EUROCHAMBRES

Position Paper

Proposal for a Regulation setting up a regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast) - COM(2016) 616 final

Background

On 28 September 2016 the European Commission published a proposal for a recast of the regulation setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items. On 17 January 2018, the plenary of the European Parliament adopted its position concerning the proposal. The matter was then referred back to the committee for International Trade (INTA), which is responsible for interinstitutional negotiations. The Council is still developing its position on the proposal. Interinstitutional negotiations are not expected to start before the autumn of 2018.

General Remarks

EUROCHAMBRES welcomes the objective of harmonizing the export rules for items that can be used for both civilian and military purposes (dual-use goods). We agree that in an ever-changing environment it is necessary to bring the existing rules in line with newly emerging circumstances and threats, in order to create a consistent framework and a level playing field. Unfortunately, the proposed draft recast of the European Commission does not succeed in achieving this goal. Due to vague legal concepts, the new rules would unfortunately cause legal uncertainty, additional bureaucracy, reduced planning security and enormous risks for enterprises. Especially small and medium-sized enterprises (SMEs) will have difficulties when trying to comply with the foreseen changes.

The amendments to the proposal adopted by the European Parliament on 17 January 2018 contain some adjustments but overall only limited improvement has been attained. Therefore, important improvements still need to be made in order to ensure the competitiveness of the Chambers' member businesses.

Please find below our main points:

New items list: Cyber Surveillance Technology

With the newly added category 10 (Annex I Section B) the EU deviates significantly from the traditional definition and lists of dual-use items which are defined by multilateral export regimes. Adding new items to the list will cause an unnecessary tightening of regulations. A unilateral, EU-autonomous authorisation requirement creates a competitive disadvantage in relation to competitors from third countries, especially in the area of smart technologies. Furthermore, a unilateral control by the EU will not prevent the abusive use of cyber surveillance technologies in general, since other countries still can (and will) export those items

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without any control. Furthermore, dual use controls aim countering the proliferation of all weapons of mass destruction. Cyber-surveillance technologies may be misused for the violation of the right to privacy or the freedom of expression, but it cannot be used to proliferate weapons of mass destruction. Including cyber-surveillance technologies to dual use control lists would mean to abandon the reliable and internationally agreed foundations of export controls.

Recommendation: The definition of dual use items should remain in line with the internationally established dual use definition. Concerning cyber-surveillance technology, it would therefore be more sustainable for the EU to intensify its efforts on a multilateral level. The EU should focus its efforts primarily on reaching an international listing of cyber-surveillance technology requiring an export licensing, using the various International Regimes like the Wassenaar Arrangement. In addition, the dual-use definition should remain as it is today, based on an internationally established definition.

Definition:

A wide range of indeterminate legal concepts in the proposal will lead to legal uncertainty, additional bureaucracy and reduced planning security for both the companies as well as the implementing authorities. Dual use items should be identified by their technical characteristics and not by their potential misuse. The term “Cyber Surveillance Technology“ is currently too broadly defined and affects many harmless, everyday products of the IT-industry.

Furthermore, a new "obligation to exercise due diligence" is to be introduced for the businesses when determining whether the goods are to be used for specific purposes (Art. 4 paragraph 2, "due diligence"), whose content, scope and impact remain unclear. It should be emphasized that this obligation has only been studied with regard to the control of surveillance technology in the scope of the impact assessment implemented by the European Commission. This is problematic, since the empirical basis for an evaluation of the draft is lacking. Thus, it is difficult for the stakeholders of the legislative process to take a position on the draft. The approach also contradicts the code of conduct the European Commission has imposed on itself, which prescribes impact assessments prior to the proposal of major legislative initiatives.

The "human security" approach is included in the draft regulation of the European Commission to an extent that goes beyond the original goals, and also the aspects investigated in the scope of the impact assessment. This has been noted by the European Parliament (e.g. Amendment 32). But regarding the legal concept of “exercising due diligence” it has to be noted that the European Parliament still broadens its application (see Amendment 34). Neither the draft of the European Commission nor the Amendments of the European Parliaments succeed in neatly defining and creating the necessary legal certainty.

Recommendation: The European Commission should implement improvements and conduct an in-depth assessment of the impact of the current version. The criteria and definitions of the proposed recast need to be specified to become as feasible as possible for businesses. A clear wording and neat definitions in the regulation itself are preferred by Chambers’ member businesses - as these would define legally binding rules for the export of dual-use goods for companies in all Member States. Guidelines – especially if affected businesses are consulted - are helpful, but the uniform application in all Member States cannot be guaranteed. Legal and planning security is of vital importance to business.

Extension of the "catch all"-Clause, Art. 4

The Chambers' member businesses always strive to make their contribution to free and fair trade and to the protection of human rights, as well as to the prevention of terrorism. Businesses are aware of their social responsibilities and want to fulfill them.

It is already a huge challenge for the industry to manage the existing catch-all clauses. However, there, controls for non-listed items are at least based on a minimum of legal certainty (e.g. country of destination is subject to an arms embargo). The newly proposed human right-catch all and the terrorism-catch all, however, are too vague for Chambers' member businesses to be able to comply with the rules. The clauses target non-listed dual-use items without any limitation, and therefore in principle EVERY item. In the end, every export has to be controlled regarding the possible misuse.

In addition, combating serious violation of human rights and acts of terrorism are sovereign tasks. It is not understandable that the responsibility for an ex-ante evaluation of such complex situations should be shifted to businesses. They have only limited possibilities in comparison to state actors and where government officials even often fail. The exporter is left alone with the risk of misjudging the situation which goes beyond his discretion and influence. In addition, businesses would have to bear serious consequences under criminal law in case of an incorrect assessment.
Especially SMEs do not have the staff and the organization in place to cope with those provisions. It also bears the risk of divergent interpretations by Member States.

Recommendation: There is no need for additional unilateral catch all-controls. Current catch all-controls are already challenging. Terrorism catch-all should be deleted completely. An autonomous list for cyber-surveillance items could only be a temporary solution. Instead, our members are striving for an international solution. In addition, such a list should not be adopted by the Commission alone, and therefore not through delegate act. Instead of tending to criminalize the industry, we request the European Parliament and the Council to take further measures in order to create more planning and legal security. EUROCHAMBRES prefers a list-based approach as being much more targeted, e.g. for cyber-surveillance items, which can in particular be misused for serious violations of human rights or of international humanitarian law.
These lists – lists of countries and goods – are more appropriate and precise for the fight against terrorism or human right violations than general catch all provisions which - in practice - cannot be duly observed, neither by authorities nor by companies. In case of an autonomous list of cyber surveillance items there is no need for additional catch-all controls which should therefore be deleted.

Additional points:

- Enterprises - EPU, SME, family-owned enterprise, only trader etc. – differ. As a result, a one size fits it all-approach is not possible. Currently, the challenges presented are too high for enterprises. Therefore, EUROCHAMBRES calls on the European institutions to have a higher sense of proportionality. The proposed changes go beyond what could be reasonably expected of the companies. They thus do not do justice to the stated aim of the reform. EUROCHAMBRES thus recommends sound judgement in the choice of means. The changes should particularly fit within the framework of existing international agreements.

- New provisions with extra-territorial effect are not only detrimental to businesses in Europe but are also likely to be inapplicable in practice.

- We welcome the establishment of new EU-wide general authorisations and appreciate that this simplification would be extended to subsidiaries in other EU member states, too.

- Authorizations should be valid for a standard of two years. This request corresponds to Amendment 44 of the European Parliament.

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EUROCHAMBRES – The Association of European Chambers of Commerce and Industry represents over 20 million enterprises in Europe – 93% of which are SMEs – through members in 44 countries and a European network of 2000 regional and local Chambers.

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