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From: Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Subject: REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT on the activities and consultations of the Anti-Torture Coordination Group referred to in Article 31 of Regulation (EU) 2019/125 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment

Delegations will find attached document COM(2020) 803 final.

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REPORT FROM THE COMMISSION

TO THE EUROPEAN PARLIAMENT

on the activities and consultations of the Anti-Torture Coordination Group referred to in Article 31 of Regulation (EU) 2019/125 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment

1. Introduction

Article 31(4) of Regulation (EU) 2019/125 of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment ⁽¹⁾ (the Regulation) requires the Commission to submit an annual report to the European Parliament on the activities, examinations and consultations of the Anti-Torture Coordination Group. The report must not undermine the commercial interests of natural or legal persons.

This report provides information on the activities of the Anti-Torture Coordination Group in 2019.

2. Regulatory framework

The Regulation's objective is to prevent capital punishment, on the one hand, and torture and other cruel, inhuman or degrading treatment or punishment in countries outside the EU, on the other, by restricting trade in certain goods. It distinguishes between goods that:

- are inherently abusive and should not be traded at all (Annex II), or
- can have legitimate uses, such as law enforcement equipment (Annex III) or goods for therapeutic use (Annex IV).

Trade in such goods is subject to certain restrictions.

This is why the Regulation restricts trade with non-EU countries. In particular, it does the following:

- i. It prohibits the import into, export from and transit through, the EU of goods, listed in Annex II, that have no practical use other than for the purposes of capital punishment or torture. The provision of any technical assistance related to such goods, specifically including training in how to use them, is also prohibited. The advertising of such goods in print media or on the Internet or advertising time on television or radio, or the display or offer for sale in an exhibition or fair, are also prohibited.
- ii. Goods listed in Annex III that could be used for the purposes of capital punishment or torture, but that may also have other legitimate uses (law enforcement), are subject to a prior export authorisation, on a case-by-case basis. A prior export authorisation is also required for supplying technical assistance or brokering services related to this category of goods. Annex III does not include: (a) firearms subject to Regulation (EU) No 258/2012; (b) dual-use items subject to Regulation (EC) No 428/2009; (c) goods subject to the terms of Common Position 2008/944/CFSP4.

¹ The Regulation concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment was adopted on 30.7.2005 (Regulation (EC) 1236/2005). It has been amended several times, most recently by Regulation (EU) 2016/2134 of 23.11.2016, and subsequently codified as Regulation (EU) 2019/125 of 16.1.2019 (OJ L 30, 31.1.2019, p. 1).

² Regulation (EU) No 258/2012 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 an export authorisation, and import and transit measures for firearms, their parts and components and ammunition, OJ L 94, 30.3.2012, p. 1.

- iii. It regulates trade in goods – chemicals or pharmaceutical substances (Annex IV) – that could be used for capital punishment (e.g. products that could be used to execute people by lethal injection). A specific licence authorisation (EU General Export Authorisation) has been introduced to control the export of such anaesthetic chemicals and prevent their transfer for use in lethal injection executions, without limiting their trade for medical, veterinary or other legitimate purposes.

The lists of prohibited and controlled goods are set out in Annexes II, III and IV to the Regulation.

3. Activities of the Anti-Torture Coordination Group

The Anti-Torture Coordination Group (ATCG) was set up pursuant to Regulation (EU) 2016/2134 of the European Parliament and of the Council, to examine questions concerning the application of the Regulation.

The ATCG serves as a platform for Member State experts and the Commission to exchange information on administrative practices and discuss issues of interpretation of the Regulation, technical issues with the goods listed, developments related to the Regulation, and any other matters that may arise. The Commission also consults the ATCG when preparing delegated acts, in accordance with the Interinstitutional Agreement of 13 April 2016 on Better Law-Making ⁽⁵⁾.

The ATCG held two meetings in 2019, on 29 April and 17 December, to exchange information on a number of issues summarised below concerning the Regulation's implementation.

3.1. Developments related to the basic act

The ATCG was informed of developments related to the basic act, namely the codification of Regulation (EC) No 1236/2005 in Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019. The original Regulation (EC) No 1236/2005 had been substantially amended several times between 2005 and 2018. For clarity and legal certainty, it had been codified. The codified Regulation repealed Regulation (EC) No 1236/2005 and consolidated all its amendments, but did not amend the lists of controlled goods.

The Commission also informed the ATCG of, and subsequently consulted it on, a draft delegated act amending: (i) the list of competent authorities (listed in Annex I) and (ii) the list of destinations to which the Union General Export Authorisation (Annex V) applies (adding The Gambia and Madagascar). The approach so far has been to include a non-EU country in Annex V if it has ratified a relevant international agreement with a commitment to abolishing the death penalty for all crimes. For countries that are not members of the Council of Europe, that means the country in question must have ratified the Second Optional Protocol to the

³ 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.

⁴ Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment (CFSP) (2020/C 85/01), OJ C 85, 13.3.2020, p. 1–37 .

⁵ OJ L 123, 12.5.2016, p. 1.

International Covenant on Civil and Political Rights (ICCPR) without reservation ⁽⁶⁾. The Gambia has ratified the Second Optional Protocol to the ICCPR without reservation. The same goes for Madagascar and the countries added previously to the list in 2017⁷.

3.2. Trade information: data reporting

The Commission reviewed with the members of the ATCG the status of the submissions from EU Member States, received and outstanding, for the preceding years (2017 and 2018), in order to prepare the Commission's annual report in accordance with Article 31(4) of Regulation (EU) No 2019/125. The Commission has stressed the need for all Member States to report, even if no export authorisation was granted or denied.

In the broader context of the reporting process, the Commission with the ATCG looked into extending it to matters such as (i) information on authorisations concerning the brokering of services and technical assistance and (ii) information on the use of the Union General Export Authorisation. The ATCG also discussed the possibility of including the end-user in regular reporting. One national competent authority expressed the view that such information should be provided to the Commission on request only, in line with Article 26(2).

On the basis of the above, the Commission informed the ATCG of its intention to update the reporting form in order to incorporate a broader range of data, in preparation for the reporting exercise for 2019.

3.3. Review of Regulation (EU) No 2019/125

The Commission informed the ATCG of the process of reviewing the Regulation as set out in Article 32. In accordance with the Better Regulation guidelines, the Commission published a roadmap in July 2019 outlining the scope of the exercise, the consultation modalities, and the involvement of stakeholders, as well as a tentative timeline. It also informed the ATCG that, as part of the review (and in line with Article 32 of the Regulation), it was seeking information about specific parts of the Regulation: penalties referred to in Article 33, and additional national measures referred to in Articles 10 and 14.

The Commission invited the ATCG to take part in the review process by relaying to it Member States' views, comments, suggestions and information on best practices – as well as on loopholes – that they may have identified in their day-to-day implementation of the Regulation. Suggestions were made to put together guidance on risk assessment, or put a system in place for an exchange of views, in an appropriate format, on export destinations.

The ATCG was also invited to raise awareness of the public consultation and get input from other parts of their administrations, as appropriate.

⁶ Article 2 of the Second Optional Protocol to the ICCPR states that a country can make, at the time of ratification or accession, a reservation that provides for the application of the death penalty in time of war (pursuant to a conviction for a most serious crime of a military nature committed during wartime).

⁷ Regulation (EC) 2018/181 of 18 October 2017, adding the Dominican Republic, Sao Tome and Principe and Togo.

3.4. Alliance for Torture-Free Trade

The Commission provided an update on the state of play regarding the Alliance for Torture-Free Trade, notably the adoption on 28 June 2019 of the UN General Assembly resolution ‘*Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards*’.⁸ The resolution laid the foundations for the UN’s work in this area in the future. The Commission has shown its commitment to making trade torture-free by supporting the work of the Office of the UN High Commissioner for Human Rights in following up on the resolution’s implementation.

⁸ Resolution A/73/L.94: ‘*Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards*’, adopted by the UN General Assembly on 28 June 2019.