Commission shall within six months commence the procedure for the adoption of the requested amendment or inform the requesting Member States of the reasons for not doing so.'

(13) After Article 13, the following Article is inserted:

'*Article 13a*

Processing of personal data

Personal data shall be processed and exchanged in accordance with the rules laid down in Directive 95/46/EC of the European Parliament and of the Council * and Regulation (EC) No 45/2001 of the European Parliament and of the Council **.

* Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the movement of such data, OJ L 281, 23.11.1995, p. 31.

** Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1.'

(14) Article 15 is deleted.

(15) After Article 15, the following Articles are inserted:

'*Article 15a*

Exercise of delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The delegation of power referred to in Article 12 shall be conferred on the Commission for a period of five years from …. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

3. The delegation of power referred to in Article 12 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect on the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 12 shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months from the notification of that act to the European Parliament and to the Council or if, before expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

Article 15b

Urgency procedure

1. Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.

2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article 15a(5). In such a case, the Commission shall repeal the act without delay following the notification of the decision to object by the European Parliament or the Council.'

(15) The Annexes are amended as follows:

(a) In Annex III, section 4 is deleted

(b) A new Annex IIIa, the text of which is set out in Annex I to this Regulation, is added.

(c) A new Annex IIIb, the text of which is set out in Annex II to this Regulation, is added.

Article 2

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

Point 6 of Article 1 and, to the extent that it inserts Article 7d, point 7 of Article 1 shall apply as from 1 January 2015.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*