EECARO
European Export Control Association for Research Organisations

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EECARO non-paper on the improvement of Intangible Technology Transfer controls

Introduction

EECARO appreciates the ongoing efforts of the European Commission and the competent Member State authorities to improve the implementation of the EU dual-use export control system. Research organisations are particularly impacted by the controls on Intangible Technology Transfers (ITT) and would benefit significantly from **further improvements, through guidance to enhance a level-playing field within the EU or through regulatory amendments**.

EECARO is fully aware that the implementation of ITT controls is complex and multifaceted, and that there is most likely no regulator bandwidth to solve all outstanding challenges in the short term. This non-paper therefore highlights **EECARO's priorities for improving ITT controls** so that with a few quick wins the daily compliance efforts by research organisations is improved.

Further ITT guidance is only relevant if the European Commission and competent authorities are willing to obtain a **common operational alignment on the risk-appetite (or red lines)** for each ITT activity. The current (very) different interpretations concerning the scope of "export", "exporter", "technology", "required", "development", "production", "use", "basic scientific research" or "in the public domain" make it *de facto* impossible to implement the EU dual-use export controls consistently across the EU, putting more restrictive interpretations in disadvantage of the more (formally or informally) relaxed interpretations. Additionally, some subtle or significant differences in other jurisdictions, like the ones of the United States, United Kingdom or upcoming in Norway, make it difficult to motivate researchers for the implementation of ITT controls in a research context.

Research organisations welcomed **Commission Recommendation (EU) 2021/1700[1],** which helped to understand the scope of export controls, including ITT controls, and the recommended internal compliance measures. The Q&A section in this guidance in particular is a start, but it has also resulted in more questions from research organisations. EECARO welcomes a revision of this guidance whenever possible, but it does not see this guidance as the only format to improve ITT controls. EECARO advocates to use a **Frequently Asked Questions (FAQ) format** as soon as possible to be able to address identified problems and solutions in a more agile way, comparable to the Russia sanctions FAQ.

Below is a summary of priority questions for EECARO members when dealing with ITT controls. The purpose of these questions[2] is to (ultimately) arrive at a common operation alignment

[1] Commission Recommendation (EU) 2021/1700 of 15 September 2021 on internal compliance programmes for controls of research involving dual-use items under Regulation (EU) 2021/821 of the European Parliament and of the Council setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items.

[2] These questions only relate to clarifications about the export controls implementation; EECARO understands that the compliance obligations of researcher and research organisations can go beyond export controls, including other regulations, such as sanctions. EECARO does not expect guidance beyond export controls for these questions.

between the European Commission and the EU Member States so that it is clear for all EU based research organisations how ITT controls are implemented. The below questions will focus on the key aspects impacting research organisations, but EECARO is interested of course in improvements suggested by other stakeholders such as industrial R&D.

Technology transfer through research activities, including the mobility of researchers

- Is the secured transmission of controlled technology from research activities to a cloud-based storage - without making it available - subject to export controls?
    - If so, who is the exporter and what is the guidance concerning tracking and reporting of these transmissions under a licence?
- Is the access to controlled technology by the researcher or other employee via a Virtual Private Network (VPN) of the affiliated research organisation outside the EU an export, if this technology is not made available to another person in a third country?
    - If so, what is the guidance concerning applying for a licence (the exporter, end-use and end-user), and concerning tracking and reporting of accesses under a licence?
    - Does the answer depend on whether the researcher has an employment relationship or is independent academic staff?
- If publications must remain subject to systematic export control checks, can the guidance give clear examples of publication thresholds of "technology" "required" for the "development", "production" or "use" of listed dual-use items or listed dual-use technology?
- Publishing is a multi-step process, including sharing ideas, data sets and drafts with (possible) co-authors, the peer-review or open-source review phase and the post-acceptance release in the public domain. How are research organisations expected to do a systematic publication pre-release check? Or is the operational alignment that a publication cannot realistically contain "technology" "required" for the "development", "production" or "use" of a listed dual-use item?
- Research increasingly uses Cloud Infrastructure as a Service (e.g. for Cloud Computing), Platform as a Service (e.g. to develop software), or Software as a Service (without access to the source code) to create scientific output or to provide access to such services for third parties. What do the regulators expect research organisations to focus on and what is not relevant for export control checks?

Technology transfers via research output to be shared broadly within the scientific community

- Is a licence application for a publication with controlled technology possible? If so, can the licence be granted or is there a presumption of denial for such licence application?
- Who needs to be assigned as exporter in case of a controlled publication: the researcher, the research organisation, the publishing house, or the cloud provider making the publication available? Who needs to be assigned as the consignee or the end-user?
- The minimum information necessary for a patent application is exempted from technology controls for non-nuclear dual-use technology, while in practice such information is often more detailed than what will be found in publications. Are publications still to be treated differently compared to patents, as both intended to become available in the public domain?
- Is it the correct interpretation that the definitions of "development" and "production" are open-ended, while the definition of "use" is a closed definition, meaning that only research output that contains all the elements of "use" is to be considered as listed technology? EECARO notes here that there are differences in the official EU languages for the definition of "use" further complicating a harmonized implementation.

- What are best practices concerning the financial value or the date of export/transfer for an ITT licence application?

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- Should Article 8 provisions (on technical assistance) be invoked irrespective of the tangible or intangible format of the technology? In other words, is the carrier (e.g. an external flash drive or printed paper) of controlled technology a determinant whether the technical assistance check needs to be performed?
- What is the best practice guidance about the implementation of Article 11(9)[3] for intra-Union transfer of dual-use technology resulting from academic research?
- What is the best practice concerning export controls for coordinators and consortium members dealing with submitted or granted EU/national research funding with EU based and/or non-EU based research partners?
    - Who is considered the end-user of this funded research: the funder, the consortium members or the public domain?
    - Beneficiaries of most grants must disseminate their results as soon as feasible, in a publicly available format, subject to any restrictions due to the protection of intellectual property, security rules or legitimate interests. Can the regulator give guidance or examples of such security interest related restrictions in relation to export controls?

Conclusion

EECARO wants to emphasize that operational alignment on the questions above is already a significant step towards an EU wide level-playing field on ITT controls. But EECARO also urges for legal certainty with regulatory amendments beyond operational alignment, particularly related to the definition of export and exporter when it comes to transferring controlled technology without making it available, or when making it available for own researchers outside the EU without access by third country persons.

Furthermore, EECARO wants to see more harmonization of export control practices with other 'like-minded' jurisdictions so that the international level-playing field for both less and more risky research activities is made clear. A first step would be to exempt the systematic control on scientific output that is the result from research and that is intended to become available in the public domain. This could be achieved by amending the definitions of "basic scientific research" and "in the public domain", or via an exemption in the General Technology Note.

About EECARO

The European Export Control Association for Research Organisations (EECARO) is a network that unites European research institutes, universities, and their export control compliance officers with a view to addressing the specific character of export controls in a research context. This includes the intersection of export controls and other relevant areas such as knowledge/research security and R&D funding for technologies with civil/military synergy potential. For more information, please visit: http://www.eecaro.eu | Contact: info@eecaro.eu

[3] The relevant commercial documents relating to intra-Union transfers of dual-use items listed in Annex I shall indicate clearly that those items are subject to controls if exported from the customs territory of the Union. Such documents include, in particular, any sales contract, order confirmation, invoice or dispatch note.