BUSINESSEUROPE

16 October 2019

An effective and efficient Dual-Use Export Controls Regulation

EU Regulation on Dual-Use Export Controls

On 5 June 2019, the Council of the European Union agreed on a common position on the reform of the EU Regulation on Dual-Use Export Controls, allowing for the commencement of the tripartite meetings ('Trilogues') between Parliament, the Council and the Commission.

European companies recognise the need to review the EU Regulation on Dual-Use Export Controls (Regulation 428/2009). In this regard, it is essential that the Regulation strikes the right balance between security considerations and imposing unnecessary restrictions on European companies.

As the EU Dual-Use Export Controls Regulation applies directly to our members, BusinessEurope would like to express a number of key concerns ahead of the Trilogue meetings.

Promising proposals

European business would first of all like to voice its support for a number of **positive proposals**:

- **The introduction of new EU General Export Authorizations (EUGEAs).** European companies welcome the introduction of new EUGEAs, including on encryption, intra-company transmissions of software and technology as well as on low value shipments. While these are very positive developments, the Commission's and the Council's proposals for new EUGEAs require some "fine-tuning" to make these solutions practical for exporters.
  The proposed EUGEA on encryption is for example largely based on the UK's OGEL for information security, which is often not used due to excessive conditions and reporting requirements. Secondly, the proposed EUGEA on intra-group export of software and technology does not cover exports to "sister" companies within the same corporate group. In addition, we recommend waiving reporting requirements, as companies already need to have a compliance system in place under the GEA for intra-group transfers of software and technology.

- **The extension of the validity period.** Extending the validity period for individual export authorizations and global export authorizations will stimulate and facilitate

businesses in their operations as it will offer companies more planning security. However, the Commission's initial one-year proposal is too short and will increase the administrative burden. Therefore, BusinessEurope welcomes the Council's amendment to extent the validity period to two years. A further (optional) extension should also be considered.

- **Intra-EU transfers.** European companies furthermore welcome the Commission's proposal to limit the list of items that are subject to control within the EU (Annex IV) to the most sensitive items. This will avoid the disruption of intra-EU trade of dual-use items and minimise the administrative burden for companies.

However, the initial proposal by the Commission also includes several features that do not contribute to an effective and efficient export controls system and would create unnecessary administrative burdens for European companies.

Remaining concerns for European business

Avoid diversion from multilateral export controls regimes

Firstly, the EU must **avoid a diversion from multilateral export controls regimes** such as the Wassenaar Arrangement and should refrain from adopting unilateral export controls. A multilateral approach is more effective than a unilateral approach as EU unilateral export controls would allow the supply of dual-use items to continue from outside the EU. Additionally, autonomous measures have a negative impact on the global level playing field.

In this regard, the EU should **refrain from creating an autonomous list for cyber-surveillance items**. While European business generally supports the principle of a lists-based approach, it is important to note that this measure will harm EU competitiveness as our competitors are not following our pace. Instead, the EU should discuss the issue of controlling trade of certain cyber-surveillance items in the relevant international export controls regimes as maintaining a global level-playing field is absolutely critical.

The proposed catch-all controls will not have the desired effect and will hurt EU competitiveness

The Commission has proposed to establish new catch-all controls to prevent human rights violations and terrorism. European business recognizes and supports that human rights violations and terrorism are global problems which need to be urgently addressed, but in our view catch-all controls are not an effective measure to tackle this issue.

The proposed catch-all rules are firstly **too vague and they create legal uncertainty** for business. The provisions are simply too unspecific to serve as a workable control criterion. As a result, companies will engage in compliance activities that go beyond what is necessary ('overcompliance') to be on the safe side and avoid possible penalties. The EU Dual-Use Regulation must ensure legal certainty for businesses and should not create unnecessary administrative burdens for companies.

For these reasons, catch-all controls would not only be ineffective to tackle human rights violations, but would also lead to long delivery times that could paralyze business. The proposed catch-all controls would have severe consequences for export processes and for EU competitiveness.

Moreover, government agencies are better equipped than private companies to assess whether certain countries or other actors should be classified as sensitive on the basis of human rights violations as they for example have sophisticated intelligence information at their disposal. The amended Dual-Use Regulation should not pass the responsibility for evaluations of a political-legal nature onto companies as this may lead to the 'privatization' of human rights.

Therefore, the proposed new rules on human rights and terrorism should be **removed from Article 4.** In this regard, European companies welcome the Council's amendment that removes the proposed catch-all controls from Article 4.

The due diligence clause overbears individual business' competences

In Article 4 paragraph 4, the Commission suggested an exercise of due diligence by exporters concerning possible misuses of their non-listed export goods in destination countries. If affirmed by the affected company, this in turn leads to the obligation of an export authorisation. BusinessEurope supports the Council's mandate which does not confer such additional responsibilities to individual companies. Placing the onus on businesses overbears the financial and human resources of companies, in particularly of SMEs.

Business should be consulted when drafting Guidelines

The process of the preparation of potential Guidelines should be transparent and inclusive. European companies have valuable experience and expertise that they can share to contribute to an effective and efficient implementation of the Regulation. For this reason, it is essential that companies and other stakeholders are consulted as soon as possible in case the Commission desires to prepare Guidelines.

The prescription of end-use statements is unrealistic

Lastly, BusinessEurope does not support proposals by the Council that prescribe end-use statements when granting individual export licences. This would lead to unnecessary bureaucratisation of export procedures where authorisation is required. Moreover, end-user statements are from time to time very difficult to obtain, for instance when it is a contract with a State (e.g. MOU). The uncritical end use is often sufficiently secured even without formal end-use statements. The exemption by national authorities envisaged by the Council is not sufficiently flexible.

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