EECARO
European Export Control Association for Research Organisations

Comments to EU-US Trade and Technology Council' s Export Controls Working Group (WG 7)

Challenges for Research Organisations and Universities

Research Organisations and Universities play an ever-increasing role in the field of export controls mainly due to their crucial role in technological developments. The cross-border exchange of items - including technologies or software - through conferences, exchanges among the academic and research community, (international) research projects and cooperation with industry partners is an essential part of their day-to-day work.

EECARO appreciates the opportunity to provide comments to the **Working Group 7 of the EU-US Trade and Technology Council (TTC).** We believe that a common approach regarding the interpretation and application of export control laws and regulations in the US and EU would be highly beneficial for researchers, scientists and academics both in the US and the EU, making sure that no additional and parallel structures add to the existing framework of international export control regimes

We would like to provide comments and suggest concrete actions in the following areas.

Areas

Area 1: Exemptions and Facilitations

Major international export control regimes include exemptions for "basic scientific research" and "information in the public domain". Participants to the international export control regimes have implemented those exemptions differently, specifically regarding the level of detail – including the US and the EU.

However, binding, and concise criteria for the application of the exemptions for "basic scientific research" and "information in the public domain" - representing the reality of today's research and academic community - are necessary for a more efficient application[1].

[1] As clarified by the EU guidance on compliance in research involving dual-use items (Commission Recommendation (EU) 2021/1700 of 15 September 2021, , OJ L 338, 23.9.2021, p. 1.), controlled dual-use software or technology that is not yet in the public domain cannot be de-controlled under the "in the public domain" de-control note. Consequently, the output of a research project (open-source software, publication, conference material, …) can only benefit from this de-control if the listed dual-use software or technology that it contains is already in the public domain. If it is not the case, the EU exporter should request an export license for the release. In the US, for instance, encryption software that is made "publicly available" may be subject to license exceptions and related notification or reporting obligations. To determine if the output of a research project is basic fundamental research, the EU decided to focus on two criteria to determine whether the output of a research project can be considered as 'basic', being the TRL (technology readiness level) and the industry funding (sponsor) involved. However, there is no clear confirmation from the US side whether this approach is accepted and equally implemented to ensure a level playing field.

We believe that the following suggested actions are key to help the research and academic community both in the US and the EU to bring together high-quality international research and science and efficient export controls.

Suggested concrete actions:

- Broadening the definition of "basic scientific research": The definition provided by Annex I of the EU Dual-use regulation for "basic scientific research" is too abstract and complicated to apply. Instead, the exemption for "basic scientific research" should follow the definition of "fundamental research" as laid out in the EAR. It should be emphasized that publishing results and sharing them broadly within the research community is the decisive factor for arguing in favor of an exemption for "basic scientific research". If this is not possible, it should be acknowledged by both the EU and the US that the technology readiness level (TRL) and the industry funding (sponsor) involved are sufficient criteria to assess whether technology falls under the exemption for 'basic scientific research'.

- Following the EAR approach in exempting "published information" and "information intended to be published" from export controls: Allow for an unrestricted publishing in publicly available scientific journals – print or online - including sharing information with co-authors and reviewers abroad, to enable a smooth and timely peer review process. Further, the EU and the US should align the licensing requirements for software and technology to be released "in the public domain".

- Exempting public scientific conferences from export controls: Participating in public scientific conferences is key to research and academia, while conference contributions and presentations are generally of low technical applicability. The approach undertaken by the EAR regarding open conferences should serve as a starting point.

- Align US and EU licensing requirements in the context of a patent application: In the EU the exemption applies only once the publication has been published but sometimes the invention is not patented as there are no grounds to proceed, or the patent is rejected. This is in clear contrast with the interpretation in the US, where the 'intention to publish' is considered as sufficient for the exemption to apply.

Area 2: Secured Remote Access and Cloud Computing

A secured remote access from third countries should not always constitute an export.

Remote access to home networks and databases is a standard nowadays, in industry as well as research and academia. However, making software and technology available to anyone in a third country is still considered an export by the EU-Dual-use-regulation ("making available"). This should not be the case for a secured remote access, such as through a 'virtual private network' that restricts the access to a predetermined and limited group of people. Additionally, the storage of technology or software on servers hosted in third countries is considered an export by the EU-Dual-use-regulations ("making available"), even when said technology and software is encrypted. We believe that the storage of encrypted technology or software cannot be defined as "making available". This issue has become even more relevant in the context of the COVID-19 pandemic, since working remotely and from abroad on a (semi) permanent basis became a common practice. In this scenario there would be no technology

nor software shared by the employees of the University or Research Organisation with public or private entities, nor with individuals in the country where they would be working from.

Suggested concrete actions:

- Amending the definitions of export and clarifying that a secured remote access from third countries does not always constitute an export: Researchers, academics and scientists need to be able to access technology and software from abroad without lengthy review and possible application processes. This should at least be the case when the access is limited to the researcher, academic or scientist and secured through e.g., a 'virtual private network'. This includes working from abroad or working remotely.

- Making 'cloud computing' easier: The storage of encrypted technology on a server in a third country should not constitute an export in cases, when there is no access possible from that third country or any other third country.

Area 3: The Exporter

When transmitting technology or software by electronic means, such as e-mail or a server upload, uncertainties exist regarding the role of the exporter. This especially holds true for organisations with a high degree of decentralized authority such as Universities and other Research Organisations. An additional layer of uncertainty is added when publishing, since several parties are involved in the publication process: the author, the Research Organisation or University, the editor, the reviewers and the publisher or rights holder.

Suggested concrete actions:

- Providing binding criteria: Clear and binding criteria are needed to decide who is the 'natural or legal person or partnership' that decides to transmit software or technology by electronic means.

- Regarding publications: It should be clarified that the University or Research Organisation employing the author, is only responsible for the first export to the publisher but not for further exports throughout the publishing process.

Area 4: Extraterritorial application of U.S. export controls

For Research Organisations compliance with the US deemed re-export rule is a serious challenge. Since collaborations with researchers affiliated to companies or other Universities and Research Organisations can vary widely in structure, it is not always possible to make use of the exception foreseen for 'bona fide' permanent employees. Students might require access to US origin technology to work on their research projects as well as access to US origin software, which does not imply an export of source code to their country of nationality or of the university of origin.

Suggested concrete actions:

- Clarifying how the US deemed re-export applies for visiting students, professors, etc. when they are invited for a collaboration in the EU.

Area 5: Emerging technologies

Both in the EU and the US there is clearly a common understanding that emerging technologies should be protected and promoted. In this context it becomes increasingly important to define common rules on which countries should be granted access to such technologies and which ones should be excluded to ensure a common level playing field. With regard to possible future controls on emerging technologies, it will be crucial to establish clear criteria on controls, whether based on a licensing scheme or with reporting obligations, which take into account the fast pace of innovation and quickly evolving of the emerging technologies.

Suggested concrete actions:

- Defining clear guidelines about which emerging technologies should be controlled, from which stage of development and how frequently the detailed list will be updated.

Area 6: Close the information gaps in international trade

The collection of data from business partners to detect the dual-use classification and origin of items received by Universities and Research Organisations is a real administrative burden. Such data, which is required for the correct application of the de minimis rule and FDPR, is not automatically provided by suppliers and frequently it has to be asked for by the purchasing department, if any. Suppliers do not have the obligation to inform the receiving party of the ECCN/ML number or whether they made use of certain license exceptions. As long as the data is not provided by the suppliers to their customers in a consistent way, it will be hard to track the strategic items in the full supply chain until the final end-user. Moreover, suppliers are frequently requesting customers to complete and sign generic end-user documents, regardless of their classification and destination. Therefore, suppliers can be over-compliant when collecting signed statements for their own export control authority.

Suggested concrete actions:

- Obligation and Standardisation: Make the provision of export control data by the US- supplier mandatory. Additionally, common requirements should be introduced regarding the scope of the provided export control data - i.e. ECCN, country of origin etc.

- Avoiding 'over-compliance': The requirement by many suppliers to sign generic end-user documents is often based on the intention to comply with every possible export control law and regulation. However, this understandable intention can lead to 'over-compliance' and unnecessary administrative burdens on the customers as well on the supplier's side. Guidance on what "you need to know" from your customer would help to avoid 'over-compliance' in this regard.

About EECARO

The European Export Control Association for Research Organisations (EECARO) is a network that aims to unite European Union research institutes, universities, and their export control compliance officers with a view to address the specific character of export controls in a research context.

For more information please visit: http://www.eecaro.eu | Contact: info@eecaro.eu