



CIVIL SOCIETY DIALOGUE

MEETING ON EXPORT CONTROL POLICY REVIEW: PRESENTATION FOR A PROPOSAL FOR A MODERNISED REGULATION

Date: 03/10/2015

Time: 14:30 – 16:30

Location: Albert Borschette Centre, Room 5-B, Rue Froissart 36, Brussels

Lead speakers

Mr Denis Redonnet, Director for WTO, Legal Affairs, and Trade in Goods, Directorate-General for Trade

Mr Stéphane Chardon, Policy officer, Export Controls, Directorate-General for Trade

Ms Maryna Tsukanova, Policy officer, Export Controls, Directorate-General for Trade

Moderator

Mr Lutz Guellner, Head of Unit, Information, Communication and Civil Society Unit, Directorate-General for Trade

Cabinet Malmström – Trade

Ms Jolana Mungengová, Member of Commissioner Malmström's Cabinet

Presentation of the proposal for a modernised regulation

The **Commission** (DR) presented the proposal for a modernisation of EU export controls adopted on 28 September 2016 (COM(2016)616)¹ and noted that the key to effective export controls lies in the right balance between security and economics. The Commission (DR) observed that the proposal is aimed at ensuring that the EU export control system keeps pace with the evolving security risks, as well as with economic and technology developments.

The **Commission** (DR) explained that the proposal broadly follows two directions. Firstly, it consists in a "system upgrade", aiming at improving the efficiency and effectiveness of current controls. Secondly, it introduces a new "human security dimension" in response to challenges posed by the emergence of new cyber-surveillance technologies and their impact on human rights and the EU's security. Starting from the premise that there is already a good system in place the Commission's approach builds on the existing solid foundations. In this respect, the Commission stressed that the "human security dimension" has been designed using the traditional tools of export controls. Thus, the proposal does not constitute a revolution, but rather an evolution of existing EU export controls.

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1476175365847&uri=CELEX:52016PC0616>

The **Commission** (DR) argued that the proposal would make the system more efficient by reducing the cost and the administrative burden associated with control, without reducing effectiveness in terms of security. To illustrate this point, the Commission referred to the proposal to introduce new EU General Export Authorisations, which would cost economic operators four times less than individual licenses. The Commission also pointed to the proposed reduction of intra-EU transfers that would immediately reduce costs by approximately 40%. As regards effectiveness, the proposal provides for a further harmonisation of controls which aims at minimising the possibility of divergent *à la carte* controls and the resulting distortions of competition between EU exporters. The Commission stressed that a more consistent application of controls will not only improve the level-playing field for exporters in all Member States but also ensure better security. The Commission also noted that certain loopholes must be filled: for example, the Commission proposes to explicitly mention terrorism as a reason for control to remedy the lack of legal a basis to block the export of sensitive items where there is a risk of misuse in connection with acts of terrorism – as already defined in the EU *acquis*.

The **Commission** (DR) noted that the "human security dimension" had already been evoked in a 2014 Commission Communication², and explained that it addressed the need to control certain new emerging "cyber-surveillance technologies" and to prevent the misuse of dual-use items for violations of human rights. The Commission (DR) recalled the 2014 Joint Declaration³ in which the three EU institutions – including the Council and the Parliament – had jointly identified the problem and recognized the need to address it and to modernise the EU export control system.

The **Commission** (DR) acknowledged the industry's concerns with respect to the new "human security dimension" and the potential administrative burden that it might generate, but confirmed its assessment that the proposed measures will have only limited economic impact, since the proposed new controls have been designed in a targeted way so as to only focus on very specific technologies in very specific circumstances. The Impact Assessment conducted in relation to the recast of the Regulation supports this conclusion⁴. The Commission expressed readiness to continue to constructively discuss with the co-legislators and stakeholders in the upcoming ordinary legislative procedure.

Discussion Highlights / Questions and Replies

BDI took the view that the new "human security dimension" was more than an evolution, and stated that its members had mainly critical reactions to it. BDI asked for clarifications regarding the additional requirements that might be imposed on economic operators as a result of this new dimension of the dual-use export control regime.

BUSINESSEUROPE observed that certain stakeholders had concerns that the proposed "human security dimension" might result in a shift of the "burden of proof" from national authorities to economic operators. BUSINESSEUROPE also sought reassurances regarding the industry involvement in the development of the guidelines that could support the effective implementation of the proposed controls.

The **Commission** (DR) explained that the introduction of the human security dimension will not significantly enhance the burden of economic operators as they are likely to rely on the

² <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1476175619398&uri=CELEX:52014DC0244>

³ Joint Statement by the European Parliament, the Council and the Commission on the review of the dual-use export control system, OJ C100, 4.4.2014, p. 11,

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014AG0005&from=EN>

⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1476176212616&uri=CELEX:52016SC0315>

information generated by their regular due diligence processes to identify potential exports of concern. The Commission stressed that, at the end of the day, the exporter's obligation is merely to notify transactions of concern to the competent authority, while the final decision to authorise or deny an export will continue to be the competence of national authorities. The Commission (SC) further explained that it intended for the new controls to have a limited scope to target only the most critical of situations, and that the proposal assumes that economic operators are already conducting due diligence in relation to a number of issues, including human rights and terrorism. Hence, the only new obligation imposed on economic operators is to notify to national authorities information resulted from their due diligence processes. The Commission (SC) confirmed its readiness to work closely with Member States and with stakeholders, including the industry, in developing guidelines, and on building on the intensive engagement with industry in the context of the export control policy review and the preparation of the proposal

The **Confederation of Danish Industry** (CDI) expressed concerns regarding the proposal's controls of exports of cyber-technology to repressive regimes and inquired whether such exports were done in violation of existing export control rules. The **Commission** (DR) observed that the proposal addressed the lack of clarity of the existing regulation with regard to human rights issues. The Commission (SC) recalled that a number of problematic exports in the past few years – including some public cases – highlighted the lack of a solid legal basis for control.

Bitkom requested clarification of the terms used in the "targeted" catch-all in Article 4.1(d) – such as "relevant public international institutions", or "evidence" – and of the legal implications of the proposed changes, and asked whether the mentioned guidelines would be legally binding. The **Commission** (SC) explained that these terms, or "filters", aim at focusing the catch-all controls on the really problematic exports and avoid broad impact on legitimate exports of Information and Communication Technology and explained that the term "relevant public international institutions" refers to those organizations that have a mandate related to the protection of human rights while the term "evidence" requires an information threshold stronger than "suspicion". As for guidelines, the Commission's view is that they would, by their very nature, not be legally binding.

BUSINESSEUROPE requested clarifications of the meaning of the phrase "in connection with acts of terrorism". The **Commission** (SC) explained that in situations where there is a direct or indirect relation to acts of terrorism, the economic operators must notify the national authorities. The Commission (SC) stressed that economic operators were best placed to know their customers and had the most relevant information about them.

European Digital Rights expressed content with the Commission's proposal and inquired about the criteria for defining a "serious violation of human rights" under Article 4(d), while **Access Now** stressed the importance of ensuring that exports of dual-use items do not cause violations of human rights. The **Commission** (DR) clarified that such situations should be assessed on a case-by-case basis by competent authorities, in line with the traditional approach to export control. The Commission (SC) added that guidelines could possibly clarify the conditions of application of these provisions, and noted that more detailed definitions could be considered during the legislative process, if appropriate.

BUSINESSEUROPE pointed to the proposal to enable the post-shipment verifications of exports in third countries and enquired about plans to develop dialogues with other countries, aside from Canada and the US. The **Commission** (MT) suggested the possibility of closer cooperation with EU Delegations and the Embassies of Member States in the third countries. It also mentioned Switzerland as an example of a country that has been using post shipment verification clauses for certain exports of military equipment. Moreover, the Commission confirmed that it planned to engage in dialogues with other third countries.

Digital Europe expressed appreciation for the expansion of the scope of the EUGEAs and stressed that this would be beneficial to the competitiveness of the industry, but shared concern with the perceived expansion of the definition of dual-use items. The **Commission (SC)** clarified that the proposal – and the revised definition of "dual-use items" – does not expand the scope of the definition of dual-use items, as compared to the current regulation, but merely clarifies that definition in relation to the category of "cyber-surveillance technology".

The **Commission (DR)** stressed its readiness to continue engagement with stakeholders as the legislative process moves on, and invited participants to participate in the upcoming Export Control Forum planned on 12 December 2016.