

Why BDI Supports Dual-Use Reform But Not the New Catch-All Rules

On 28 September 2016, the European Commission adopted a reform proposal for its export control regime that sets out extensive amendments to the EU dual-use regulation. The proposed changes could have a negative impact on Europe as a technology location. The European Parliament and Council must now ensure a sound judgment in the legislative process. In a recently published position paper, BDI made recommendations on how to improve the reform proposal.

The European Commission would like to strengthen the so-called human security approach in export controls. The approach aims at regulating the export of certain cyber-surveillance technologies more strictly in cases in which they are deployed for surveillance purposes and might lead to human rights violations. According to the European Commission, the current export control system is solid but still has loopholes when it comes to controlling the export of critical cyber-surveillance technology to third countries. These conclusions were based on reports about human rights violations during the Arab Spring: journalists and civil society organizations reported human rights violations against regime opponents who had been monitored by state agencies. According to press reports, EU- technologies were used in some instances to monitor those individuals.

BDI explicitly backs strengthening human rights in third countries. It also supports the EU's value-based trade agenda that is intended to ensure high standards of sustainability, human rights, and democracy. However, the tools proposed in the reform proposal go beyond what is necessary. In fact, they could even fail to protect human rights. This is especially true for the new catch-all rules. In its position paper, BDI proposes an extended list-based approach that should be considered instead.

New Catch-all controls will burden industry and harm the EU jobs and growth agenda

Why? The proposed human rights catch-all rules are too vague and create legal uncertainty for companies. "Possible human rights violations" is simply too unspecific to serve as a control criterion for companies. They will thus apply for export licenses even for goods not deemed critical in order to be on the safe side and avoid possible penalties. These could have severe consequences for the export process and for EU competitiveness.

First, application procedures will proliferate and delivery times will become lengthy and uncertain. At the same time, neither the EU Commission nor national export administrations plan to increase their control capacity. However, the future burden for the administrative decision-making process is underestimated: a complex political and legal decision always requires the backing of national agencies. The question if an export might lead to serious human rights violations will entail particular complex consultations as well as intelligence gathering, which an individual companies cannot ensure.

Second, if too many non-critical goods fall under an export license reservation, EU's high technology exports as well as R&D activities will be harmed. Unpredictable and lengthy procedures will paralyze project planning and compromise EU companies' competitiveness. Customers' plants risk standing idle if EU companies cannot ensure rapid remote diagnosis, repairs, or deliveries of spare parts. This delivery and downtime risk might provoke procurement for important infrastructure projects such as smart traffic infrastructure, smart and green power supply as well as e-health solutions *without* considering EU companies. However, these industries are crucial for future jobs and growth in the EU; and they all need cyber-surveillance tools to guarantee security of supply and consumer protection. Secure IT connections ensure that the population enjoys security of supply. Surveillance systems reduce the chances of security gaps remaining undiscovered and hacker attacks causing considerable damage. Secure IT connections are needed to ensure a high level of product safety. A car manufacturer must for example protect cloud services from unauthorized access by a third party. Driver assistance systems and autonomous driving must be safeguarded against hacker attacks.

New catch-all controls are not necessary

Foreign trade is essentially free and should not be unnecessarily restricted by catch-all regulations. This was stressed by EU Trade Commissioner Malmström in another export control area – the reform of the anti-torture regulation. In this context, too, catch-all instruments had to be weighed against the list approach. However, the final decision was clear: the Trade Commissioner spoke out explicitly against new catch-all regulations, as no good reasons were found to justify doing otherwise. The same holds true for the new catch-all regulations in the dual-use reform: There is no reason to opt for ineffective and burdensome new catch-all rules. There are other – and better – ways to effectively control critical exports:

First, the tried and tested list approach has until now enabled sound export controls. Country and product lists ensure that companies can carry out effective and efficient checks before exporting. And if product lists do indeed become too quickly outdated in the current rapidly-changing technological and security environment, a fast-track procedure could be implemented similar to that provided for by the revised anti-torture regulation. *Second*, the country-list approach can be modified without fueling political tensions. BDI proposes criteria based on the rule of law standards in third countries that would increase the predictability of listings and differentiate between countries and end-users.

Finally, adaptability to even faster changing environments is also guaranteed. If the security or technological environment changes overnight ad hoc measures can quickly stop export: companies and export control agencies can even stop the export of non-listed items under the already existing catch-all regulations. And above and beyond the application procedure, national agencies can make use of their implementation and enforcement powers: In the event of any human rights violations, they already have the administrative authority to stop the export. The principle that the strict national enforcement of existing rules should take priority over new far-reaching rules hold true in this case, as well.

The new catch-all controls are ineffective and harm the EU's 'Trade for All' agenda

Only companies *with a presence* in third country markets can ensure responsible deliveries. Strengthening competition, therefore, is not only crucial for businesses; it is also a prerequisite for effectively implementing the EU's "Trade for All" agenda. However, if delivery times are too long and uncertain, non-EU competitors will likely secure the deal. Customers need to keep their machines running. For this reason, the risk of a standstill is frequently given more weight than quality considerations during contract negotiations. It is essential to strike the right balance between restricting exports of critical goods and guaranteeing those of non-critical goods or deliveries in "good infrastructure" in order to improve the promotion of human rights.

The new catch-all rules also harm our European rule of law values

Unspecific rules with penal consequences harm the common legal principle of *nulla poena sine lege (certa)*. The French Constitutional Council reiterated this principle in a recent ruling (Décision n° 2017-750 DC du 23 mars 2017). In this case, the penal consequences of a non-specific regulation on human rights due diligence were declared void and the obligations of companies to ensure the non-violation of "human rights" and "basic freedoms" were declared too vague. According to the ruling, the regulations conflicted with Article 8 of the French Constitution of 1789. In Germany, the corresponding legal principle is enshrined in Article 103, Paragraph II of the German Basic Law; in the European Convention of Human Rights, it is to be found in Article 7. The conclusion to be drawn is clear: At a time when European values are subject to many challenges, the European legislator should not call into question the basic principles of our common European legal tradition. And the EU can hardly demand higher rule of law standards in third countries when it is failing to meet those standards in its own legislation.

Verena Kantel
Senior Manager
BDI; Foreign Economic Policy