SPECTARIS Statement:

Commission Proposal for a New EU Dual-Use Regulation

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Contact person:

Jennifer Goldenstede
Head of
Foreign Trade & Export Promotion

Fon +49 (0)30 41 40 21-27
Fax +49 (0)30 41 40 21-33

goldenstede@spectaris.de

Alexander Strempel
Project Manager
Foreign Trade & Export Promotion

Fon +49 (0)30 41 40 21-58
Fax +49 (0)30 41 40 21-33

strempel@spectaris.de

SPECTARIS is the German industrial association for optical, medical and mechatronic technologies and unites roughly 400 mainly mid-sized German high-tech companies in the four trade associations Consumer Optics, Photonics, Analytical, Bio and Lab Equipment as well as Medical Technology. Boasting an average export rate of more than 60 per cent, the SPECTARIS companies are especially distinguished through their export strength.

Preliminary remarks

On 28 September 2016, the European Commission presented a proposal for a new EU Dual-Use Regulation (COM(2016) 616), which is meant to replace the Regulation (EC) 428/2009 by the Council from 05 May 2009 on the Community regime for the control of exports, transfer, brokering and transit of dual-use items ("EC Dual-Use Regulation"). This provision is the most significant legislative text on European export control and absolutely all European companies need to pay attention to it that manage goods or technologies that may be used for civilian as well as military purposes.

This legal provision is of immense importance to numerous SPECTARIS member companies. Therefore SPECTARIS established the project group "EU Dual-Use Regulation" with the goal to analyse and comment on this proposal by the Commission. The work's results are presented in this opinion piece. SPECTARIS wishes to hereby actively and constructively accompany this legislative process.

The so-called "Human Security Approach"

According to the new trade strategy "Trade for All" (COM(2015) 497), the European Commission is committed to pursuing a value-based trade policy. To do justice to this goal, the Commission introduced the concept of "Human Security Approach" to the regulation's proposal. This new value approach is noticeable at various points of the regulation proposal. For example, the definition of "dual-use items" has been redefined, new catch-all controls added, and the due diligence obligations of the economic operators and the test criteria of the competent national authorities have been expanded.

1. The definition of dual-use items is expanded to include "cyber-surveillance technology which can be used for the commission of serious violations of human rights or international humanitarian law" (art. 2 para. 1 lit. b). The term "cyber-surveillance technology" is then further defined in art. 2 para. 21.

   The question must be raised as to whether the pursued goal can actually be reach by expanding this definition. In practice, situations often arise in which one cannot determine beforehand whether the technology will be used for civilian purposes or misused to violate human rights. A clear example of this are surveillance cameras in shopping centres. The footage taken by these devices are per se legitimate and transparent. However, these surveillance cameras may be seized by authoritarian regimes and used to track down and arrest government critics or opposition members.

2. Special attention must be given to the new catch-all controls. In the current EC Dual-Use Regulation, the catch-all clause only applies if non-listed goods could be used in terms of ABC weaponry, missile/carrier technology or other defence technologies and a weapons embargo has been imposed on the final destination country. The new regulation proposal distances itself from this approach and introduces two new catch-all rules: a human rights catch-all rule (art. 4 para. 1 lit. d) and a terrorism catch-all rule (art. 4 para. 1 lit. e).

The human rights catch-all rule describes "serious violations of human rights or the international humanitarian law". While the term "international humanitarian law" – for example based on the Geneva Convention – can be delimited, the general reference to human rights is quite unprecise and will lead to ambiguities in practice, as a clear and uniform-codified legal source is missing. It is unclear whether the regulation proposal refers to the Declaration of Human Rights of the United Nations, the European Convention on Human Rights, the EU Charter of Fundamental Rights or the single state's fundamental and human rights. Even if the term "human rights" would be specified, the inclusion of this catch-all clause would remain highly problematic. The question remains how and on what basis of which information a company is meant to judge which behaviour poses a serious violation of human rights. This assessment can only be made by a responsible state institution.

The matter of the terrorism catch-all clause is similar. In order to qualify the term "terrorist act", art. 2 para. 23 refers to the definition that is included in the common position of the Council 2001/931/CFSP. Nevertheless, that does not make it easier for a company to determine whether a product could possibly be misused for terrorist purposes. Here too, an indication or reference by a state authority is indispensable.

3. The increased compliance obligation that is imposed on the exporter is especially alarming. While art. 4 para. 1 assumes the instruction by the responsible authority, art. 4 para. 2 stipulates that the exporter, "under his obligation to exercise due diligence", must notify the competent authority if his goods are fully or partially intended for offences listed in art. 4 para. 1 (i.a. human rights violations and terrorist activities).

   This stipulation deviates from the previous requirement of positive knowledge and introduces a new notion of diligence. It is unclear how companies are to implement this due diligence notion, which business processes need to be newly implemented accordingly and, above all, the extent of the companies' obligation to acquire information is not specified either. This has the effect that the compliance effort within the company will increase significantly. At the same time, one can assume that the work volume of the responsible national authorities will have to expand in parallel, as numerous companies will apply for negative certificates to hedge their bets.

4. The "Human Security Approach" also plays a decisive role concerning the test criteria for issuing authorisations. For the criteria listed in art. 14 para. 1 to be applied uniformly within the EU, the Commission and the Council provide guidelines and/or recommendations (art. 14 para. 2) to the responsible authorities of the Member States. To the extent that these guidelines and recommendations do not exhibit any legally binding character, it will be difficult to implement a consistent interpretation of the test criteria throughout the EU. An EU-wide consistent authorisation practice cannot be sufficiently ensured by those means.

The "Human Security Approach" makes it clear that the Commission is moving away from traditional goals in export control. Hitherto, the export control pursued two main goals: preventing the proliferation of weapons of mass destruction (non-proliferation) and the unchecked distribution of conventional arms. This proposal shows that the intent is for companies – as well as the responsible national authorities – to also take on additional responsibility in the area of protection of human rights and counter-terrorism. This socio-politically important and commendable goal puts additional strain on companies and it will not be possible for them to adequately implement these. Both the protection of human rights and counter-terrorism measures are classic tasks in the core area of political action (and that of authorities). This shall not be transferred to the area of responsibilities of commercial companies without automatically endangering the competitiveness through additional administration and lacking predictability and reliability for international partners. Instead, companies rather depend on receiving

clear indications by the responsible state bodies on sensitive products as well as critical target countries, persons and institutions.

Exterritorial status of the export control provisions

By means of this regulation proposal, the Commission also wants subsidiary companies that are located outside the EU to be included in the jurisdiction of the future EU Dual-Use Regulation. The plan is to check broker and supplier of technical assistance who are located in a third state but represent the property of a legal person from the EU (art. 2 para. 7 and 9 in conj. with art. 11 para. 1). So far, this extraterritorial approach has especially been seen in American provisions for export control in the US. This would, however, signify a new development for European export control laws.

The extraterritorial application of European export control provisions would lead to an increased amount of bureaucracy for a lot of companies. Training and sensitisation would need to be established for the corresponding business processes to secure the compliance with European rules. In practice, the proper compliance with this provision will be difficult to implement.

Furthermore, the question would arise on how to handle contradictory legal regulations. The insecurities when dealing with Regulation (EC) No. 2271/96 can serve as an example. This regulation deals with the protection from the effects of extraterritorial application of legal acts issued in a third country. There is reason to fear that third states could issue analogous regulations to defend against this extraterritorial status of the EU rules and thus expose European companies to uncertainty that is not acceptable.

Autonomous list of goods of the Union

Pursuant to art. 16 para. 2 lit. b, the Commission is authorised to change the list of goods in Annex I, section B by means of delegated legal acts, if this appears to be necessary based on serious violations of human rights, international humanitarian law or the essential security interests of the Union and its Member States. Art. 16 para. 3 is formulated in the same spirit, as it permits the Commission to make changes to Annex II while considering the criteria as set forth by art. 14 (i.a. the final destination country must respect the human rights and international humanitarian law). While a provision similar to the one in the last paragraph is also included in the current EC Dual-Use Regulation, the Commission's power of alteration is coupled to a weapons embargo.

The Commission is granted the option to maintain an autonomous list of goods which has not been coordinated with the international export control regimes. This provision carries the risk that the multilateral approach of export control is diluted.

Conclusion

Respecting human rights and the fight against terrorism are two very important goals. The member companies of SPECTARIS share these as well and are committed to contributing their part to security in the world. However, it is doubtful whether these goals can be attained by means of these provisions that are unprecise and out of touch.

While the so-called "Human Security Approach" initially appears as a commendable approach, it is impossible for companies to properly implement these in practice. Both the protection of human rights as well as the fight against terror are classic tasks of the state. Policy-makers may not pass this responsibility on to businesses and

the economy. Companies are dependent on receiving clear indications about sensitive products and critical target countries, persons or institutions by the responsible state authorities. Otherwise, the additional bureaucracy and lacking predictability would negatively impact the competitiveness of the German industry.

Therefore, SPECTARIS vehemently opposes this new approach and advocates retaining the existing list approach. That is a method that has consistently proven itself and that companies can adjust to.

Moreover, SPECTARIS rejects the extra-territorial character of the Commission's proposal and wishes to point out that the international approach of export control needs to be maintained.

Annex to the SPECTARIS statement from 17 February 2017
Commission Proposal for a New EU Dual-Use Regulation

Provision	Comment
Art. 2.1(b)	See SPECTARIS statement: "The so-called Human Security Approach".
Art. 2.2(d)	Merely "transmission" of software or technology is now mentioned and no longer the "provision" of software and technology. Thus it is unclear whether the "provision" is to be seen as an export or not. If that were the case, art. 2.3(b) would also have to be adapted, as the exporter is the one who decides on providing software and technology.
Art. 2.3(b)	Whether the provision of software and technology are also considered exports needs to be clarified (see comment above). What is new is that even a private person can be seen as an exporter in the meaning of the Commission Delegated Regulation on the Union Customs Code (UCC), if the goods are located in his/her personal luggage. The consequences of this provision thus need to be explained in further detail. Does the private person have to submit the export declaration him-/herself?
Art. 2.7 and 9	See SPECTARIS statement: exterritorial status of export control provisions.
Art. 2.15	This new EU GEA can be generally assessed as positive. Nevertheless, uniform report duties should be defined in order to keep the bureaucratic work at a minimum.
Art. 2.21	The terms used are in part very unprecise and thus need more accurate descriptions. For example, it is unclear what is meant by items related to "monitoring centers".
Art. 2.22	The content of this provision is written similarly to § 2.2(6) of the German Foreign Trade Ordinance. Care should be taken to guarantee that uniform standards apply for the internal program for legally-compliant behaviour for all Member States.
Art. 2.23	See SPECTARIS statement: "The so-called Human Security Approach".
Art. 4.1(d) and (e)	See SPECTARIS statement: "The so-called Human Security Approach".
Art. 4.2	The new parenthesis "under his obligation to exercise due diligence" in conjunction with art. 4.1(d) and € will cause uncertainty for many economic operators. It can be anticipated that more "negative certificates" will be applied for.
Art. 4.4	The newly introduced expression "essentially similar transactions" must be explained further. Does this refer to an identical or similar good? Furthermore, clarification is needed as to how the economic operators can inform themselves about the authorisation requirements for dual-use goods that are not listed in Annex I. Will the economic operators receive access to this directory or will they only be informed of a authorisation requirement after a concrete application has been submitted? This second option should be avoided as it would lead to unnecessary work for businesses.
Art. 10.1	The new global export authorisation for large projects can generally be judged positively. The text of the Regulation should possibly define as of when a project is seen as large.
Art. 10.3	This article establishes that the authorisations for export are valid for one year and can be renewed at the responsible authority. It would be desirable if instead of "renewed", the term "extended" would be used. It would be easier for both the economic operators as well as the national authorities for the authorisations to be extended without an audit – if there are no significant changes. Moreover, it would be better to set the validity at two years, with the possibility of providing the authorities the option of setting a shorter term.

Provision	Comment
Art. 10.4	Clarification is needed whether this paragraph also includes the global export authorisation for large projects (cf. art. 10.1(b)). In addition, the term “at least” in the line “the exporter shall also report to the competent authority, at least once a year, on the use of this authorisation” should be removed. A mandatory report on the use of the authorisations completely suffices once per year.
Art. 11.1	See SPECTARIS statement: Exterritorial status of the export control provisions.
Art. 14.1	Merely the test criterion in lit.(a) is to be welcomed, as it presents an enhancement to the EU. In contrast, lit. (b) to (f) are to be rejected. These new developments are an expansion of the original objectives of the Dual-Use Regulation and pose a strain on enterprises and the economy. There is a danger that what had previously been an administrative decision will become a political one.
Art. 14.2	It would be desirable if these guidelines and/or recommendations would be binding, as otherwise the uniform application is not guaranteed in the EU. This could, possibly, be implemented with the instrument of the delegated legal act.
Art. 16.3 and 2(b)	See SPECTARIS statement: Autonomous Goods List of the Union.
Art. 18.5	The paragraph can generally be judged as positive. This guideline needs to be binding for approval and customs authorities though.
Art. 20.2	Clarification is needed whether the information that is collected will be made public or not. Above all, the question arises whether the exchange of all this data is truly necessary for the collaboration between the authorities.
Art. 20.3	The system for the information exchange could lead to stronger centralisation, benefiting the Commission. Such a development would not be desirable.
Art. 21.3	It would be preferred if the stakeholders affected by this Regulation would always have to be consulted in the framework of a technical group of experts.
Art. 23	This new provision makes little sense from a formal and legal point of view.
Art. 24.3	This paragraph extends the test intervals from static three years to five-seven years. Three years are too short – however seven years are too long: five years would be more appropriate. Furthermore, minimum content requirements for these reports should be listed, such as, for example, evaluation of the economic consequences in the Union or the achievement level of the Regulation’s targets, or rather relation between achieving the goal and the burden on businesses.
Art. 27.1	In general, the collaboration with third countries is sensible. However, this paragraph is too vague and thus poses several risks. First, there should be a limitation or restriction of the information content that may be exchanged. Beyond that, the third countries with whom an information exchange is possible needs to be clarified – if needed, a distinction between NATO Member States, “regime states” and other third states should be made.