



Marietje Schaake – Member of European Parliament (ALDE / D66)

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Written submission to the public consultation on the European Commission's:

GREEN PAPER
**The dual-use export control system of the European Union: ensuring security
and competitiveness in a changing world**

A. Introduction

1. I welcome the publication of the Green Paper on “the dual-use export control system of the European Union: ensuring security and competitiveness in a changing world” (the “**Green Paper**”) and the following public consultation.
2. Given that article 25 of the Council Regulation (EC) 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use (the “**Regulation**”) requires the European Commission (the “**Commission**”) to publish a report every three years (by mid-2012) concerning the application of the Regulation and proposals for its amendments, I am happy to contribute to the this first stage of the review process, before the Commission will send a formal report to the European Parliament (the “**Parliament**”) and the Council.
3. From the 2011 Dual-use Exporter Conference held on 20 September 2011 I have learned that the main stakeholders involved in the review and public consultation are European businesses that are concerned about the current and future impact of the dual-use export control system, and its diverging implementation and application in the EU Member States (the “**MS**”), on their competitiveness.
4. Economic concerns are the primary force behind the ongoing review process of the Regulation. In the report of the 2011 Dual-use Exporter Conference, as published on the DG Trade website, no mention is made of other considerations that justify a review of the Regulation.
5. In this submission I will give a basic outline of the current export control mechanism in relation to human rights concerns, and the EU's strategic foreign policy objectives, and where it fails to address these concerns. Consequently I will list a series of amendments to the Regulation that can fix the current shortcomings.

B. Human rights concerns

Recent developments

6. On 27 September 2011 the Parliament adopted a legislative resolution¹ on “the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology (COM(2008)0854 – C7-0062/2010 – 2008/0249(COD))”, (the “**Compromise**”).
7. The Compromise for the first time explicitly included human rights concerns in the framework of the dual-use export control mechanism. Two amendments by the International Trade Committee (INTA) of the Parliament have explicitly excluded the export of certain technologies from the General Export Authorization (the “**GEA**”).
8. It should be noted that the GEA on Telecommunications in the Compromise only applies to exports to Argentina, China (including Hong Kong and Macao), Croatia, India, Russia, South Africa, South Korea, Turkey and Ukraine.
9. Exports to countries like Iran, Syria or Saudi-Arabia are therefore subject to MS export control mechanism and are therefore not covered by the human rights clause.
10. The relevant paragraphs in Annex II of “Telecommunications” are the following:

Part 3 - Conditions and requirements for use

This authorisation does not authorise the export of items where:

(1) the exporter has been informed by the competent authorities of the Member State in which he is established that they are or may be intended, in their entirety or in part,

(ca) for use in connection with a violation of human rights, democratic principles or freedom of speech as defined by the Charter of Fundamental Rights of the European Union, by using interception technologies and digital data transfer devices for monitoring people's mobile phones and text messages and targeted surveillance of internet use (e.g. via Monitoring Centres and Lawful Interception Gateways); (NEW, Marietje Schaake).

(2) the exporter, *under his obligation to exercise due diligence*, is aware that the items in question are intended, in their entirety or in part, for any of the uses referred to in *subparagraph 1*. (Italics are NEW, Marietje Schaake).

(2a) the exporter, under his obligation to exercise due diligence, is aware that the items will be re-exported to any destination other than those listed in Part 2 of this authorisation, those listed in Part 2 of the EU 001 or Member States. (NEW, Marietje Schaake).

11. The articles (1), (ca), (2) and (2a) only apply to exports that fall under the GEA. It is important to note that the new articles will confer an obligation on both the MS to inform exporters about a licensing obligation (article 1) and the exporters to exercise due diligence (articles 2 and 2a).

¹<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0406+0+DOC+XML+V0//EN&language=EN>

12. The destinations listed in Part 2 of the EU 001 (as referred to in article 2a) are: Australia, Canada, Japan, New Zealand, Norway, Switzerland (including Liechtenstein), and the United States of America.

Current practices

13. Exporters have a licensing obligation if they want to export an item or product that (1) is not covered by the GEA and (2) is listed in the annexes to the Regulation or (3) if MS invoke a so-called 'catch-all control' (the "**catch-all**") ex article 4 of the Regulation.
14. Items are on the list if they meet a certain threshold, e.g. the exact composition of chemicals. The definition of these thresholds is essentially a political discussion and is agreed upon by the members of the international control agreements (e.g. the Wassenaar Arrangement, the Missile Technology Control Regime (MTCR), the Nuclear Suppliers' Group (NSG), the Australia Group and the Chemical Weapons Convention (CWC)). Items that are not on the list or included in the GEA are so-called non listed items.
15. In case a MS invokes an abovementioned catch all control concerning a non listed item (e.g. because technical specifications have been changed in order to evade the threshold) this only constitutes an (ad hoc) licensing obligation for this specific item to be exported from that specific MS. This obviously allows for a "race to the bottom" as multi national companies will likely choose the most favourable MS as their 'safe haven' for exports.
16. An exporter who is not sure whether an item requires an export licence (proactively) asks the licensing authority in the MS where he is registered whether a export license is required. This requires a voluntary decision by the exporter – which also seriously undermines the effectiveness of a catch all control. Also note that the MS bear responsibility for the assessment and not the Commission.
17. This is where the asymmetrical implementation of the Regulation comes into play. As the Commission has no access or knowledge of the benchmarks and assessments the MS apply in considering whether a license will be issued, it cannot smoothen the dissimilar practices and ensure a level playing field.
18. The result of the diverging national export mechanisms are that companies in certain MS experience huge competitive disadvantages but also that there is no universal EU export policy or analysis of the situation on the ground in third countries – which can potentially constitute threats to both human rights in third countries as well as the EU's own security policy.

Examples

19. Below I have listed a number of reports on the involvement of EU technologies in human rights violations. I want to stress that I have been in dialogue with all companies that are mentioned in the articles below and believe that only a dialogue between policy makers, companies and NGO's will result in a comprehensive and efficient solution.

Iran:

1. Iran's web spying aided by western technology (2009).

http://online.wsj.com/article/SB124562668777335653.html#mod=rss_whats_new_s_us

2. Iranian policy seizing dissidents get aid of western companies (2011).

<http://www.bloomberg.com/news/2011-10-31/iranian-police-seizing-dissidents-get-aid-of-western-companies.html>

Bahrain:

3. Torture in Bahrain becomes routine with help from Nokia Siemens (2011).

<http://www.bloomberg.com/news/2011-08-22/torture-in-bahrain-becomes-routine-with-help-from-nokia-siemens-networking.html>

Libya:

4. Firms aided Libyan Spies (2011).

<http://online.wsj.com/article/SB10001424053111904199404576538721260166388.html>

Syria:

5. U.S. firm acknowledges Syria uses its gear to block web.

http://online.wsj.com/article/SB10001424052970203687504577001911398596328.html?mod=googlenews_wsj

Egypt:

6. Vodafone under fire for bowing to Egyptian pressure (2011)

<http://www.guardian.co.uk/business/2011/jul/26/vodafone-access-egypt-shutdown>

C. Remedies to current shortcomings in the Regulation

Action 1: EU wide catch all

20. The current catch all controls require an EU wide application if a MS decides to invoke such a control triggered by grave human rights concerns. If exported

technologies are to become instrumental in human rights violations then all MS should work together and establish an EU wide ad hoc licensing requirement. This will also prevent the 'race to the bottom' by multi national companies active on the EU's internal market.

21. MS should have an pro-active notification obligation towards the Parliament and submit an annual report of the number and nature of license applications, in order to eventually set up one objective standard for the issuing of export licenses.
22. The Commission should be able to ensure timely and speedy updates of the annexes to the Regulation. An assessment of the Regulation vis-à-vis technological developments, and the changing of parameters are required to ensure the effectiveness of the dual-use export mechanism.

Action 2: GEA for intra company transfers

23. Multi national companies are able to de facto export technology that is subject an export license requirement by transferring the technologies from one branch of the company to another, simply by clicking "send" or by uploading the software in the company's online "cloud", e.g. from Germany to Iran. The EU should therefore establish a GEA relating to intra company transfers, which enables the EU to draw up a list of items that are not allowed to be transferred (without prior consent).

Action 3: Single use items

24. Albeit potentially outside the scope of this consultation it should be noted that some of the technologies exported are no longer of dual use but specifically designed to violate human rights and fundamental freedoms. These "single use" items should also be subject to export restrictions, and possibly included in traditional arms embargoes.

Action 4: Country specific lists

25. The changes in North Africa and the Middle East have over the last 10 months required urgent EU action, e.g. relation to the adoption of (targeted) restrictive measures like oil embargoes, asset freezes and investment bans. In a similar way the EU should also be able to impose ad hoc export license requirements on certain products, to certain countries, to prevent the ongoing export. Reportedly the U.S. pressed for additional export controls in the Australia Group on the export of biochemical technology to Syria. This is an example of how the goal of more targeted action and flexibility can be accomplished when applied to monitoring / surveillance items.
26. It should be noted that these additional export controls do not address the problems of so-called technical assistance by EU companies (e.g. software updates, operational teams on the ground) to governments of countries that are subject to (ad hoc) restrictive measures, as technical assistance is not qualified as the export of items, but are services.
27. Technical assistance is covered by the Council Joint Action² concerning the control of technical assistance related to certain military end-uses and requires

² http://trade.ec.europa.eu/doclib/docs/2003/december/tradoc_114998.pdf

the Council's action. Technical Assistance That means an end to software updates or mechanics actually operating the sold technologies (on the ground).

Action 5: EU guidelines on exports

28. The Commission should provide better guidance to companies that are unsure whether an application for an export license is required. If a lack of resources in the Commission currently prevents this guidance that problem should also be addressed. The abovementioned examples show that the results of the export of ICTs is becoming troublesome and requires the EU's urgent attention. The UN "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework"³ should be the standard for due- diligence activities by exporters.
29. The Commission should perform EU wide human rights impact assessments on an ongoing basis. Companies should be required to check whether their products or services may be used to violate human rights before the sale is completed. The Commission in turn should monitor enforcement. Whistleblower protection should be offered to employees of exporters that report non-compliance.
30. If the MS do not (want to) share their benchmarks with the Commission or the public the Commission can pro-actively give more guidance to businesses – in order to improve due diligence activities, which should be an integral part of these companies' corporate social responsibility programmes. In order to consider companies' needs, guidance should be provided through a helpdesk on a confidential basis.

Action 6: Human rights impact assessments

31. Given the (voluntary) notification obligation of exporters to request an export license the EU should explore possibilities of incorporating (human rights) impact assessments at an earlier stage, e.g. the R&D phase or when registering a new item for an EU patent - companies aiming for commercial success will probably register their new items. At this stage items that are potentially harmful outside the EU can be identified and flagged at an early stage, ad-hoc probes can be done to check compliance.
32. I invite the Commission to study the effectiveness and design of these 'smart measures'. The human rights impact assessments or 'flagging' could be performed by an European regulator, e.g. the Body of European Regulators for Electronic Communications ("BEREC").

Action 7: Dialogue with exporters

33. Given the often intangible transport (or export) of technologies it is key that the exporters are also pro-actively engaged in preventing their tools from becoming instrumental in human rights violations. Obviously exporters that are well known by the public, and who's sales are dependent on a good reputation will most likely comply with the EU's and MS export mechanisms. However, subsidiaries and spin offs of these large companies, or companies that do not fear reputation loss often operate under the radar out of tax havens and are less vulnerable to a public outcry. Exporters should take responsibility and increase transparency regarding exports by smaller companies that belong to their holdings. The

³ <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework>

Commission should have the mandate to demand transparency. (COMPARE
Weapon embargo, transparency index, anti-trust cases?)

34. I have set up a working group that provides a platform for companies, policy makers and NGO's to engage in a dialogue in order to effectively address the abovementioned concerns.

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