

ITI Response to the Request for Public Comments Regarding Areas and Priorities for U.S. and EU Export Control Cooperation Under the Trade and Technology Council (BIS-2021-0044)

January 14, 2022

Mr. Matthew Borman
Deputy Assistant Secretary for Export Administration
Bureau of Industry and Security
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

Re: Request for Public Comments Regarding Areas and Priorities for U.S. and EU Export Control Cooperation Under the Trade and Technology Council (BIS-2021-0044)

Dear Mr. Borman:

The Information Technology Industry Council (ITI) is the premier global advocate for technology, representing the world's most innovative companies. Founded in 1916, ITI is an international trade association with a team of professionals on four continents. We promote public policies and industry standards that advance competition and innovation worldwide. Most of ITI's members service the global market built over decades in which technology is developed, made, and service customers across all levels of government and the full range of global industry sectors, such as financial services, healthcare, and energy.

Our membership includes 80 high-tech and tech-enabled companies, including wireless and wireline network equipment providers, computer hardware and software companies, internet and digital service providers, mobile computing and communications device manufacturers, consumer electronics companies, payment networks and network security providers. All of our members are headquartered in, operate U.S. subsidiaries, or otherwise have significant operations in the United States, and their investments have propelled economic growth and innovation across the country. Many (if not all) of these statements also accurately characterize our members' engagement with the European Union (EU), which underscores both the breadth of our experiences with U.S. and EU export control regimes and the importance of promoting alignment to foster stronger trade, investment, and research & development (R&D) flows.

ITI appreciates the opportunity to provide comments on areas and priorities for U.S. and EU export control cooperation under the Trade and Technology Council (TTC). As the world's leading innovation

economies, the United States and EU have significant shared interests in aligning policy approaches in areas including export controls. The U.S. and EU should work collectively to ensure that any proposed export controls are targeted and tailored to the security threat at issue, agreed to at the multilateral level and do not detract from either economy's leadership on innovative technologies. Additionally, any proposed export controls must be constructed practically enough to be implemented by small, medium, and large businesses with varying levels of compliance infrastructure.

Authorities on both sides should also collaborate in exploring creative ideas to make export controls more effective and practical for exporters, while preserving the technological leadership of both economies, including with regard to the most sensitive technologies and the potential for plurilateral controls amongst the EU, U.S., and other trusted allies.

ITI's Engagement with the TTC

ITI strongly supported the establishment of a TTC as a timely and necessary forum to expand on recent trade discussions and enhance transatlantic cooperation, facilitate regulatory compatibility, and to address current and prevent the emergence of market access barriers. We believe that by prioritizing openness, shared economic objectives, and market-driven global competitiveness, the United States and EU can chart a path for sustainable, values-driven global leadership in the digital-driven 21st century economy. To that end, we encourage expanded stakeholder engagement and commitment to a commercially meaningful set of initial policy deliverables by spring 2022.

ITI appreciated the opportunity to represent the global technology industry during the TTC's inaugural meeting in Pittsburgh. During his remarks, ITI's Senior Vice President for Policy Rob Strayer underscored the importance of basing future work across all working groups, including export controls, on shared tenets of non-discrimination, proportionality, and fostering international compatibility. Most recently, ITI participated in the EU-U.S. Joint Stakeholder Outreach on Dual-Use Export Controls and the U.S. Stakeholder Engagement sessions on Information and Communication Technology and Services (ICTS) Security and Competitiveness, Secure Supply Chains, and Technology Standards. We as industry overwhelmingly support the mission of the TTC to grow bilateral technology trade and investment while strengthening global cooperation on digital policy, technology, and supply chains, and we want to do our part in supporting the realization of tangible outcomes.

We applaud the U.S. and EU governments for convening these initial events and consultations, and we urge policymakers to continue prioritizing transparency and stakeholder engagement, particularly important as policy discussions become more discrete and/or technical in nature. Mechanisms could include hosting consistent, joint public briefings alongside political- and working-level TTC engagements, arranging for written public consultations where necessary to inform working group activities, and providing for regular, detailed public readouts.

Overarching Comments on Export Controls

Many of these points were explored in ITI's responses to the advance notices of proposed rulemaking for [emerging technologies](#) and [foundational technologies](#) in 2019 and 2020, respectively. We thought it would be helpful to include a brief overview to support BIS's development of fundamental principles for cooperating with the EU on export controls.

- *Overly broad export controls on technology products undermine the ability of companies to participate in the global marketplace.* Generally speaking, overly broad unilateral controls limit the ability of companies to participate in the global marketplace, which in turn disrupts the virtuous cycle of private-sector R&D investments made possible by revenues from sales of U.S. products to a diverse customer base in overseas markets. Similarly, maintaining the United States' status as a top destination for foreign R&D investment is a critical component of strengthening U.S. technological and economic leadership.
- *Any new export controls must consider the threat landscape and appropriately target national security risks.* Consideration of any new export control rules and approaches must be informed by a comprehensive assessment of the threat landscape and a distinct understanding of the specific and clearly articulated national security objectives that are intended to be achieved. While the private sector can provide important input on market dynamics, U.S. intelligence agencies also must be involved to articulate the national security imperative of a particular control measure and its necessity to U.S. national security – it must be fully risk-informed.
- *Any new or amended regimes must consider foreign availability and capability.* A thorough, ongoing evaluation of foreign availability and capability must also inform consideration of new or amended regimes. In cases where technology of comparable quality, quantity, and cost is available outside the U.S. and EU, even bilateral U.S. and EU controls will be ineffective in preventing end users of concern from acquiring the controlled technology and result in limiting U.S. and EU companies' global competitiveness and their ability to lead in the development of core technologies. Imposing additional export restrictions on items with foreign availability, even in a limited number of countries like China or Russia, would effectively cut off U.S. consumer and enterprise electronics companies from access to these massive markets, as well as other markets globally where multinational companies do not want to rely on technology they can use in, for example, Europe, but not in China or Russia. That gap will then be filled by companies that are not headquartered or otherwise do not have presence in the United States, potentially even by companies from the very countries the controls target.
- *"Foundational technologies" should not include commodities or software.* ITI would like to reiterate our concern about BIS's stipulation in the ANPRM for foundational technologies that "the term foundational technologies includes not only 'technology' but also 'commodities' and 'software' as used in the EAR." There is no authority under section 4817 of the Export Control Reform Act (ECRA) – which provides the statutory standard for scoping new controls for emerging and foundational technologies – to regulate commodities or software. While BIS has the authority to administer controls for commodities and software through the EAR and other aspects of ECRA, ITI urges BIS to limit its consideration of "foundational technologies" to technologies as reflected in section 4817 for the purposes of that rulemaking. The TTC is an opportunity to encourage that any similar EU controls would also remain focused on technology.

Broad Goals for TTC Engagement on Export Controls

Before discussions begin on more discrete initiatives, the U.S. and EU should look to define what national security means for the purposes of transatlantic cooperation on export controls. Absent clear agreement on the specific threats that U.S.-EU cooperation on export controls is intended to address, the resulting policies are likely to be less effective and to cause more challenges for industry. The U.S. and EU should work collectively to ensure that any proposed export controls are targeted and tailored to the security threat at issue, agreed to at the multilateral level and do not detract from

either economy's leadership on innovative technologies. Indeed, Congress and the President recognized in the Export Control Reform Act (ECRA) that "[the] national security of the United States requires that the United States maintain its leadership in the science, technology, engineering, and manufacturing sectors." The statute further emphasizes that any proposal to introduce controls on technology must take into account potential impacts to the future of U.S. technological leadership. This principle should also drive BIS's engagement with Working Group 7.

A Transatlantic Approach to Multilateralism

Multilateral controls are the most effective approach and should be the preferred avenue for advancing any new controls. Engagement with the Wassenaar Arrangement (WA) is particularly relevant to the TTC as EU Member States and the United States comprise the large majority of WA members (27 of 42) and almost all WA members are mutual, trusted allies. To encourage the effectiveness of such regimes, the two parties should prioritize policy alignment and hold technical consultations prior to the proposal of and alongside the discussion and adoption of new controls within multilateral regimes.

In instances where WA or other multilateral processes may not be progressing as quickly as the U.S. and EU governments would like, taking a plurilateral approach may be appropriate in terms of achieving interim outcomes that could then inform broader multilateral efforts. Again, while multilateral controls remain the most effective approach, a plurilateral approach is more effective than a unilateral control, and we encourage the United States and the EU to include like-minded allies and partners – such as Japan, Korea, and Taiwan – in any such endeavors.

We would also encourage the U.S. government to devote additional resources to support the processes undertaken in multilateral regimes. We likewise strongly encourage the U.S. government and the European Commission to engage in prior technical consultations on draft controls to be proposed in the WA, and also consult with industry and other stakeholders.

Another area worth exploring is the development of a common approach to implementation of multilateral controls, both in terms of timing and substance. Even if governments are basing policy off the same multilaterally developed controls, inconsistent implementation can lead to compliance challenges for companies complying with rules across jurisdictions. A common approach should also extend to the decontrol of items to ensure a smooth and effective transition for companies and enforcement officials. For example, there should be alignment for interpretation and implementation of WA dual-use control list decontrols of categories 5 part 1 and part 2. Different interpretations of Cryptography note 3 create complexity and significant gaps in classification, with the effect of putting certain exporters at a competitive disadvantage. In addition, while items eligible for cryptography note 3 or 5A002.a Note 2 are considered to be non-listed in the EU, they have dedicated control entries in the U.S. Export Administration Regulations (EAR) Commerce Control list under ECCNs 5x992 and other AT-only controls and remain a burden for many exporters and re-exporters.

Supporting Intra-EU Cooperation

We also see the TTC as an opportunity to encourage better cooperation among European governments when it comes to customs and export regulations. Addressing these compliance and facilitation challenges would supplement other ongoing efforts to advance more secure and resilient supply chains. As noted earlier, because 26 of 27 EU Member States participate in WA, prioritizing

multilateral engagement also contributes to fostering interoperability and cooperation across the Single Market and between the United States and the EU.

Leverage the TTC to Support More Effective Controls and Mitigate Administrative and Compliance Challenges

Finally, in past submissions ITI has raised that BIS should take into consideration the cumulative impact of (and changes to) the U.S. export control regime on the U.S. technology industry as officials evaluate how best to address specific risks to U.S. national security. There have been more than 500 additions to the Entity List since January 2017, in addition to many other changes or proposed changes to the U.S. export control regime.¹ The EU has also been pursuing significant changes, such as those included in the new Export Control Regulation (Regulation (EC) No 2021/821). These observations should not be construed as criticism of any individual control or regime change, but instead as an indication of the operational challenges facing corporate compliance departments due to the sheer volume of controls.

As these departments work to keep pace with the changing landscape, they are increasingly devoting more and more of companies' limited resource pools to export compliance, which impacts their ability to invest in advancing technological developments. Deepening cooperation with the EU on export controls presents an opportunity to not only support more effective controls but to better mitigate the administrative and compliance challenges companies face in complying with various export control regimes. Ultimately, rapid and drastic changes to export control rules will impede companies' – particularly small companies' – ability to innovate due to the unpredictability of changing regimes and uncertainty as to whether and where they will be able to sell their products. One small change that could support broader efforts for more effective controls would be to update new and existing regulations to be more readily accessible on modern electronic devices (i.e., mobile, tablet, etc.). Similarly, the formatting of regulations should be updated to be more readable on electronic devices.

Discrete Issues

We have included for your consideration several discrete issues of relevance to U.S. engagement with Working Group 7.

Ensuring Common Definitions Yield Identical Outcomes

Even in instances where the words of the respective rule are identical, the same product can be subjected to a variety of outcomes in the U.S. and the EU. One means of addressing inconsistent applications could be through a periodic, internal comparison of confidential commodity rulings that were based on mutually agreed-upon language, with the goal of ensuring that the same facts lead to the same outcome every time.

Exporting the U.S. Approach to Intangible Transfers

The TTC provides a venue to encourage the European Commission to adopt the U.S. treatment of intangible transfers, which protects national security and fosters a better environment for cloud and other IT service providers, companies managing their own global data networks, and customers who rely on cloud services. Specifically, the provision of cloud services is not subject to export controls,

¹ <https://www.bis.doc.gov/index.php/documents/regulations-docs/2326-supplement-no-4-to-part-744-entity-list-4/file>.

and if an export occurs in the cloud, the user of the cloud – as opposed to the cloud service provider – is considered to be the exporter.

U.S.-EU Alignment on Treatment of Encrypted Data

One specific example where harmonization would be beneficial is in the treatment of encrypted data under export control rules. The U.S. has created rules under both its commercial/dual-use and military export control regimes stating that, under certain conditions, sending, taking, or storing software or data that is end-to-end encrypted is not an “export, reexport, transfer” or “retransfer” of that software or data.² Industry and governments in the EU would benefit from adoption of a similar rule. Aligning these rules would promote easier collaboration between the U.S. and the EU, simplify the compliance obligations of companies in both jurisdictions, and encourage companies to use robust encryption to protect sensitive data.

Mutual Recognition of Licensing Approaches

ITI strongly encourages BIS to pursue mutual recognition of license exceptions, exclusions, or authorizations between the United States, the EU, and other key technology partners as appropriate. Status quo means companies that have obtained EU export licenses for export of products out of the EU, are also obliged to secure U.S. export licenses due to the extraterritorial application of U.S. controls. If recognition cannot be fully achieved, parties should strive to enhance available license exceptions for reexports from the EU.

Effectuating End-Use/User Restrictions

ITI’s response to the ANPRM on foundational technologies stated that BIS should not impose new end-use/user restrictions on specific technologies absent specific, list-based designations which identify specific entities of concern. For example, in some cases where a license requirement has been triggered for military end-use/user reasons, the situation may be specific to that end-user and therefore, application of or use of the technologies is not widely concerning in other parts of the country. Hence, a broad, list-based control based on country will be unhelpful in addressing legitimate national security concerns. To the extent BIS may be contemplating adding additional controls to the categories listed to address national security concerns, it should do so not by imposing broad controls on entire categories of ubiquitous technologies, but instead by updating the Entity List, where appropriate, to reflect any changes to military end-uses or end users.

Provisions in the EU’s new Export Control Regulation (Regulation (EC) No 2021/821), however, place the burden of identifying nefarious entities on the exporter. Article 5 creates a licensing requirement where an exporter is aware, according to its due diligence findings, that cyber-surveillance items which the exporter proposes to export, not listed in Annex I of the regulation, are intended, in their entirety or in part, for use in connection with internal repression and/or the commission of serious violations of human rights and international humanitarian law. However, in contrast to the U.S. approach, the EU regulation does not identify any such military end users. Article 4 establishes the same licensing requirement for military end-use purposes.

Broad end-use restrictions that do not identify specific end users present huge compliance challenges to U.S. and EU industry and are difficult to scale. Although exporters undertake their best efforts with respect to “know your customer” (KYC) due diligence on customers, this work creates a tremendous

² See Export Administration Regulations, 15 CFR § 734.18(a)(5); International Traffic in Arms Regulations, 22 CFR § 120.54(a)(5).

amount of compliance overhead and is ultimately not an effective mechanism for determining whether one customer out of hundreds, thousands, or tens of thousands may intend to use the technology in question for a nefarious purpose. In almost all instances, we would expect a government to have more and better information than private industry about whether a particular entity presents a threat to national security, and the government can effectively manage that threat by identifying such entities appropriately.

To the extent that the U.S. and the EU have concerns about specific end users, we would encourage the U.S. and the EU to share information about end users of concern and for both jurisdictions to agree on an exclusive list of end users to whom both jurisdictions can prohibit exports of certain items (with the items identified by ECCN (as is currently the case on the U.S. Military End User List) or EU classification). This would not only simplify due diligence for U.S. and EU exporters, but it would also create a level-playing field between U.S. and EU exporters and further facilitate meeting U.S. and EU shared policy goals of addressing civil/military fusion threats and human rights violations.

Standards

Working Group 7 engagement on export controls should seek to foster expanded U.S. and EU support for industry-led and open international standardization activities and should avoid unintentionally limiting the ability of leading U.S. and EU technical experts to participate in relevant international processes. ITI believes that TTC engagement on technology standards should center on promoting the development and reliance on international, industry-driven, voluntary technical standards.³ We continue to encourage the establishment of a transatlantic commitment to base regulatory or procurement requirements on such standards – including those for digital services and green procurement – as doing so will be especially important to facilitating forward-looking international compatibility in areas where governments necessarily depend on technical standards to fully realize the benefits of and inform approaches to new technology (e.g., artificial intelligence, cybersecurity, data portability, Internet of Things (IoT) products, sustainability and climate). Similarly, and where necessary, we encourage U.S. and EU policymakers to commit to accepting test results and/or associated certifications from accredited bodies located in the territory of the other Party by leveraging international standards and accreditation schemes, and implementing domestic legislative changes where necessary.

As we have noted in recent interventions in the EU,⁴ regulatory reliance on regional standards or a limited subset of international standards in the context of technology policy may lead to unnecessary and avoidable regulatory divergence and market fragmentation in the form of non-tariff barriers to trade and economic costs to businesses, workers, and consumers. Moreover, to the extent that forthcoming procurement, certification, and/or conformity assessment requirements for digital services are not grounded in international standards, there is a risk not only of divergent requirements between jurisdictions, but of technical disruption (i.e., impact on the ability of firms to deliver optimal and secure products and services).

³ i.e., All those developed in accordance with Annex 2 to Part 1 (Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement) in the Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995 (G/TBT/1/Rev.13), as may be revised, issued by the WTO Committee on Technical Barriers to Trade.

⁴ See “ITI Response to DG GROW Roadmap on the European Standardisation System,” <https://www.itic.org/documents/europe/ITIESSConsultationResponseAugust2021Final1.pdf>.

The consequences of curtailing U.S. participation in standards development activities are already apparent due to the Administration's failure to amend the flawed June 2020 [BIS rule on technical standards and export controls](#). ITI continues to urge the Administration to revise the rule that has led U.S. and multinational companies to withdraw from technical standards development work based on the composition of their respective memberships – leaving competitors with more influence. The U.S. cannot advance international standardization work without first addressing harmful policies at home. Without a rule change to clarify that EAR99 and AT technology and software do not require a license for release in standards development activities, the U.S. will continue to jeopardize its long-standing and successful standards policy and diminish the influence of its companies internationally.

Human Rights

ITI and its member companies are supportive of the Administration's efforts to ensure that the technologies developed by innovators to secure the ICT ecosystem are not misused for malicious purposes. The effectiveness of export controls intended to prevent violations of human rights through the misuse of particular technologies depends in part on how the technologies subject to export controls are defined and how the controls are scoped. As we collectively learned in the context of the 2015 WA export controls on intrusion detection software and network surveillance items, overly broad controls on technologies that can be misused by certain end users can significantly impair the legitimate, necessary, and intended use of those same technologies for positive purposes such as cybersecurity. ITI appreciates the work and progress made by BIS and the U.S. Department of State to address the concerns raised by stakeholders in 2015 and to provide an opportunity in late 2021 for stakeholders (including ITI) to comment on an interim final rule. The years spent developing these controls reinforce the importance of thorough and sustained stakeholder engagement, particularly given the technical complexity of the underlying issues and the critical objectives at hand, and we encourage U.S. and EU policymakers to integrate these lessons into the TTC's work on export controls.

Conclusion

Thank you for providing an opportunity for our member companies to contribute input to the U.S. government's engagement with the TTC Export Controls Working Group. As our letter demonstrates, the future of U.S.-EU cooperation on export controls is of critical importance to our member companies. We appreciate BIS's consideration of our perspectives and look forward to continuing to work with the U.S. Department of Commerce, interagency colleagues, and other stakeholders contributing to the work of the TTC.

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