

# DIGITALEUROPE position paper on the review of export control policy in the EU

Brussels, October 2014

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## INTRODUCTION

Dual-use items are an integral part of most digital technology. Information security, often in the form of encryption, is an absolutely necessary tool for everyday business. For the digital technology industry in the EU a well-balanced export control policy is crucial in order to survive today's tough global competition. Indeed important parts of digital technology equipment can be covered by the scope of dual use regulations while being predominantly used for civilian use.

DIGITALEUROPE fully recognizes the very nature of export controls as an instrument for non-proliferation in order to safeguard national security and international security and stability. Effective controls implemented by the EU will also ensure that the international commitments of the Member States in the various control regimes are complied with. It is however also imperative that the balance between security and trade remain intact in order to avoid self-inflicted trade barriers to a high cost for the EU industry without receiving anything in return.

The 30th of June 2011 the European Commission issued a Green Paper launching a consultation on the implementation of the EU export control system and possible areas of reform. This review process was initiated due to the legal obligation for the Commission to continuously review the implementation of the export control system in the European Union (EU). As an outcome from this review process the European Commission has now adopted, on 24 April 2014, a Communication setting out concrete policy options for the modernization of EU export controls and their adaptation to rapidly changing technological, economic and political circumstances.

Before taking concrete initiatives for action, the Commission has invited the Council and the European Parliament to consider the approach set out in this Communication, and will conduct an impact assessment of the review options outlined in this Communication. The Industry has also been invited to contribute to this important review process.

DIGITALEUROPE appreciates the possibility to contribute with its expertise and will support initiatives which are pragmatic and based on best practices from Member States and the Industry.

Without compromising the overall goals of national security and international security and stability, a well-balanced and proportionate export control system which considers global availability of dual use items, global value chains and the ambition for a global level playing field can actually strengthen the competitiveness of the digital technology industry in Europe.

By reducing the differences between Member States, through a greater harmonization of practices and procedures, a modernized export control policy could also pave the way for a more level playing field within the EU.

## DIGITALEUROPE POSITION AND RECOMMENDATIONS

The Communication contains several proposals that DIGITALEUROPE believes are worth pursuing.

### 1. Engagement with the industry

First of all we welcome the recognition that structured engagement with industry would be of benefit.

We fully acknowledge the role that industry can play in strengthening the export control system, for example, in fully understanding the implications of new and emerging technologies or in the identification of items that would be ripe for de-control.

DIGITALEUROPE does believe it to be important that updates of the common list of dual-use items remain in conformity with the commitments that Member States have as members of the control regimes. We believe that any ambition to expand the Regulation to cover exports of items that are currently outside the scope and purpose of these control regimes should be analyzed extremely thoroughly.

The Wassenaar process (e.g. introduction of a new category to the list of controlled items) is the right way to introduce more controlled goods should that be deemed necessary; it would be more comprehensive than an EU mechanism only. In addition, a level playing field must be secured in order to avoid economic disadvantages in case of EU-controls only. Additional political effort is required to also include non-Wassenaar countries to additional controls of items/ technology in discussion.

EU-only action must be avoided, not to further nurture the divergence of the global export control framework and not to contribute to the already uneven global playing field, most probably to a high cost for the European industry. The digital technology industry in the EU is facing tough competition from third country competitors and any unilateral export controls by the EU must be proportionate to the outcome of these controls..

DIGITALEUROPE further believes that the industry needs to be involved in the development of guidance or redrafted legal framework for Intangible Technology Transfers (ITT) controls. Industry needs a consistent and pragmatic approach to the operation of controls in this area. In addition, the participation of industry will ensure review of international best practices in the area of dual use export control reforms. We would be able to offer insights based on our experience of complying with a number of national export control regimes along with instruments of self-regulation these national export control regimes provide and by that further utilize possible investments that have already been made by the industry to strengthen compliance.

## 2. ICT as a tool for democratization

ICT provides vitally important tools for democratization. Availability of information allows the public to participate meaningfully in governance, through engaging in public discussions and contributing to decision-making.

It empowers individuals, NGOs, national governments, and supranational institutions to effectively communicate their stories, agendas, laws and agreements, with maximum impact. ICT enhance and strengthen good governance and rule of law by increased transparency, imposing international accountability and fostering cooperation.

ICT may facilitate the networking and mobilizing of many NGOs working across national borders – for instance enabling the disaster response -, and may be even more effective as a force for human rights, providing a global platform for opposition movements challenging autocratic regimes and military dictatorships, despite government attempts to restrict access in certain countries. ICT have proven to be very effective instruments` for disseminating information relating to human rights violations on a worldwide scale.

DIGITALEUROPE fully recognizes, supports and contributes to the important initiatives in spreading democratic principles worldwide. We are convinced that our contribution is made through our digital technology and we believe that the communication and connectivity we provide is a basic human need.

We also assume special responsibility in controlling our products impact on human rights; DIGITALEUROPE members have introduced due diligence programs, applied range of policies and processes, and integrated human rights into their corporate culture, while respecting the Universal Declaration of Human Rights and the UN Guiding Principles on Business and Human Rights. DIGITALEUROPE members are committed to respect Human Rights throughout the lifecycle of their products and services, when it comes to design, development and use. Finally, innovative solutions can help ICT using Industry to entrench Human Rights into their own management and supply chain strategies.

This should be kept in mind when considering a necessity for further ICT controls; those controls should not hinder opportunities which ICT bring to the societies.

### 3. Coordination between the European Commission and Member States

DIGITALEUROPE also believes it to be important to keep today's division of responsibilities between the EC and Member States, especially in the areas of authorizing and controlling, including auditing. It is imperative that the Member States retain full competence to grant or deny authorizations and control exporters through audits and inspections.

From a historic perspective dual-use items has often only been available from a limited number of countries within the four export control regimes. Looking at the digital technology industry this has changed significantly the last decade.

The globalization and development in third world countries have led to an increased foreign availability of this type of dual-use items.

In addition to this many dual-use items, e.g. microprocessor and other semi-conductor technology computing and telecommunications are designed and function according to global standards. This is especially the case in the Telecom industry where the requirements for inter-operability between the vendors' items have been a driver for this development.

Even though foreign availability of dual-use items first of all is an issue to be considered in the four control regimes, DIGITALEUROPE would like to underline that the items with lower security concerns can be facilitated under the export authorization licensing perspective. Coupled with a robust licensing and general authorization programme for the distribution of mass market products, measured and systematic export controls will assist in executing proposed goals on defined areas of concern without adversely affecting industry. Thus promoting export compliance for general purpose technology at the exporter's discretion.

Looking at today's economic situation in the Member States together with razor sharp competition in the industry it is imperative that the resources for export controls are spent on the most sensitive products, while less sensitive products, such as products more widely available on a global level, should be allowed for export with less control. This can for example be facilitated with Community General Export Authorizations (CGEAs). The use of CGEAs cannot only provide the proper level of control for foreign available products but would also ensure a similar handling in the 28 member states for exports from the EU.

DIGITALEUROPE therefore recommends the EU to consider a broader range of EU General export authorizations (EUGEAs), especially for cryptography, semiconductor, computing and telecommunications design & development technology, and intra-company transfers. Companies are often working with research and development on a global level and technology transfers within a company group should be facilitated effectively within the framework of the EU's export control system.

We welcome the statement that compliance efforts could be recognized through the facilitation of control and fast-track export processes by setting clear private sector compliance standards for use of simplified mechanisms (such as EUGEAs, NGEAs, Global Licenses). Efforts of exporters which proved to be reliable, based on e.g. AEO-certification, should be honored by granting simplifications in handling/ processing/ reporting etc.

It is also DIGITALEUROPE's view that national general export authorizations (NGEAs) impose an inequitable situation for exporters of dual-use products within the EU. The long term ambition should be to convert national general export authorizations to EUGEAs in order to create a level playing field within EU. DIGITALEUROPE therefore believes that the NGEAs should be reviewed in order to ascertain whether it would be appropriate to transform them into EUGEAs. Opportunities exist for NGEAs to apply international best practice methods in consistently identifying countries of less concern with respect to dual use export control goals, therefore providing compliant and efficient methods to support EU companies in the global business environment.

Preparation of guidelines for consistent licensing practices at national level, including best practices, would be supported; the Communication mentions an example of processing times - a maximum processing time for export licenses should be introduced, for instance 2-4 weeks. We call for elimination of differences in handling licenses, its conditions and respective processing times across the EU. Alignment of procedures, types of approvals and its conditions is required for competitiveness of the European business.

#### 4. Evolution of global value chains

DIGITALEUROPE appreciates that the Commission recognizes the evolution of global value chains. Especially in the digital technology industry this is a reality today. We therefore fully agree that it could be beneficial for the economic operators to clarify certain definitions such as “exporter”. One way could be to fall back on the globally accepted terminology for customs purposes. It would then be easier to determine whose responsibility it is to obtain the necessary export authorizations. We would also point out that there is a clear practice for this determination, a process also connected with ICC’s Incoterms.

Export control reforms and initiatives in third countries have effect on EU exporters in various ways. On the one hand, the U.S. reforms which are aimed to promote domestic export of general purpose mass market products and technologies, while streamlining and defining products and technologies requiring processes in support of national security. It would be recommendable to engage with the US authorities to align, with a view to establishing a level playing field for EU and US exporters and to reduce the administrative burden for multinational companies operating under both EU and US export controls

On the other hand, there exist other unilateral export control regimes not harmonized to international best practices and not in line with technological developments. DIGITALEUROPE’s members operate on a global market and are adversely affected by a variety of export control systems which are not harmonized to international norms.

#### 5. Towards a global level playing field

With globalization comes also a need to strive for a global “level playing field”. DIGITALEUROPE appreciate the Commission’s commitment to promote the global convergence of export controls to facilitate trade in dual-use items.

DIGITALEUROPE would like to point to the possibility for the EU to act as a model for these emerging systems through the various outreach programs executed with funding from the EU.

The digital technology industry in the EU is used to work with export control and often have well established compliance programs.

Being able to work in a standardized way on a global scale will not only simplify export compliance for EU companies but also strengthen the global export controls as a whole since they will rest on a common foundation. DIGITALEUROPE would therefore like to encourage, and offer to contribute to, continued activity in this area, preferably with a clear vision that is developed together with the Industry. Ambitious steps in the form of new licensing and general authorization programs across the EU may be a first step in aligning to international best practices in support of EU industry.

DIGITALEUROPE would also like to see more harmonization in the so-called end-user statements. In a global world where a business can be established in various parts of the world a generic treatment of end-user verification would be beneficial. Harmonization in Europe together with a clear vision of the EU outreach in countries that implement export controls could lead to administrative simplification for exporting companies.

## **6. Inclusion, training and e-learning tools**

We are also in favor of more ‘in-reach’ to EU industry and the preparation and publication of guidelines for certain focus areas, such as cloud computing. Currently there is a significant uncertainty how to treat electronic communications in cloud environment – who is responsible, how to treat encrypted materials etc.

Many ICT companies have established compliance programs and internal trainings and would welcome the availability of further e-learning tools that would assist companies in undertaking internal company training.

DIGITALEUROPE also supports the idea of developing an EU-wide capacity building program and training for officials in key areas and the enhancement of the ‘Pool of Experts’. In order to achieve a more harmonized export licensing process also within the EU DIGITALEUROPE suggests that the Commission provide in depth training for the national authorities.



## 7. Exchange of information and confidentiality

It is DIGITALEUROPE's firm belief that all ideas of overall supervision and coordination of the catch-all mechanism must be examined thoroughly before they are considered. An individual Member State may otherwise be granted a too extensive authority to bring up certain products under EU control.

The information submitted to the member states as part of the authorization process can be extremely sensitive and can for example contain detailed technical information on a company's product portfolio and market strategy. DIGITALEUROPE would therefore like to stress the importance of confidentiality of this information.

The exchange of information between the national authority and the industry is extremely important and must not be compromised. Any reporting requirement must take into account the protection of company confidential commercial information not to distort the competition and to protect the openness required in the license applications process.

DIGITALEUROPE fully understand the need for exchange of relevant information between Member States and between Member States and the Commission. However we would ask that commercially confidential information at all times is protected throughout this process.

DIGITALEUROPE has also noticed an increased demand for transparency from stakeholders and civil society. In this context, it is important for the Industry to underline that reporting should be an obligation exclusively towards the Member States. It should be the sole responsibility of the Member States to fulfill any requests from EU institutions for further information and the Industry should under no circumstance be expected to undertake any such reporting, be it to the Commission or the EU Parliament.

## CONCLUSION

We believe the Commission, in their Communication, has captured the essence of a robust, but efficient, export control policy:

"Economic operators, Member States and citizens of the EU all have an interest in effective export controls, ensuring security by combating illicit trade while facilitating legitimate trade".

DIGITALEUROPE offers a continuing dialogue with the Commission and the governments of Member States. We believe that it is in the interest of all parties to exchange views, experiences and expertise to achieve the best possible outcome of this review process.

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## ABOUT DIGITALEUROPE

**DIGITALEUROPE** represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

**DIGITALEUROPE** ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 58 corporate members and 36 national trade associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

## DIGITALEUROPE MEMBERSHIP

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**Denmark:** DI ITEK, IT-BRANCHEN

**Estonia:** ITL

**Finland:** FTTI

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**Hungary:** IVSZ

**Ireland:** ICT IRELAND

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