Response to EU COMMISSION PUBLIC CONSULTATION GUIDELINES
THE EXPORT OF CYBER SURVEILLANCE ITEMS UNDER ARTICLE 5 OF
REGULATION (EU) No 2021/821

Introduction

DIGITALEUROPE supports the Commission’s work of providing voluntary
guidance to exporters to help them understand the human rights implications
of exporting items with cyber-surveillance capabilities. However, the
Commission should be careful that any guidance it offers does not negatively
impact the exporter’s ability to make an independent and timely licensing
determination. This guidance should rather be operationalised to help EU
exporters determine in a standardised manner if a notification to its competent
authority is required and what this procedure should entail.

As such, these guidelines should:

- Reinforce the cumulative nature of Article 5 elements.
- Describe when a company should notify its competent authority. We
  recommend the Commission describes a voluntary process by which
  a company can determine that a particular export is reasonable, as
  well as provide a representative list of scenarios, detailing examples of
  products, end-users, and countries, where the guidance would
  recommend a company notify or not its competent authority. We
  recommend this process is accompanied by a decision tree.
- Safeguard predictability, by describing what the notification procedure
  is. Currently, there is a lack of clarity: what information should be
  provided, what answer can be given by the competent authority at
  what time and what is the legal effect of such answers.

More specifically on the due diligence measures, we recommend the
Commission updates the guidelines to further clarify:

Item scope and classification

The guidelines currently create additional uncertainty. They should suggest
steps that the exporter should take to lift such uncertainty on whether the item
is a cyber-surveillance item specified by Article 2 (20) or not such as applying
for formal classification with the national competent authority. The guidelines
should:

- Align the definition of “specially designed” with current export
  practices. The new draft guidelines qualify an item as “specially
  designed” if it is “at least suitable” to enable covert surveillance. This
  lowers the threshold for items to be considered “specially designed”
and diverges from practices that have been established in some Member States since the last recast of the dual-use regulation.¹

Potential misuse of the item is also contradictory to the specially designed aspect of the definition of cyber-surveillance items. We suggest references to misuse are removed from the guidelines.

Explicit that "covert surveillance" is not characterized when data is being transmitted knowingly by the users.

Make clear that general-purpose computing and networking items such as laptops, servers and their components should not be considered to fall within the scope of unlisted cyber-surveillance items.

Provide clarity on controls for components by indicating required steps for products that can be used as a component of a larger system.

In section III.2.1 on facial and emotion recognition, we suggest that the guidelines should explicitly indicate that facial detection is not specified by article 2(20).

We also recommend deleting the annex on listed items. At best, the annex should reference control text from the Annex I list. These guidelines should be limited to the scope of Article 5 which does not apply to listed items.

On what constitutes awareness/knowledge

EU Commission should provide examples of documents that can be reviewed and reasonable steps that should be taken to ascertain or lift awareness/knowledge.

Commission could suggest and include an end-user statement template/language specific to the human rights risk in the annex of the guidelines.

Multiplication of cross-reference material creates a significant burden the on exporter.

Guidelines should make it explicit that the exporter’s responsibility is limited to due diligence conducted at the time of export. In the case of components, the exporter would find it extremely difficult and time-consuming to predict and perform due diligence on second-tier and third-tier integration.

On qualification of Internal repression, serious violations of human rights and international humanitarian law

¹ C.f. the Guidelines of the German Export Control Authorities.
Cross-referenced guidelines such as User's Guide to the Common Position 2008/944/CFSP are directed at Member States and their export licensing officers. Exporters cannot be expected to be able to follow such guidelines. This is a major compliance burden.

The guidelines must give more specificity on what “an obvious relationship” i.e. Is it ownership? Are state-owned enterprises a good example? Is there a threshold that defines ownership?

On prevention and mitigation of potential future adverse impacts

It is indicated that companies should use due diligence findings to draw up plans to prevent and mitigate potential future adverse impacts. This is an overreach to the usual-use regulation. It conflates with other regulations as well as international human rights norms (e.g., UNGPs). Instead, we recommend the last step of due diligence should be to notify the competent authority. Prevention and mitigation of potential future adverse impacts is the responsibility of the national competent authority in making the notification review as well as an export license decision if applicable.
Accordingly, we would like to recommend the following steps as a basis for a decision tree:

Rather than exporters being responsible for assuming such a heavy compliance burden, we recommend the publication of a harmonised EU-wide list of excluded parties and/or countries of concern, in line with suggestions put forward by various Members States. This would ensure significantly better effectiveness to meet the Commission’s goal of preventing exports leading to human rights abuse.
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