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Proposed guidelines on export controls for intangible technology transfers

The definition of 'export' in the application of export controls under the Dual-Use Regulation relates to intangible transfers of software and technology. Its ambiguity creates differing interpretations and regulatory requirements for intangible transfers within the EU, and between the EU and its global allies. It also creates unnecessary complexity and costs for exporters in the EU, putting them at a competitive disadvantage.

DIGITALEUROPE calls for clear and harmonised guidance on what constitutes an 'export' and an 'exporter' of dual-use technology or software by electronic means, to ensure legal certainty, reduce administrative burden, and maintain the EU's global competitiveness. To avoid European industries falling behind in a world where innovation cycles are becoming shorter and shorter, companies must have access to the latest technologies to stay competitive in the global tech race. It is also important that allied and like-minded partner nations keep their borders open for dual-use technologies to flow freely, ensuring a large market that allows their companies to scale fast and win the global tech race.

DIGITALEUROPE suggests that EU guidelines on intangible transfers include the below guidance.

'Export' of dual-use technology or software by electronic means

The key element to determine whether an export of dual-use technology or software takes place under Art. 2(2)(d) Dual-Use Regulation is to identify whether it has been 'transmitted' outside the EU's territory.

For this reason, technology and software that have undergone encryption are not considered an export or re-export and therefore do not require an export authorisation even if they are downloaded or accessed in encrypted form, as long as the controlled content is indecipherable and not accessible. For example, the use of servers located outside the EU for storage of dual-use software or technology will only give rise to an export when the software is downloaded and fully executable in unencrypted form to a recipient outside the EU, or when the technology is accessed in unencrypted form by a recipient outside the EU.

Not to be considered an export in such a case, encryption has had to be carried out according to recognised standards or other equally or more effective cryptographic means, such as ISO/IEC 19790.

An export takes place once technology or software has undergone decryption and has been accessed by the intended recipient outside the EU.

No 'export' occurs when the software is provided as a service, as long as no software is transmitted to or downloaded by the service user. Access to a service hosted on a data centre or server does not amount to transmission, as long as the user does not access the underlying software code.

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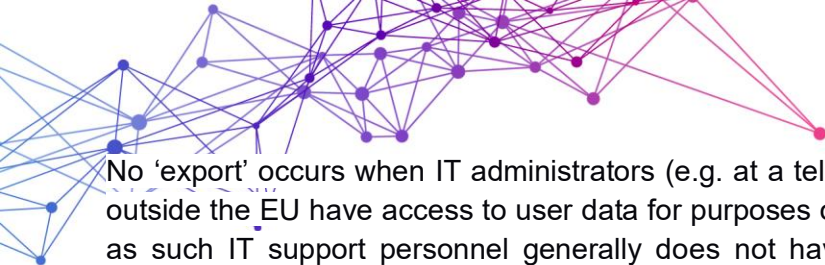
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No 'export' occurs when IT administrators (e.g. at a telecoms, cloud service or other IT provider) located outside the EU have access to user data for purposes of providing, supporting or maintaining the service, as such IT support personnel generally does not have actual access to the controlled technology or software. Therefore, no export would occur and no authorisation would be required unless the controlled technology or software is actually accessed/downloaded.

'Exporter' of dual-use technology or software exported by electronic means

The party who caused the technology or software to be exported to the intended recipient is responsible for obtaining the export authorisation.

Pursuant to Art. 2(3)(b) Dual-Use Regulation, the IT service user that transmits, stores, processes or otherwise provides access to controlled technology or software in a way that causes an export is the exporter, not the provider of the IT service used to export the technology or software.

The exporter is the party that controls and provides access details (e.g. decryption keys, network access codes or passwords) so that the controlled technology or software can be accessed outside the EU. IT service providers generally do not decide or have knowledge of where, when and to whom its users are transmitting or making data available.

National competent authority for an export by electronic means

The national competent authority is the one applicable to where the exporter is located, as defined in Art. 2(3)(b) Dual-Use Regulation, not where the electronic means server is located.

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About DIGITALEUROPE

DIGITALEUROPE is the leading trade association representing digitally transforming industries in Europe. We stand for a regulatory and investment environment that enables European businesses across multiple sectors, as well as citizens, to prosper through digital technologies. We wish Europe to grow, attract and sustain the world's best digital talent, investment and technology companies. Together with our members, we shape industry positions on all relevant policy matters, and contribute to their development and implementation. Our membership represents over 45,000 businesses who operate and invest in Europe. It includes corporations and scaleups which are global leaders in their fields, as well as national trade associations from more than 30 European countries.