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COMMENTS ON COMMISSION PROPOSALS FOR REFORM OF THE EU EXPORT CONTROL REGIME

INTRODUCTION

As European companies stated in their initial communication on the subject of April 2005¹, the need for reform of the EU's regime on export controls of dual use goods responds to geopolitical, economic and institutional changes and is thus vital to prepare for the next century. BUSINESSEUROPE thanks the Commission for its proposals for reform. The changes cover some important aspects of the regime and some of them at least go in a direction that business could support.

However, industry must register its considerable disappointment that the reform proposals are not as ambitious as it had hoped. It is unfortunate that the EU's ability to act in this field has been constrained by Member State concerns about common European action in the security field. BUSINESSEUROPE reminds the Commission and Member States that the administrative and cost burden placed upon business as a result of the current export control system represents a serious drain on the EU competitiveness in high-tech sectors. The reform should be seen in the light of the EU's overall drive for better regulation and the Lisbon agenda, which would seem to dictate more dramatic change. BUSINESSEUROPE therefore urges the Council to improve seriously upon the proposals in its discussions over the coming months.

COMMENTS ON THE ISSUES RAISED BY BUSINESS

Transparency/Harmonisation

With regard to further harmonisation of procedures, business' principal concern was, while supportive of greater harmonisation, this should not lead to increased red tape and inflexibility in the system. The measures proposed by the Commission in this direction - enhanced use of the "pool of experts" to ensure more uniform interpretation of Annex I; better information-sharing among member states on national controls on denials; greater harmonisation of authorisation forms – appear to achieve greater harmonisation without unnecessary formalisation of the process.

On the question of business consultation, however, BUSINESSEUROPE would like to make a number of points. First, company experts should be included in the pool of experts, which would further enhance transparency and provide the authorities with considerable additional practical input. Second, companies would like to see an institutionalisation of

¹"Comments on the Reform of Export Controls on Dual-Use Goods" Available at www.busesseurope.eu



consultation by the Article 18 Coordination Group and the Article 19 Committee. On the other hand, we see the inclusion of “other relevant stakeholders” into Art 18 with serious concern. Finally business is concerned that the proposal to formalise dialogue between “other relevant stakeholders” and the Article 18 Coordination Group may lead to an eventual politicisation of the export controls process. This would be an unwelcome development.

Business is disappointed that the step taken towards harmonised deadlines for the processing of export control authorisations in Article 6.2 does not establish a fixed maximum time. Further progress on this will be needed.

European business welcomes the pledge to improve both national and EU websites and establish a common entry point. The quality of implementation of this commitment will be crucial for improving understanding of the system for business users. In the medium term business would like to see the website developed following the model of the single window concept.

Business also notes the inclusion of “transparency” among the areas to be tackled by administrative action. Business had suggested that outreach efforts to raise awareness of export control obligations among EU business could be useful and this could certainly be an example of such administrative action.

Catch-all clauses

Improved transparency and understanding among business of the system of national controls on non-listed items is essential if the dual use regime is to be effectively improved and applied. While the Commission’s proposals make some helpful advances in this regard, more is needed to tackle some of the inherent problems in this system.

In particular, BUSINESSEUROPE notes that no change has been made to Article 4.1 of the regulation. The inclusion of items for the detection of WMD is of considerable concern here as it included a very broad range of products that do not warrant inclusion in this highly restrictive procedure. Article 4.1 should be reserved for genuine proliferation activity. Companies are also concerned that no change has been made to specify minimum quantities for the application of the catch all provisions, which means that controls are also applied to all samples of products as well as eventual shipments. BUSINESSEUROPE would also like to see the creation of a list of commodity products which would be excluded from the application of the catch all clause given that they are relatively cheap, easily produced in large quantities and easily available from many sources.

The inclusion of a compulsory procedure for fast advice on individual shipments in Article 4.8 is very welcome. Business believes, however, that to be really effective the deadline should be reduced from 20 to 10 days.



There are also a number of measures that improve information sharing among member states on these cases, both through the new regulation and in best practices and guidelines. Industry welcomes this increased coordination but emphasizes that the fruits of this improved coordination must be shared with business, if the system is to be improved.

Community General Export Authorisation

Business welcomes the clarification provided by draft Article 6.1 (a) on the question of reporting by notification, particularly the specific inclusion of an option to report after first use. European business is disappointed, however, that no new authorisations have been proposed. The CGEA is a useful tool and business would highly appreciate that its use be expanded. It is to be hoped that the Commission will at a minimum take action in line with Annex V of the communication to extend the CGEA to chemicals covered by the CWC to more CWC States Parties; small quantity/value shipments and Wassenaar non-sensitive items to certain Wassenaar members. Electronic procedures for authorisations should also be considered in the future.

Intangible Technology Transfer (ITT)

Many of the elements of the proposed reform concern intangible transfers of technology. While this focus is certainly appropriate, it is very regrettable that the Commission has a priori ruled out the main proposal from business – i.e. to treat a multinational company as a single entity for the purposes of controls on ITT. Controls on ITT often imply a major burden on companies' day-to-day operations and the proposals have missed an opportunity to materially improve business conditions in that light.

Furthermore the new Article 16.2 (iii) as currently worded appears to create alarmingly burdensome record keeping requirements. The proposal could require detailed records for every instance of ITT, be they telephone conversations, e-mail exchanges or other methods of transmission. If this is the case, for both multinational and smaller companies the proposed requirements will be extremely burdensome and not workable in practice. Such documentation does not presently exist and cannot be introduced for every single transaction. BUSINESSEUROPE notes the Commission's assurances at its recent stakeholder meeting to take these concerns into account in the drafting of this section but is concerned its changes will not go far enough. To be safe companies urge the deletion of this article in the current form, or replacement by a much simpler and much more feasible uniform solution. BUSINESSEUROPE is also concerned about the application of ITT controls to operating instructions, which are not security critical.

Business nonetheless looks forward to working with the Commission to help define any future guidelines referred to for enforcement controls and technology transferred via company intranet. Clearly, the least burdensome and clearest approach possible will be the route to follow in this further work.

Global authorisations



Given the practicality of global authorisations for certain products and industries it is disappointing that no attempt to encourage their implementation by more Member States has been made. However, business welcomes the possibility of future guidelines to improve procedures for implementation, which, it is to be hoped, will encourage uptake.

Internal compliance programmes

Business notes with considerable interest the proposal to oblige Member States to “take into consideration” the existence of an ICP in a company when deciding on a global authorisation. The interpretation of this phrase will be key to its implementation.

Transit

Industry notes the proposals on transit with some concern. Industry had suggested that an awareness-raising approach could yield results without reducing predictability in the trade of dual use items.

Brokering

BUSINESSEUROPE accepts the new license requirement for brokering activities related to proliferation of WMD (article 4, paragraph 3) as a necessary step in order to prevent contributions to illicit WMD programmes out of the EU. The text of this paragraph, however, urgently needs to be clarified as it is not well defined what the "relevant international treaties and obligations" are and what activities are addressed by "violations"; in particular the scope of "has grounds of suspecting" (rather than "is aware" as in Article 4, paragraph 4) goes too far.

BUSINESSEUROPE is very concerned about the consequence of the interaction between article 2, definition “export” (b), case (iv) and article 3, paragraph 1, because this results in a license requirement for any service of intermediation of items in Annex 1 (list of dual-use items) far beyond the a. m. regulation in the case of WMD. The need for this requirement is not apparent and it imposes a heavy burden on business as it is difficult to put to practice and a serious disadvantage against our competitors in important third countries.

COMMENTS ON OTHER MAJOR ELEMENTS OF THE REFORM

Comitology

The introduction of a comitology procedure to streamline decision-making in relation to goods listed in the annexes is to be welcomed. However, the opacity of the comitology procedure as it is used in some other areas of EU policy gives cause for concern, and business insists that the procedure involve extensive consultation with stakeholders as a matter of course. As noted above the relationship between the Dual Use Committee and business representatives should be institutionalised.



Third countries

Business is pleased to see provisions that allow for negotiations with third countries and supports their use to afford greater legal certainty for European companies ultimately through mutual recognition. The extraterritorial application of third country controls to transfers between EU Member States is unacceptable.

Replacement of EU intra-community controls

The Commission's proposal to replace all intra-community controls with a notification and traceability system is certainly an improvement. Business hopes that this provision can be implemented without delay once the regulation is approved. However, as the notification system is meant to simplify procedures for business, the text has to make sure that there no new administrative burdens for companies are created compared to the present system. In some cases (e.g. maximum licenses for a certain amount of goods under which these goods can be shipped spontaneously) the current system may be more predictable and less bureaucratic than a notification for every transaction.

Companies also note that the pre-notification proposal should be removed altogether if, as is under discussion, a full liberalisation of the intra-community movements of defence products is agreed.

Application requirement

We strongly recommend deleting the passage "including any relevant information collected from third parties ..." from Article 9.1. This provision could lead to an enormous burden for companies and to a considerable delay of application procedures.