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Contribution to public consultation on white paper on export controls

Executive summary

DIGITALEUROPE welcomes the opportunity to express its views on the EU's future export control policies, and the European Commission's White Paper on Dual-Use Export Controls specifically.¹

We appreciate the Commission's efforts to protect European know-how and businesses. Any new export control measures should strive towards maintaining the EU's global competitiveness by ensuring a level playing field and a consistent application of controls across the EU. Coordination with the private sector is crucial to maintain European competitiveness globally.

In particular:

- ▶ Multilateral negotiation within frameworks like the Wassenaar Arrangement helps avoid the pitfalls of unilateral controls. The Commission Expert Group should be used for internal alignment and platforms like the EU-US Trade and Technology Council leveraged for external coordination.
- ▶ When extending export controls, evaluation criteria should look at foreign availability, enforceability, impact on EU competitiveness and likelihood of retaliatory responses. Redundant controls of technologies that are now globally available should be removed when possible.
- ▶ Economic security initiatives should prevent overlap and complexity, in particular by separating between laws governing sanctions and export controls. Existing tools should be reviewed before creating new regulatory structures.
- ▶ Human rights impact and misuse potential should be considered when regulating cyber-surveillance items. Certain items may not pose risks for internal repression or rights violations, and commercial tools should be exempted accordingly, reflecting their broadening scope of usage.

¹ COM(2024) 25 final.

- ▶▶ The Dual-Use Regulation's vague 'export' definition for intangible transfers complicates regulations, increasing costs for EU exporters.² Upcoming Commission guidelines should address this, including by clarifying that encrypted technology exports happen only after decryption outside the EU.
- ▶▶ A forum for political coordination on export controls should be established, with private sector involvement and technical expertise.
- ▶▶ Enhanced cooperation between Member States and industry, alongside technical expertise, is also vital in the Council Surveillance Technology Expert Group/Emerging Technology Expert Group. The Commission should improve internal expertise and establish expert groups with industry representation for setting export control criteria.
- ▶▶ Updates to the Dual-Use Regulation should include a mechanism for a harmonised EU-wide list of excluded parties/countries as well as clearer definitions, especially regarding export licensing criteria, to accommodate automation and due diligence.

² Regulation (EU) 2021/821.



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Consistent application of export controls in the EU

We welcome the Commission's ambition for further harmonisation of controls across the EU. The uniform adoption of controls that were not developed through multilateral regimes would help avoid market fragmentation.

The adoption of unilateral controls risks harming not only the global competitiveness of European industry, but the effectiveness of such controls. Unilateral controls pose challenges to both small and large companies, and fragment the internal market.

The adoption of any new controls should proceed only if these have been negotiated within the Wassenaar Arrangement (WA) or alternative multilateral frameworks, and have achieved a significant level of maturity and consensus, evidenced by the support of a majority of members.

Following multilateral consultations, Member States, in collaboration with the Commission, should make use of the Commission Expert Group to align and finalise such controls prior to adoption.³ Moreover, the EU should also leverage other platforms to seek alignment with like-minded partners and industry stakeholders on this issue. One of the key coordination mechanisms is the EU-US Trade and Technology Council.⁴



Evaluation criteria

When considering the extension of export controls to new items, the Commission and Member States should consider the following key evaluation and selection criteria:

- ▶▶ The foreign availability of the item outside the EU;
- ▶▶ The ability to make a clear and objective specification of the item;
- ▶▶ The enforceability of the controls;
- ▶▶ The impact on EU competitiveness; and
- ▶▶ The likelihood of retaliatory responses from third countries.

There is also a clear risk that there will be export controls in different countries and regions seeking to achieve the same goals by different means. This will make it more difficult and resource-consuming for global industries to comply with export controls than under current identical (or at least very similar) export controls.

³ <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&do=groupDetail.groupDetail&groupID=1028>.

⁴ https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/stronger-europe-world/eu-us-trade-and-technology-council_en.

As export control compliance frameworks become increasingly complex, Member States and the Commission should consider removing existing controls where possible. Continuing to control technologies that are now globally available would be ineffective, and listed technologies should be regularly evaluated.



Critical technologies

In October, the Commission published a list of ten critical technology areas for the EU's economic security, selecting four for detailed risk assessments by Member States.⁵ Whilst the outcome of these risk assessments is still pending, we underline the importance of stakeholder engagement throughout the assessment process. Relevant industry actors can share 'lessons learnt,' including with a view to controls on AI-capable semiconductors in the US.

Controls on critical technologies might prove challenging to implement, and impact negatively on supply chains. In this context, we emphasise the importance of recognising that not all advanced technologies pose a risk of civil-military fusion. For example, AI systems bound by specific transparency requirements could be exempt from controls, since they represent a lesser threat to safety or fundamental rights.

Given the importance of cross-border research, development and standardisation initiatives for technological innovation, we recommend that any new controls on critical technologies be complemented with EU-level or national general authorisations that allow for continued cooperation between trusted partners.

The existing system of EU and National General Export Authorisations (EUGEAs and NGEAs), which recognises trusted jurisdictions, has been a key driver of cross-border innovation, and we recommend further streamlining and simplifying eligibility conditions to facilitate technological advancement on a global scale.⁶

Further international cooperation, facilitated by coordination of controls, licensing policies, enforcement and interoperability, leveraging existing, well-understood concepts in the EU export control regime would be beneficial. In particular, the Commission should seek to coordinate the adoption of new controls on critical technologies amongst Member States and allies, ensuring timely publications, standardised export control classification codes, consistent licensing policies, and sufficient time between publication and controls coming into effect.

⁵ https://defence-industry-space.ec.europa.eu/system/files/2023-10/C_2023_6689_1_EN_annexe_acte_autonome_part1_v9.pdf.

⁶ As an example of this, we welcome the UK Export Control Joint Unit's open export general licence to cover exports of chip and quantum technologies to the EU and other allies such as the US.

Should the Commission consider expanding controls to new critical technologies, besides the evaluation criteria outlined in the previous section, it should also take into consideration that regulating the fast-changing and varied technology sector with methods mainly designed for stable and traditional fields, such as export restrictions on specific materials, can lead to a system that does not match the pace of advancements and is too slow and cumbersome. This is all the truer for critical technologies at an early stage of development.



Multiplication of legal instruments

The Commission and Member States should consider all economic security initiatives carefully to avoid overlap, inconsistencies and unnecessary complexity.

In the White Paper there seems to be an overlap between the laws governing sanctions and export controls. It is crucial to keep these two legal frameworks separate because they serve different purposes, even though they may be monitored and implemented by the same government authorities at Member State level.

In addition, we also call for reviewing existing tools, such as export controls and inbound investment screenings, before creating new regulatory structures like outbound investment screenings to address related concerns.



Cybersurveillance items

In addition to the recommended evaluation criteria above, we also suggest the following when considering controls on cyber-surveillance items:

- ▶▶ The positive human rights impact of the item, including the rights to privacy and personal security; and
- ▶▶ The misuse potential of an item in risk analysis, especially when the item, despite its risks, is unlikely to be used harmfully due to more effective alternatives.

We believe that certain items, potentially viewed as cyber-surveillance tools, do not pose a risk for use in internal repression or serious human rights and international law violations. The Dual-Use Regulation's recitals list purely commercial tools as exempt, such as those for billing, marketing, service quality, customer satisfaction or network security.⁷ This list should be revised to reflect the broadening scope of commercial usage.



Software and technology transfers

⁷ Recital 8, Regulation (EU) 2021/821.

The definition of 'export' in the Dual-Use Regulation is ambiguous as it concerns the intangible transfer of software and technology. This has led to varied interpretations and regulations for such transfers both within the EU and in its dealings with global partners, complicating the export process and increasing costs for EU exporters. This situation may place EU exporters at a competitive disadvantage.

DIGITALEUROPE understands that, in line with Recital 11 Dual-Use Regulation, the Commission is in the process of preparing guidelines with harmonised interpretations for software and technology transfers. These guidelines would be a significant stride towards realising the objectives of the Dual-Use Regulation whilst minimising the administrative burdens affecting exporters and national authorities.

DIGITALEUROPE recommends the Commission consider the adoption of the following stances in its guidelines on software and technology transfers:

- ▶▶ Encrypted technology is only exported if decrypted and accessed outside the EU;
- ▶▶ The Software as a Service (SaaS) model does not constitute a software export;
- ▶▶ The user of an IT service is the responsible exporter; and
- ▶▶ The competent authority and the country of export is not defined by the location of the server.

We reiterate the importance of publishing guidelines on software and technology transfers, and that industry input is vital to developing effective guidelines.



Forum for political coordination on export controls

The proposal to establish a forum for political coordination on export controls is welcome. This forum should also actively solicit contributions from the private sector, and have technical experts on board to ensure a comprehensive approach to export controls, including by considering having dedicated expert groups for individual critical technologies. In addition, coordination with like-minded partners is paramount to avoid unilateral restrictions.

If the EU plans to extend export controls to include emerging and new technologies not currently covered by export controls, it is crucial to involve industry through wide-ranging and ongoing consultations. This would help ensure controls are well targeted and implementable. To gather essential input from industry, establishing technical expert groups under Art. 24 Dual-Use Regulation should be considered. These groups should include not only Member State experts but also representatives from relevant industry sectors.



Further stakeholder engagement and cooperation

Outside the proposed political coordination forum, enhanced cooperation between Member States and industry in the Council Surveillance Technology Expert Group/Emerging Technology Expert Group is still necessary. We also believe that technical expertise is required when deciding on product characteristics.

To form a comprehensive understanding of the practical application of controls, the Commission should improve internal technical expertise, as well as leverage contributions from national authorities and industry. Public meetings could be scheduled on an ad-hoc basis to ensure broader stakeholder engagement, providing a platform for public consultation, valuable feedback and opportunities for industry insights with government stakeholders.

One good example of this type of cooperation are the United States Bureau of Industry and Security's Technical Advisory Committees,⁸ which grant a variety of stakeholders the opportunity to apply for a mandate to provide input to ongoing and upcoming initiatives via confidential sessions. These technical groups advise on export control policy on a broad range of goods, technologies and software presently controlled under the Wassenaar Arrangement for national security, foreign policy and non-proliferation purposes.

We recommend the Commission to take inspiration from these good practices and form expert groups, preferably with technical backgrounds, that are officially structured to include industry representatives and government officials. These expert groups would play a crucial role in offering guidance to the Commission on setting technical criteria for export controls on dual-use goods and technologies, as well as advising on the consistent application of these controls.



Evaluation of the Dual-Use Regulation

Many of the recommendations made in this paper, including on formalised stakeholder engagement groups, would require an update to the current Dual-Use Regulation. If the Regulation is revised, the Commission and Member States should include a new mechanism for a harmonised EU-wide list of excluded parties and/or countries of concern.

Whilst enforcement guidelines are welcome, they cannot replace clear definitions of applicable export licensing criteria. They will not be sufficient to account for automation and enhanced due diligence on the part of exporters, who may be obliged to engage vendors and intelligence service providers to obtain necessary information. At the very least, guidance to exporters should reflect a large span of scenarios addressing different sales channels such as components, indirect and channel distribution models, but also customer

⁸ <https://tac.bis.doc.gov/>.

sectors such as public health and telecommunications service providers. There is likewise a risk of divergent interpretation by the competent authorities across Member States. The Commission should also strive to be consistent with other regulatory initiatives in this area to limit the complexity of the compliance burden for industry.

In general, any evaluation or review of the Dual-Use Regulation should be coordinated with the private sector. Whilst the initiatives in the Commission's White Paper are generally positive, it is crucial to ensure they do not hinder European competitiveness globally.

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About DIGITALEUROPE

DIGITALEUROPE is the leading trade association representing digitally transforming industries in Europe. We stand for a regulatory environment that enables European businesses and citizens to prosper from digital technologies. We wish Europe to grow, attract, and sustain the world's best digital talents and technology companies. Together with our members, we shape the industry policy positions on all relevant legislative matters and contribute to the development and implementation of relevant EU policies. Our membership represents over 45,000 businesses that operate and invest in Europe. It includes 108 corporations that are global leaders in their field of activity, as well as 41 national trade associations from across Europe.