UNICE
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UNICE PRELIMINARY POSITION PAPER

IMPLEMENTATION OF THE COUNCIL REGULATION 1334/2000 OF 22 JUNE 2000 SETTING UP A COMMUNITY REGIME FOR THE CONTROL OF EXPORTS OF DUAL-USE ITEMS AND TECHNOLOGY

Executive Summary

This position offers a preliminary European business assessment of the practical implementation of Council Regulation 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology.

While UNICE fully supports and welcomes the development of an efficient and harmonised system of export controls for legitimate international security reasons, it is concerned that some provisions of the Regulation may unduly hamper European trade opportunities and competitiveness.

With this in mind, European companies call for differentiated treatment for the control of intangible transfer of technology and software, as opposed to physical shipment of goods, within and between EU-based companies and their subsidiaries within the EU and worldwide, or any of its linked entities. European companies cannot apply the same ex ante control procedures to physical exports and to internal electronic communications, for they differ greatly in both their nature and intensity. Unless eliminated or streamlined, export controls on intangible transfers of technology risk interfering unduly with normal commercial practices.

UNICE also proposes an extension of the scope of the Community general export authorisation to include any repair equipment and replacement items for or temporary services on previously legally exported main equipment, or for the temporary purpose of trade fairs and exhibitions - as this would not pose a threat to national or international security. Similarly, goods transiting via a customs free zone or free warehouse whose final destination is a country covered by the general authorisation should benefit from the latter.

Moreover, UNICE recommends clarification of the definition of 'exporter', thus making it consistent with the Customs Code Regulation Article 788.

In the absence of a clear identification list of the embargo countries and in view of the difficulty for European businesses of determining the potential end-use of exported dual-use items, UNICE demands that further and more open information be disseminated on both the countries of concern and the risks related to end-uses and end-users. To that end, UNICE makes several concrete proposals.

Finally, UNICE recommends that information and consultation with European industry be organised on a regular basis, in conformity with article 18 of the Regulation, so as to track technology/market developments and initiate prompt responses to the fast-moving business and geopolitical environment. UNICE believes that it is of utmost importance that policy-makers and the business community work together to enable the former to come up with workable and effective solutions which do not put European companies at a disadvantage compared with third country competitors, while addressing legitimate security concerns.

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Introduction

European companies recognise that export controls are necessary for national and international security reasons and fully support the development of an efficient and harmonised system of export controls to that end. European business further appreciates the efforts made by the Commission to understand and reflect European industry's needs and concerns. With this in mind, UNICE supports the Council Regulation 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports on dual-use goods and technology as a useful step towards further harmonisation in that field. The creation of a Community general export authorisation (items referred to in Annex II Part 1 for exports to countries listed in Annex II Part 3) and the liberalisation of most encryption products (Annex IV category 5 Part 2) are viewed, in particular, as major improvements.

While European business is committed to the legitimate protection of international security and foreign policy interests, it is concerned that some definitions and procedures laid down in the Regulation may unduly hamper European trade opportunities and competitiveness. In order to avoid creating or maintaining unnecessary burdens on European companies, UNICE proposes that the following issues be given consideration in the framework of the review process provided by article 18 of the Regulation:

Intangible transfers of technology

Article 2 (b) (iii) of the new Regulation reads:

> "Export shall mean transmission of software or technology by electronic media, fax or telephone to a destination outside the Community (…)".

Issues of concern

European companies understand and support the need to prevent exports of dual-use technologies that pose certain problems for national or international security and/or risk proliferation.

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The increasingly common use of electronic means of communications, together with the increasingly global presence of businesses, make it however impossible for multinationals to submit all of their internal electronic communications to *ex ante* controls. Global demand for information technology is evolving at a dramatic pace and products can be transferred around the globe at the click of a mouse. The exchange of proprietary emails and the use of intranets in performing engineering projects within a global business organisation are fundamental to a company's competitiveness. Policy-makers need to take due note of these changes when drafting regulations. Unless eliminated or streamlined, export controls on intangible transfer of technology risk interfering unduly with normal commercial practices.

Article 16 of the new Regulation establishes the obligation for exporters to keep detailed records of their exports in accordance with the practice in force in the respective Member States, in particular commercial documents such as invoices, manifest and transport and other dispatch documents. Whereas this article applies very well to physical shipments of goods, it is of little relevance for the intangible communication of technology.

Registering and Reporting

The registering and reporting practices attached to the use of a Community general export authorisation are left to the discretion of Member States.

Annex II, Conditions and requirement for use of this authorisation, (4) reads:

> "The registration and reporting requirements attached to the use of this general authorisation, and the additional information that the Member State from which the export is made might require on items exported under this authorisation, are defined by Member States. These requirements must be based on those defined for the used of general export authorisations granted by those Member States which provide for such authorisations"

The conditions applied by national licensing authorities in deciding to grant general licences can prove scattered and obsolete in the case of intangible technology transfers. For instance, the national requirement of statistical proof of a certain level of physical exports to obtain a licence can no longer apply under intangible communication of technology products and software. If applied by national licensing bodies, this criterion risks rendering the new Regulation unenforceable. Recording and reporting requirements therefore need adapting.

There is also room for greater transparency and harmonisation. To come back to the previous example, it is very difficult to unearth the calculation mode and exact amount of exports required. The calculation and resulting figure further seem to fluctuate between Member States and even companies within the same Member State. This discretion left to the national authorities in the general setting-up of licensing requirements adds complexity to the export control procedures and ultimately risks creating major trade distortions to the recently created Community regime.

Government Auditing of Export Controls

Similarly, current legal audits are based on the requirement to show, upon request, copies of official documents that have been issued in order to perform the transaction. No such document is issued however when electronic transactions are made.

Furthermore, all electronic transactions reside in the company's system. As auditors may request access to all the data structure of a given company, UNICE is concerned to avoid any violation of corporate privacy.

Recommendations

A licence exemption covering the intangible transfer of technology and software within and between EU-based companies and their subsidiaries within the EU and worldwide or any of its linked companies, provided that those transfers are for internal use only, would alleviate an onerous burden imposed on EU companies and enable them to compete more effectively.

If controls on intangible transfers of technology are to be maintained, UNICE insists that the Commission together with the Member States help devise common guidelines, in close consultation with European industry, for the recording and reporting of electronic communications, so as not unduly to hamper trade and competitiveness or put unjustifiable burdens on European industry compared with third country competitors.

Provided European companies can prove that their internal electronic communications are safe, easily traceable and free of any external interference, there should further be no need for *ex ante* controls on intra-company intangible transfers of technology.

UNICE is willing to discuss this issue further with the Commission and the relevant national authorities in order to find a workable solution.

Extension of the Community general export authorisation for exports

Article 6.1 states:

> "A Community general export authorisation for certain exports as set out in Annex II is established by this Regulation"

The replacement for repairs or the temporary export of services or installation/equipment/tools on previously legally exported equipment are not included in the Annex II list, although they do not pose a threat to national or international security.

Recommendations

UNICE requests that, in the case of damage or repairs, spare part deliveries in connection with previous legal exports of the main equipment be *de facto* licence free. Creating a new EU general license for "1:1 replacement for repairs" could achieve this.

Furthermore, UNICE suggests to introduce a new EU general licence for temporary export of service, installation, commissioning, and repair equipments, tools, measuring instruments, etc, for previously legally exported main equipment. A licence-free temporary export should equally apply for trade fairs and exhibitions.

Annex II, conditions and requirement for use of this authorisation, (3) reads:

> "This general authorisation may not be used when the relevant items are exported to a customs free zone or free warehouse which is located in a destination covered by this authorisation".

Issue of concern

It is ever more the case that dual use goods are exported to a customs free zone or free warehouse for an end-use or final processing / integration there, and/or further transhipment to the country where the free zone or free warehouse is located. This includes such countries as Poland, Hungary and the Czech Republic.

Recommendation

The above-mentioned article should be amended and complemented as follows:

> **"Without prejudice to the exception foreseen in the paragraph below,** this general authorisation may not be used when the relevant items are exported to a customs free zone or free warehouse which is located in a destination covered by this authorisation.
>
> **This general authorisation may however be used when the relevant items are exported to a customs free zone or free warehouse which is located in a destination covered by this authorisation if the relevant items are intended for an end-use or their final processing / integration there or in a destination covered by this authorisation and if no re-export to any destination other than the countries as given under Annex II part 3 is made."**

<u>Definition of exporter</u>

Article 2(c) of the Regulation presently states:

> "Exporter shall mean any natural or legal person on whose behalf an export declaration is made, that is to say the person who, at the time when the declaration is accepted, holds the contract with the consignee in the thirds country and has the power for determining the sending of the item out of the customs territory of the Community (…)."

Issues of concern

Although UNICE appreciates the fine-tuning of the definition of exporter with regard to the previous Regulation, it remains unclear from this dual definition which of the national subsidiaries of a multinational company established in the Community would qualify as "exporter". For example, a multinational company with a subsidiary in one Member State responsible for the invoicing, a second one holding the contract in another Member State and a third one acting as distributor in yet another country may experience difficulties in identifying its exporting entity.

The definition given in this article and that provided by the Customs Code Regulation Article 788[*] deviate from each other. The exporter under the dual use export control regulation and the Customs exporter may be two different persons, as in the case where the holder of an export license authorisation differs from the person on whose behalf the export declaration is made.

Recommendation

> **UNICE proposes that policy-makers and business work together to clarify the definition of "exporter". The definition of exporter in the Council Regulation and in the Customs Code should further be harmonised.**

Embargo Countries and "Catch-all" clause

Article 4.2 states:

> "An authorisation shall also be required for the export of dual-use items not listed in Annex I if the purchasing country or country of destination is subject to an arms embargo decided by a common position or joint action adopted by the Council or a decision of the OSCE or an arms embargo imposed by a binding resolution of the Security Council of the UN and if the exporter has been informed by the authorities (…) that the items in question are or may be intended, in their entirety or in part, for a military end-use. For the purpose of this paragraph, military end-use shall mean:
>
> (a) incorporation into military items listed in the military list of Member States;
> (b) use of production-, test- or analytical equipment and components therefor, for the development, production or maintenance of military items listed in the abovementioned list;
> (c) use of any unfinished products in a plant for the production of military items listed in the abovementioned list."

Issue of concern

Practical application of the controls for non-listed goods by exporters is made ever more difficult as uncertainty remains as to the identification of embargo States. There is thus a need for enhanced legal certainty and transparency in this area.

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[*] According to article 788 of the Community Customs Code: "1. The exporter, within the meaning of Article 161 (5) of the Code, shall be considered to be the person on whose behalf the export declaration is made and who is the owner of the goods or has a similar right of disposal over them at the time when the declaration is accepted.
2. Where ownership or a similar right of disposal over the goods belongs to a person established outside the Community pursuant to the contract on which the export is based, the exporter shall be considered to be the contracting party established in the Community".

Recommendations

A clear definition of the relevant countries of concern should be put in place and be made public. European business proposes that the EU publishes an official detailed list of such countries to avoid any confusion in the determination thereof. This should be seen as a first step towards the establishment of a legally binding list of countries of concern in the framework of the CFSP.

UNICE recommends, in accordance with its June 1999 Position on Economic sanctions/embargoes, that the European Commission sets up an Internet site providing information on all sanctions in force at European and international level, together with the name of a contact person from whom further details can be obtained.

Article 4.4 follows:

> "If an exporter is aware that dual-use items which he proposes to export, not listed in Annex I, are intended, in their entirety or in part, for any of the uses referred to in paragraph 1, 2 and 3, he must notify the authorities (…), which will decide whether or not it is expedient to make the export concerned subject to authorisation."

Issue of concern

UNICE is concerned that the onus of determining not only the embargo country but also the nature of the end-use of the exported goods will fall solely on the exporting company. While Member States do have the capability to control proliferation activities, a company does not possess the capacity to investigate alone and in detail its customer's undeclared, indirect (in the case of resale or re-export) and potential end-use of exported dual-use items.

Recommendations

The industry and the Member State in which the exporter is established should at least share information regarding the definition of military-connected end-uses and end-users.

As proposed in the UNICE White Paper on the rationale of export controls on dual-use goods, more open information needs to be disseminated to European companies on the risks related to end-use and end-users. The most practical way to achieve this objective would be to create some kind of a matrix that would explain for each and every destination which baskets of technologies, products and know-how should be submitted to scrutiny and require an export licence. This should be seen as a first step towards the establishment of a common list of sensitive end-uses and end-users.

<u>Information to and consultation of industry</u>

As mentioned in Article 18 of the Regulation:

> "1. A Coordinating Group chaired by a representative of the Commission shall be set up. Each Member State appoints a representative to the Coordinating Group.

The Coordinating Group shall examine any question concerning the application of the Regulation which may be raised either by the chairman or by a representative of a Member State and, inter alia:

(a) the measures which should be taken by Member States to inform exporters of their obligations under this Regulation.
(b) guidance concerning export authorisation forms.

2. The Coordinating Group may, whenever it considers it to be necessary, consult organisations representatives of exporters concerned by this Regulation."

Recommendation

UNICE recommends that information and consultation with the European industry be organised on a regular basis in order to track new technology/market developments that are relevant in this area and to initiate prompt responses as and when necessary.

Conclusions

European firms reiterate their commitment to strictly abiding with export controls on dual-use items for legitimate foreign policy and security purposes. But the efficient implementation of the Regulation requires a fine-tuning of its provisions, so as to adapt it to current technical progress and business developments.

UNICE believes, therefore, that it is of utmost importance that policy-makers and the business community work together to address these practical issues and come up with workable and effective solutions which would not put European companies at a disadvantage compared with third country competitors.

As suggested in the UNICE October 2000 White Paper on the rationale of export controls on dual-use goods, bringing together government officials, industry representatives but also academic experts will ultimately contribute to formulation of a common European approach to export controls that will reflect and respond to the rapidly changing geopolitical and business environment.

European business therefore looks forward to discussing its views with national and EU administrations, together with all other interested parties.