BDI
The Voice of German Industry

REVIEW

EC Dual-Use

Review of the EC Dual-Use Regulation

January 2016

- German industry supports an improvement of export controls in Europe and worldwide. In addition, BDI supports adjustments and measures that have become necessary in recent years due to changes in the security environment. The European Commission intends to present a revised version of the EC Dual-Use Regulation at the end of 2015. In BDI's view, however, a complete overhaul of the regulation is not necessary.
- The essential principles of export controls and the main characteristics of authorization procedures have already been harmonized within the EU. The last adjustment took place only in 2009. BDI therefore regards a revision of the procedures solely necessary to reflect the new requirements under the Lisbon Treaty. Moreover, Berlin and Brussels should direct their attention to the following challenges:
    - Make provisions easier to understand. Improve the preciseness of definitions, render interpretation more uniform, e.g. through EU guidelines;
    - Make provisions more concrete. Avoid catch-all rules, give preference to product and country lists;
    - Support procedural facilitations. Maintain national General Export Authorizations (GEAs);
    - Ensure the same level of control in the 28 Member States.

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Overall Assessment

The Review Must Focus on the Creation of a Uniform Level of Control in the EU Member States

The objective of the revision of the EC Dual-Use Regulation is to adjust export control policy to the changing security, technological, and economic environment.[1] BDI explicitly welcomes this ambition but considers this objective already realized to a large extent through the changes to Annex I of the Dual-Use Regulation. In particular, we support the new lists introduced by the Wassenaar Arrangement (WA) in the area of security and cyber surveillance technology, which are already being implemented in companies. This ensures a higher level of protection against possible abuse and violations of human rights in third countries.

According to German industry, the four international export control regimes, including the WA, are the most appropriate bodies, in which export control standards should be determined. The international consensus enhances the effectiveness of export controls, and at the same time, safeguards a global level playing field. As the European Commission is seeking more far-reaching changes at EU level, these should concentrate on promoting efficient and coherent implementation and enforcement of export controls.

[1] Communication from the European Commission to Council and EP, COM (2014) 244 final; European Commission Roadmap of 17/7/2014, page 2 (at annex).

Evaluation of the Proposed Policy Options

New Rules Must Be Proportionate

Regulatory options 1 and 2 are proportionate

Of the five regulatory options presented by the European Commission[2], BDI considers the first and second variants as reasonable and proportionate. Alongside the so-called *Baseline* scenario (option 1), some of the measures set out under *Implementation and Enforcement Support* also deserve support. Aligning control levels is an important objective, as BDI has already emphasized in the green paper process. Before new laws are created, existing ones should be implemented more effectively. Therefore, German industry would welcome, if new EU guidelines and capacity-building measures were used to harmonize administrative practice in the EU Member States.

EU guidelines would offer interpretation tools and address vague elements in definitions. Distortions of competition within the EU would be better dealt with, and security policy measures would be more closely coordinated with each other. In addition, companies exporting from several EU Member States could better assess their export projects across countries. Furthermore, companies would be given support in their day-to-day export control compliance, which is costly in terms of both human and financial resources. This is especially important for small and medium-sized enterprises. For them, investments in IT infrastructure and personnel are a particular financial burden. The underlying effort for them is usually just as high as it is for larger companies. BDI therefore welcomes the SME-friendly approaches in the second regulatory option.

Regulatory options 3 to 5 constitute a disproportionate competitive disadvantage

By contrast, BDI rejects regulatory options 3 to 5. A complete harmonization and centralization of export controls (option 5) would override Member States' competence for implementation and make European exports unnecessarily difficult. The principle of subsidiarity would be disregarded. Catch-all controls, as set out in options 3 and 4, would unduly undermine companies' legal and planning certainty and also confront national authorities with great implementation difficulties. Critiques and action recommendations are explained below.

Regulatory Options 3 and 4: Critique and Recommendations

Catch-all provisions only as a last resort

BDI rejects new catch-all provisions. Instead, other legal tools should be considered. If EU Member States want to ensure an efficient export control policy, they should apply use-related controls to non-listed goods ("catch-all-regulations") only as a last resort; otherwise, foreign trade would be disproportionately restricted.

[2] European Commission Roadmap of 17/7/2014, pages 3 and 4 (at annex).

Catch-all provisions are less precise than product- and country-specific rules. They therefore entail greater legal uncertainty for companies. Moreover, greater verification effort is shifted into the individual authorization procedure. It is true that European companies can protect themselves with contractual export control clauses against claims for damages because of late delivery. Nevertheless, their competitiveness suffers, if they are unable to guarantee delivery times or maintenance work to the customer. Moreover, the increased effort on the part of companies also ties up considerable resources on the side of administrative authorities.

Thus, if the European Commission identifies a security threat and wants to tackle it through stricter rules, it should not leave the political assessment of the threat situation to companies or individual Member States. If companies make the wrong call, they risk penal actions. Product- or country-specific lists, which companies can apply with certainty in their everyday compliance, are much more preferable. However, if catch-all rules are to be applied, the threat situation must be clearly described by the EU.

In our view, catch-all controls should not be introduced without justification of proportionality. They are not an end in themselves, but one legal tool from a wider toolbox. Thus, the EU Commission should explain why a certain security threat could not be addressed through alternative policy tools. BDI therefore calls on the EU Commission to clearly identify cases, which will require catch-all controls. If the EU Commission is unable to identify and define a specific security threat, it cannot expect business to do so. Uncertainty among policy-makers must not lead to an uncertain legislative framework for companies.

Background: Catch-all Controls

According to article 3 of the EC Dual-Use Regulation, only listed dual-use goods are subject to export controls. Catch-all rules are a deviation from this. They are intended to prevent non-listed goods from being exported to particular recipients in third countries that are using these goods for military or nuclear purposes rather than for the stated (civil) purpose. Thus, under catch-all rules, civil goods that are potentially, but not typically, deployed militarily and have not been listed because of a lower risk of proliferation, can be subject to export controls. This extends the scope of export controls considerably. The respective central provision is article 4 of the EC Dual-Use Regulation.

Catch-all provisions require an exporter to apply for an export authorization for a product, if he is aware or has grounds for suspecting (i.e. has positive knowledge) that the product is to be used for military rather than the stated civil purpose. Thus, the prospective end-use of a product in the hands of the specific end-user is decisive for whether it is necessary to apply for an export authorization. Limiting export authorization requirements to cases in which the exporter has ‘positive knowledge’ is important in order to ensure that trade is not disproportionally restricted.

Catch-all provisions need to be sufficiently precise and clear. Their reach and scope must be predictable for the exporter. Furthermore, the threat situations need to be clearly defined. Otherwise, companies will not be able to identify critical export cases. This is equally important for export managers and employees working in export controls, as they can face severe penal consequences and can be held personally liable when not complying with the regulations.

The current authorization requirement under article 4 of the EC Dual-Use Regulation for exports of goods for military and nuclear purposes is sufficiently precise and clear. The (abstract) threat of a military or nuclear end-use can be technically grasped there. This is particularly true for those producing and distributing the product, as they have adequate knowledge of the characteristics and potential uses of the product.

An example of this is the use of industrial robots. Thus, a company can recognize whether the conventional (civil) industrial robot is to be deployed in a nuclear power station to handle nuclear fuel rods for instance. Prerequisite for the use is additional equipment with radiation-resistant cables. Conversely, this is not necessary for civil deployment in the automotive, electrical, or civil engineering sectors.

Recommendation

- If export controls are to be extended to other cases or new catch-all provisions are to be created, the legislator must first describe the security threat. Only in this way, the need and duration of an authorization procedure becomes clear to a company. Based on this knowledge, the company will be able to make reliable contractual promises.
- Thereafter, the right legal tool should be considered. Catch-all controls should only be a last resort. The product- or country-specific list approach is always preferable. Product lists should be determined at the level of the international regimes, country lists at least at European level, as it is already the case today for embargo measures.

Human Rights Standards in Export Controls

German industry understands the motivation for stricter controls in the area of security and cyber surveillance technology. In particular, the events of the Arab Spring show that also foreign civil populations need to be better protected against human rights violations.

It must be prevented that security and cyber surveillance technology developed primarily for defensive purposes are misused to persecute undesirable opponents of a regime. Freedom of opinion, freedom of association, and general freedom of action must be protected. They are important political and civil rights and as such vital international human rights standards.

Non-specific test criteria overwhelm industry

German industry rejects, however, non-specific human rights standards in export controls. In particular, unspecific human rights standards should not find their way into catch-all provisions, as suggested in the European Commission's regulatory option 4. In everyday authorization practice, industry needs sufficiently concrete test criteria that it can apply with certainty. Otherwise, companies and their employees will quickly face the threat of civil and criminal consequences.

Unlike the reference to a "military or nuclear end-use" in article 4 paragraph 3 of the EC Dual-Use Regulation, a reference to "human rights violations" is too broad. In this case, companies would not only have to assess an export based on the technical nature of the respective product and its stated end-use. Moreover, they would also have to assess whether a particular country or customer is committing human rights violations. This is hardly possible. The restriction of rights in a specific country may be a just cause in one case and constitute a human rights violation in another case. Thus, a government might restrict fundamental rights of some – such as the right of assembly – in order to protect others.

The integration of human rights assessments into everyday export compliance practice would pose a particular challenge for small and medium-sized companies. To be on the safe side, they might flood export control authorities with possibly unnecessary applications. Authorities would then be overwhelmed with so-called "panic" applications. This would bind capacities, which could otherwise be invested in truly critical cases. Application procedures would last longer, and the planning process for companies would become more uncertain. This could also negatively impact the competitiveness of German companies.

BDI therefore calls on policy-makers to identify threat situations and specify human rights violations more concretely in order to ensure that employees and export managers can comply with export controls. This would also be in the interest of export control authorities.

The right legal tool from the toolbox: Country lists instead of unspecific catch-all provisions

Country lists allow greater effectiveness in export controls. They correspond to the risk-based approach and concentrate the procedure on very risky exports without overwhelming either companies or authorization authorities. In addition, country lists are supported by the consensus of EU Member States and thus enjoy greater legitimacy. They are adopted by Council decisions and therefore ensure a solid threat assessment and a necessary political weighting process. They create a transparent and predictable basis for decisions for both EU Member States and companies.

Companies are not in a position to take political decisions. Instead, companies take economic decisions within the relevant legislative framework. Country lists ensure that European companies are reliable partners in international competition, as they allow business to make delivery and contractual promises and to fulfill them. This is especially important for small and medium-sized enterprises when trying to diversify their markets.

Recommendation

- If trade is to be restricted with countries, in which systematic human rights violations have been ascertained, embargo regulations should be the preferable tool rather than catch-all controls. Negative country lists explicitly show companies, which exports require export authorizations. They would ensure adequate legal and planning certainty.

Strengthen Product-specific Approaches – Delist Categories as and when Appropriate

Product-specific listings are the core approach of the four international export control regimes. The lists of dual-use goods are intended to restrict proliferation based on risk and at the same time establish a level playing field between the contracting parties. BDI strongly supports this approach and calls for a consistent and balanced assessment of product listings to be ensured ahead of the regime negotiations. EU Member States should take clear decisions on listing and delisting applications. A product should not be listed, if the listing restricts trade disproportionately without increasing the effectiveness of export controls. This approach corresponds with the Commission's objective of continuously adapting export controls to the evolving technological environment. Many technologies are now easily and widely available due to technological progress. This should be reflected in the export control regimes.

Two criteria are relevant for a listing decision: First, no mass-products should be listed, as this stands in contrast to the risk-based approach, which is usually applied in the export control regimes. Companies and export control authorities would otherwise be overwhelmed by applications. Such a situation arose in the Nuclear Suppliers Group when frequency converters were listed. That listing restricted trade in spare parts for all civil industrial production plants disproportionately.[3]

[3] See BDI position „Für eine stärkere Kosten-Nutzen Abwägung in Internationalen Exportkontrollregimen", (Link wird hier ergänzt).

Second, goods that are available worldwide should not be listed in international regimes, if their export is to be restricted temporarily to a number of selected countries due to security considerations. In this case, embargo measures are a more proportionate means of control.

Recommendation

- Ahead of the regime negotiations, existing product listings should be consistently reviewed based on objective criteria. If the listing restricts trade disproportionately without increasing the effectiveness of export controls, the listing should be rejected.
    - Mass products should not be listed;
    - World-wide available products should not be listed, if their export is to be restricted temporarily to a number of selected countries. In this case, an embargo would be the preferable policy tool.
- The European Commission should involve business at an early stage in the evaluation of technical questions.

Procedural Facilitations

General Export Authorizations (GEAs)

BDI opposes replacing national GEAs with EU GEAs. GEAs license certain specified dual-use items to certain destinations. National GEAs should continue to exist alongside EU GEAs, as the latter cannot fully capture specific national circumstances. National GEAs can be more targeted and tailor-made. Taking into account the national environment, they can facilitate procedures and reduce the application burden, if products are exported to uncritical countries. Due to different economic structures, the need for a GEA will not arise uniformly in the 28 EU Member States. As a consequence, the EU might refrain from introducing a much needed GEA for German exporters. Furthermore, decision-making processes at EU level could take too long.

This is illustrated by the EU GEAs 002-006, which have been of little value to German industry given the restricted geographic and item scope. Furthermore, the additional notification obligations associated with them are neither necessary nor desirable. Foreign trade audits in German export controls already secure corporate compliance sufficiently. Additional notification obligations would place a double burden on German and other EU companies that have similar strict provisions in their countries.

Creating a European general export authorization, alongside EU GEA 001, is therefore useful only in conjunction with a reduction of export restrictions for goods in Annex IV. Furthermore, an EU GEA for technology transfer would allow associated companies to exchange their in-house expertise better within the company. This would promote research cooperation and facilitate worldwide compliance training courses.

Recommendation

The GEA must continue to guarantee that non-critical exports are not unnecessarily delayed.

- Introducing a GEA, the needs of industry in terms of its product spectrum, its geographical scope as well as its export destinations must be taken into account. This assessment can best be carried out on the national level.
- The quality and effectiveness of administrative controls must be taken into account on a country-specific basis, as Member States' authorizations administrations vary regarding their capacities as well as the degree to which they are affected.
- The level of penalty and the system for reliability testing of persons responsible for exports must not be disregarded.

Adding Genuine Value to the Authorized Economic Operator (AEO)

BDI supports making better use of the Authorized Economic Operator (AEO) status in the export control process. The AEC has demonstrated that he complies with supply chain security standards. His internal control programs have been certified and accepted by the authorities. An AEO should therefore be granted accelerated and simplified authorization procedures also to countries classified as sensitive.

For instance, procedural facilitations should be granted in the case of intra-company trade, in order not to burden trade between associated companies unnecessarily. In this case, the end-use certificate should be dispensed with and the transfer of goods and technology should be facilitated.

In the framework of GEAs, notification obligations should be dispensed for the AEO. In any event, the reporting requirement for materials for which zero sales were reported (zero report flag) should be scrapped. Notifications would then only become necessary, if the GEA is actually used.

In addition, the AEO should be granted simplified procedures when notifying exports requiring an authorization in the clearance procedure.

Regulatory Option 5: Critique and Recommendation

No centralization and full harmonization of implementation, instead, creation of a uniform level of control

BDI rejects a centralization and full harmonization as envisaged in regulatory option 5. Member States' competence for implementation and enforcement must remain intact. Central Brussels authorities would neither make export controls more effective, nor guarantee better enforcement. Rather, the principle of subsidiarity should be maintained. National authorities are more appropriate institutions for implementation and enforcement.

Insofar as alignments and greater data exchange are desirable, the interests of the industry should be taken into account.

EU guidelines: To ensure a uniform degree of control in all 28 EU Member States, common EU guidelines could harmonize the interpretation of legal concepts more strongly. For this, the relevant practical cases must be identified by companies and authorization bodies in the Member States. The expertise of all stake-

holders should be brought into play. In twenty years of export controls, Member States and companies have been able to collect an indispensable wealth of experience.

Data exchange: Data exchange of security-relevant information must be coherent with company interests. Business and operational secrets of European companies need to be protected. In times of critical data security, the following must apply: centralization only where absolutely necessary; decentralization where possible. Access rights to data and reproduction must be restricted to the extent possible. The dissemination of sensitive data to unauthorized third parties must be technically ruled out. In all Member States, infringements of sensitive data must have legal consequences.

Principles of data exchange: Data exchange should follow the same principles in the future as in the past. When applications are rejected today, national export control authorities inform the competent authorities in the other Member States as well as the Commission. They submit all relevant information justifying their decision. This procedure limits the notification and justification to what is necessary and proportionate in order to sufficiently inform the authorities. It also avoids a flood of data that could be interpreted differently in each Member State. Also in the future, national authorities should remain responsible for preparing the facts, making the decisions on the case and using some discretion where necessary. Tried and tested interpretation standards should not be called into question.

Details of data exchange: Technical details and application specifications should be excluded from data exchange. In justified, security-relevant individual cases they should be restricted to end-recipients and classification of the good. Patents but also supply, trade and customer structures as well as prices must be particularly protected. National data protection standards must be maintained at the very least. However, with increasingly frequent data exchange across borders, the European data protection standard must also be adjusted and improved for business and operational secrets in the medium-term.

Imprint

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