

# Updated DIGITALEUROPE Comments on Proposal for Recast of Export Control Regulation

Brussels, 30 January 2018

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DIGITALEUROPE, the industry association representing the digital technology industry in Europe, fully endorses the objectives of the European Commission to safeguard and promote human rights. Furthermore, DIGITALEUROPE fully supports the European Commission's proposal to reform the export control regime in order to address the latest technological and political developments. DIGITALEUROPE recalls that the EU currently has a well-functioning export control system, implementing the results from the international export control regimes, also used by many third countries as a model and best practice. This system has been tested in practice for a long time and provides a solid legal baseline for exporters and Member States.

DIGITALEUROPE acknowledges the efforts of the European Parliament (hereafter: EP) to advance the Commission's proposal for a modernization of the EU Export Control Regime. Following the plenary vote of the EP on 17 January 2018, we encourage the EP and Council to stand ready to work towards a legally sound and operational export control regime in line with the international best practices and export control regimes.

On the basis of the efforts of the EP, and in light of the ongoing discussions in the Council of the European Union, we deem it necessary to continue working on the proposed text. It is important that the principles and goals of the export control regime as well as legitimate business and societal interests can benefit from the reform in practice and any unintended consequences are prevented. Consequently, this paper sets out our suggestions for changes to the proposed Regulation following the vote in EP plenary on 17 January 2018.

## 1) Scope and Definitions

DIGITALEUROPE believes that the existing dual-use definition should continue being based on the internationally established definition. DIGITALEUROPE therefore appreciates the EP's efforts to clarify the difference between traditional dual-use items and cyber surveillance items. The definition of cyber-surveillance items as such is now more detailed and comprehensible. While recognizing these improvements, we believe that any explanation of what covert intrusion is, must include consent by owner/administrator of systems rather than the owner of the data exclusively. In order not to compromise the primary objectives of the multinational export control system, there must be consistency between the definition and the annex in this regard as well as with the Wassenaar Arrangement Dual-Use Goods and Technologies list.

## 2) General Export Authorisations

DIGITALEUROPE welcomes the EP's strong support for the introduction of the new EU General Authorisations (hereafter: EUGEAs) for encryption and intra-company transfers, putting the EU's industry on the same competitive level as many of our trading partners. Since encryption functionalities are widely available on a global level to individuals and businesses to secure information, the licensing simplification for products from category 5 part 2 is fully justified. Similarly, the simplification for intra-company transfers of software and technology will have a positive impact on global collaboration when the dissemination of such software and technology is under control of the same corporation. We would appreciate if the EU General Authorization also covered equipment, hardware and materials e.g. laboratory equipment and prototypes, which are often moved internationally during global R&D projects. As the export of software and technology already benefits from similar licensing simplification, it is unclear to us where the additional risk should come from. There is nothing inherent in products that would put them at higher risk than software and technology.

In relation to the EUGEA for export after repair/replacement, the existing exception to this EUGEA should only be applicable when the warehouse is not under the control of the EU exporter (see para 2 point 3 in the EUGEA). This clarification would enable exporters that ship to depots which are under their control benefit from the general authorisation whilst keeping the risk of diversion at a minimum. Shipping to depots is necessary in order to be able to service customers with very short response times (down to two hours) for instance in the networking industry to avoid network outage. This clarification to the "warehouse exception" should equally be applied in all other EUGEAs.

## 3) Disproportionate Measures

DIGITALEUROPE notes the EP's strong support for the introduction of new EUGEAs for encryption and intra-company transfers, and recognises the need to limit the catch-all clause. Nevertheless, a proportionate balance must be achieved with measures for cybersurveillance technologies to avoid unintended consequences that could limit legitimate activity to ensure security of network and information systems. Such new control measures can only be effective when specific end-users and/or countries of concern are targeted. In our view, industry does not have sufficient information to take such important decisions. Governments are much better prepared to identify actors that violate or are likely to violate human rights, having access to information from sources not available to private companies, and other means to assess the political situations in specific countries. DIGITALEUROPE welcomes an opportunity to engage in continued dialogue with policy makers to better understand such a balance and any unintended consequences.

## 4) Autonomous List: Unilateral Regime and Disproportionate Power

Next to the extended definition of dual-use items to include cyber surveillance technologies, Annex I.B includes a new set of products with cyber surveillance technology. These products are set apart from traditional dual-use products that reflect the control lists of other export control regimes of other countries outside of Europe. DIGITALEUROPE regrets this proposed shift away from international regimes and urges Member States to reconsider the appropriateness of this element of the Commission

proposal. DIGITALEUROPE strongly reiterates that unilateral regimes harm the global competitiveness of the European industry and ignore existing international export control regimes. Furthermore, failure to successfully negotiate such technology to be controlled by the recognised international regime is unlikely to see a significant improvement in human rights violations, as the cyber surveillance technology can simply be procured and exchanged outside of the European Union.

Absent a full re-alignment with the international control regimes, DIGITALEUROPE considers the introduction of safeguards to prevent a future deviation of an EU autonomous list from these regimes essential. Should the Commission in the future wish to amend the list of dual-use items set out in Section B of Annex I, the Commission should be obligated to take into account the ability to make a clear and objective specification of the item as well as the foreign availability of the item outside of the European Union. The ability to control effectively the export of the item and the controls by the international export control regimes should also be taken into account (in line with former EPP amendment 301).

## 5) Internal Compliance Programme and Due Diligence

Introducing Internal Compliance Programme (ICP) requirements as one of the conditions of the global export authorizations and the Union General Export Authorization EU008 for intra-company transmissions of software and technologies seems to be justified.

Nevertheless, the mandatory ICP certification proposed by the EP would be an additional administrative burden for exporters (even if free of charge). Many multinational organizations have their global ICP and such programme should be accepted without the additional mandatory need to create separate ICP documentation in the EU (except when EU specific standards should be met, which can be addressed e.g. in the annex). Any ICP requirements in the EU should be aligned with international best practices as much as possible.

DIGITALEUROPE supports the ICP elements outlined in the draft ICP guidelines with the exception of “physical and technical security”. We are of the opinion that there should be a great level of flexibility in the implementation of ICP best practices given that there is no “one-size-fits-all” solution. Depending on the size, structure and volume of export of each organization, there are different ways to achieve compliance standards outlined in the ICP.

A similar approach should apply to due diligence guidelines which should be aligned with ICP as much as possible.

## 6) New Decision Criteria for Export Authorisations

The list of decision criteria that an export control authority shall take into account when deciding whether or not to grant an export authorisation has been expanded significantly (Art. 14). It is difficult to anticipate the practical outcome of these many new decision criteria for export authorisations as they are rather subjective and not clearly connected to the dual-use items to be exported. It is likely that the criteria will be interpreted differently by the competent authorities and that the level-playing field within the EU will decrease. DIGITALEUROPE supports a continued practice of applying, when relevant, the criteria of Common Position 2008/944/CFSP which includes human rights.

## 7) Authorisations for Technical Assistance

The definition of technical assistance creates the risk of capturing routine business activities such as consulting and skills courses. This definition should be narrowly constrained. There should be no extraterritorial controls that would be inconsistent with international law and with the EU's opposition to the exercise of such controls by the US. DIGITALEUROPE is of the opinion that paragraphs 1 and 2 of Article 7 shall not apply if the technical assistance (a) is provided in a country listed in Section A of Annex II, (b) takes place via the passing on of information, which is generally available or forms part of basic research within the meaning of the General Technology Note to Annex I or Section A of Annex I, (c) does not refer to technology, which is cited in the numbers of category E of Annex I, or (d) represents the absolutely necessary minimum for the construction, operation, maintenance and repair of those dual-use items for which an export authorisation was issued.

## 8) Harmonization of export licensing across the EU

We fully recognize that the harmonization of export control systems across the EU is vital. Therefore, we support the implementation of an EU-wide processing time of 30 days for global and individual export authorizations with the possibility of extending it in duly justified cases by additional 30 days.

While the proposed EU-wide validity period of 2 years for global and individual export authorizations is an improvement compared to the previous text of the draft regulation (1 year proposed by the European Commission), we would welcome an extension to 3 years. This would illustrate administrative simplification for both authorities and exporters (especially, given that authorities have the power to cancel authorizations at any time in duly justified cases).

DIGITALEUROPE is ready to continue working constructively with policy-makers to make sure Europe can lead in the global fight for human rights whilst providing a legally sound and operational export control regime for its ICT industry to remain globally competitive.

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Sarah Wagner, DIGITALEUROPE Policy Manager  
+32 492 50 90 96 or [sarah.wagner@digitaleurope.org](mailto:sarah.wagner@digitaleurope.org)

## ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies. DIGITALEUROPE ensures industry participation in the development and implementation of EU policies.

DIGITALEUROPE's members include in total 25,000 ICT Companies in Europe represented by 61 corporate members and 37 national trade associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

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