Position paper
1 February 2017

Dual Use – New Regulation

Introduction

Ensuring security is not only a guiding factor for our member companies but also guiding principle for our activities. We are convinced that the highest level of security can be reached with rules that are realisable and implementable for everyone. There should be no minimum company size to engage in international trade. Unfortunately, we are already in a situation in which the regulatory requirements cannot be fulfilled without risking the competitiveness of the companies. Even large companies with their own legal departments can nowadays hardly fulfil all the requirements in due time. As a result, some companies have stopped doing business with some countries just because they do not have the resources to cope with the extremely complex aspects of export controls. That is not good for EU trade and undermines our competitiveness.

EuroCommerce hence welcomes the Commissions ambition to modernise the export-control regulation, and would in particular like to welcome the proposed extension of the general export licenses and the addition of Union general transfer authorisations as these will reduce the administrative burdens and contribute to a level playing field within the EU and beyond.

The Commission's proposal unfortunately also introduces new burdens, which as currently formulated, would outweigh the benefits of the proposed new regulation. Even though the goods covered, i.e. goods that can be used for military as well as civil applications, are only a small percentage of the overall goods and services traded, we would like to stress that all companies will be obliged to have export control system in place to make sure that they comply.

Against this background we have strong concerns with the massive extension of the scope of the new dual-use-regulation. The extension not only captures new goods but extends the scope in terms of technical assistance, brokering and the transit of goods. At the same time the authorities are not bounded by further requirements when it comes to the authorisation process. In view of developments in products and applications in the field of digital infrastructure, this proposal also significantly undermines essential parts of support for Industry 4.0. Our main concerns are elaborated below:

Disproportional extension of the due diligence process

Traders concerns are heavily focused on the areas of brokering and transit trade. The extension of the scope in Art. 2 section 7 to "a legal person or partnership owned or controlled by such person [in the EU]" leads to a massive broadening of the due-diligence requirements for companies, beyond what is proportionate to many businesses, especially SMEs, which are the lifeblood of the EU. Furthermore the extension of the scope to cover technical assistance in art. 2 section 8 is formulated very broadly and will include a new type of companies under the dual-use regulation. Due to the broad formulation this could include for instance training in legitimate use of IT-software. EuroCommerce believes, that this extension amounts to double regulation, as the products on which the technical assistance is provide already are covered by the export-control. We hence see no need for this extension.

Extraterritoriality

Art. 2 section 9 introduces extraterritoriality to the regulation and demands that subsidiaries in third countries also have to comply with EU law. This is a fundamental intervention into the export control regulations of third countries. It is exactly this kind of extraterritorial impact of national law that the EU criticises when it comes to US export control laws.

Extensive increase in legal uncertainty

The extensive broadening of covered goods by the application of the catch-all rule instead of distinct person and product lists together with the introduction of several vague legal terms create a very high degree of legal uncertainty, which undermines the ability of business, especially SMEs, to comply and compete efficiently and effectively. Article 4 section 1 d-e are especially considered as a disproportional and very unclear extension of the due-diligence process. Implementing the catch-all clause as proposed by the Commission effectively will be impossible. Art. 4.1.e in effect obliges companies to conduct the tasks of national intelligence services or state and federal criminal authorities. Companies do not have the resources neither insights to conduct these public tasks. Furthermore, EU anti-terror regulation already exist, and Member States criminal laws prohibit aid to terrorist acts. The proposed extension for the catch-all control does therefore not seem to add any value, but will impose extensive burdens on companies, clearly opposing the Better Regulation Agenda.

Finally, EuroCommerce would like to see a clear definition of the "obligation to exercise due diligence", so that it is clear to traders how far they are obliged to go in their due diligence.

Lack of binding commitments by the controlling authorities

The massive expansion of disproportionate due diligence requirements unfortunately does not appear to go hand in hand with binding commitments by the controlling authorities. At least there should be a processing time limit placed on the authorisation process for national authorities.

Limiting the responsibilities of brokers are indispensable

The current Dual-Use Regulation limits its covering of brokering to companies that are based in the EU and only when it comes to products from annex I or usage in connection to weapons of mass destruction. The new proposal not only extends its coverage to subsidiaries in third countries but also to goods that are not listed and for different usage. We clearly oppose this and ask for a limitation of the scope. We suggest to limit article 5 on brokering services to the cases outlined in article 4 section 1a.

Authorisation process: unnecessary duplications and delays

At the same time the introduction of the new measures will lead to administrative duplications and delays in the authorisation process. An example is the limitation on the authorisation's validity of one year maximum. Another example is the introduction of the right for other member states to object to the granting of an authorisation. Not only will it heavily interfere with the fast processing of authorisations, it could also, contrary to the intention undermines single market principles. We would suggest to leave the process as is, and issue clear guidance to the member states authorities in order to ensure uniform enforcement. Industry should be consulted during the drafting of the guidelines.

Manufacturer's note of licensing requirements must be mandatory

We welcome the retention of the manufacturer's note of licensing requirements under article 9 section 7. This note of licensing requirements should not be restricted to intra-Union transfers but it must be mandatory also for exports to third countries. Only the manufacturer has all the information about the technical details, components, materials or technologies that are integrated in the products.

Coherence and clarifications needed

The Commission proposal raises an array of questions and there is a need for various clarifications. For example, certain references to the Union Customs Code such as article 9 section 2 are inaccurate. There is also the need to clarify who is responsible to lodge the application for authorisation under article 11. Is it the parent company or the subsidiary? The same ambiguity appears when it comes to the need for documentation under article 25 section 2. Does the broker in the third country or the parent company in Europe undertake the documentation formalities? These fundamental uncertainties need to be clarified in the regulation especially to ensure that Member States will implement and enforce the regulation uniformly from day one.

Conclusion

EuroCommerce welcomes the Commission's intention to modernise the export control system. Despite the extension of the global export licenses, strong concerns however remain, especially when it comes to the disproportionate extension of the due diligence obligation in this 'blanket' way. Furthermore the proposed regulation introduces extensive legal uncertainties, to the detriment of EU businesses and their competitiveness. As the regulation must be applied to the same extent by both large companies as well as SMEs (which do not have in house legal departments), it will be the SMEs that are likely to suffer and be forced out of certain markets, which would further enhance the concentration process in the market.

EuroCommerce is looking forward to working with the co-legislators to clarify the regulation and avoid these unintended consequences.

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