

Comment

Evaluation of the EU Dual-Use Regulation (EU) 2021/821

Federation of German Industries e.V.

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Summary

The Federation of German Industries (BDI) welcomes the European Commission's ongoing evaluation of Regulation (EU) 2021/821. The recast Dual-Use Regulation expanded the EU export control framework by integrating human rights considerations, introducing controls for cyber-surveillance items, and strengthening coordination among Member States. The evaluation provides an important opportunity to assess whether the Regulation has achieved its objectives while maintaining the competitiveness, legal certainty, and capacity for innovation of European industry.

The BDI welcomes the Commission's engagement in improving the current regime with new policy guidance and objectives that are aligned with the multilateral export control regimes. With respect to the current evaluation, German industry believes that the most important principles and features of the license architecture were already harmonised in the 2021 recast and that a fundamental overhaul of the Regulation could be detrimental to European industry at a time of sustained geopolitical pressure and distortions in international trade practices.

Therefore, the BDI calls on the EU Commission to focus on the following aspects:

1. Regulations need to become more easily manageable for companies. This requires more **precise definitions and more harmonised interpretation** across the single market, for example through the publication of legally binding EU-guidelines.
2. Regulations need to be as concrete as possible. **Catch-all regulations ought to be avoided**, as they lack the legal clarity and certainty required by companies for effective and efficient compliance. Instead, product-specific lists remain the preferred option.
3. Wherever possible, measures for **simplification** should be sought. As such, the option of national general export authorisations should be maintained and the stripping out of outdated and obsolete listings a matter of priority.

Beyond these central tenets, the BDI addresses further key issues that appear central to the Commission's current evaluation:

- Levelling the playing field as well as the important role of national general export authorisations;
- Greater harmonisation of licensing practices, administrative requirements and interpretations of competent authorities across EU Member States;
- Updating definitions of and improving legal certainty for intangible technology transfers and facilitation of low-risk intra-group transfers;
- The implementation of current and potential expansion of the new catch-all mechanisms;
- Improving the usability and transparency of Dual-Use lists.

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Introduction

The recast Dual-Use Regulation (EU) 2021/821 represented a significant shift in EU export controls. It broadened the scope of controls beyond traditional non-proliferation concerns by introducing specific provisions for cyber-surveillance technologies and human rights-related end-use controls. It also strengthened information exchange among Member States and increased compliance expectations for exporters.

From the perspective of German industry, the basic architecture of the Regulation remains sound. The EU continues to benefit from a system that is fundamentally based on common control lists based on multilateral export control regimes. Such internationally agreed controls create predictability, reduce compliance burdens, and limit competitive disadvantages for European exporters whilst maintaining European companies' international reputation as reliable and predictable business partners.

1. Level playing field in the Single Market / NGEAs / EUGEAs

The European Commission's evaluation lays a strong emphasis on harmonisation and the improvement of the level playing field within the Single Market. The BDI fundamentally agrees with this ambition. Exporters and companies with multinational structures in particular continue to experience significant discrepancies across Member States with regard to licensing practices. Divergent approaches regarding Internal Compliance Programme expectations, end-user assessments, supporting documentation requirements and licensing timelines create unnecessary administrative burdens and may distort competition within the Single Market. The evaluation should therefore focus on greater harmonisation of administrative practices and licensing approaches across the European Union.

The BDI also notes, however, that within the European Commission's line of questioning on level playing field issues it is implied that National General Export Authorisations (NGEAs) may impede harmonisation across Member States, a suggestion that greatly concerns German industry. The Dual-Use Regulation expressly permits Member States to issue national general authorisations under specific conditions. As such, NGEAs are an essential instrument for reducing administrative burdens as well as enabling efficient and more timely export processes for both businesses and competent authorities while allowing for a certain amount of flexibility and room for adaptation for individual Member States.

For many exporters, especially SMEs, NGEAs provide an efficient mechanism for low-risk transactions involving known end-use destinations and well-understood technologies. They allow licensing authorities to focus resources on genuinely sensitive exports while facilitating legitimate trade. The BDI is convinced that NGEAs are an essential mechanism fostering the national specificity and specialisation of Member States' individual industrial landscapes which ultimately form the foundation of the EU's industry as a whole. Therefore, the BDI calls for the preservation of NGEAs as part of a risk-based export control system.

Nevertheless, the BDI acknowledges that the current landscape remains fragmented. Differences exist among Member States regarding the availability, scope, and practical use of national general licences. The BDI, therefore, encourages the Commission to examine whether successful national licensing models could increasingly be translated into EU General Export Authorisations (EUGEAs) where appropriate and expedient. Such an approach would strengthen harmonisation while preserving the efficiency benefits currently delivered through NGEAs.

Furthermore, the Commission should also actively explore opportunities to expand the catalogue of EU General Export Authorisations for low-risk destinations and transactions. Such measures could significantly reduce administrative burdens while enhancing consistency throughout the Single Market.

The BDI recommends:

- Retaining Member States' ability to utilise NGEAs;
- Expanding opportunities for mutual learning and convergence among national authorities;
- Assessing whether frequently used NGEAs could be adopted as additional EU-wide authorisations;
- Expansion of EUGEAs and creation of additional EU-wide authorisations for low-risk transactions;
- Ensuring that any reform reduces rather than increases compliance burdens for exporters.

2. Intangible Technology Transfers (ITT)

Industrial innovation relies on globally integrated research, development and engineering activities. Technology development frequently involves collaboration among affiliated entities located in different jurisdictions. The practical importance of cross-border technology transfers, therefore, continues to grow as digital technologies, global development networks, remote access, cloud environments, and international engineering collaborations as well as research-intensive industries continue to grow apace. In the view of German industry, the regulatory framework for intangible technology transfers (ITT) significantly lags this operational reality, with legal uncertainty and fragmentation across Member States remaining.

The BDI, therefore, firstly calls on the European Commission to urgently revise the definition of what constitutes an export in the context of intangible technology transfers, thereby taking into account the cutting edge encryption methods deployed by companies to ensure that data is made available only to intended recipients: In the age of cloud computing and increasing digitalisation, it is no longer practical for companies to treat the mere upload of data as an export. Instead, the BDI encourages the Commission to align the EU Dual-Use Regulation's definition of an export with state-of-the-art definitions employed in other major export control regimes, such as the U.S. Export Administration regulations (EAR). Under this definition for example, only the actual access to data by, or the provision of data to, a person from a third country (for example, through the assignment of access rights, the provision of a password, etc.) constitutes an export. This concept is also applied by other countries, such as Singapore. The adoption of such an approach would significantly increase legal certainty for companies with international development teams and global IT infrastructures, while at the same time preserving the regulatory objectives of the Regulation. Furthermore, the Commission should assess whether current licensing requirements applicable to low-risk intra-group transfers of technology and software remain proportionate. Particular consideration should be given to transfers within multinational corporate groups operating mature Internal Compliance Programmes and robust export control processes.

Finally, the BDI encourages the Commission to address regulatory uncertainty in the context of software and cloud service provision: As such, further legal clarification is required on questions such as whether or not the provision of Software as a Service (SaaS) should be deemed an export, who is understood as the exporting entity in the context of IT infrastructure and

services, how the location of the relevant competent authority is determined as well as how remote access from outside the EU to controlled hardware is regulated when no controlled software or technology is transmitted in an accessible form. It is essential that any and all updates to the Regulation in this context consider practical operational realities and reflect the high encryption standards utilised by industry.

In the BDI's view, the evaluation should be used to:

- Further enhance legal certainty with regard to intangible technology transfers (ITT);
- Consider aligning the definition of an export of ITT with state-of-the-art definitions already employed by competent authorities in like-minded third-country jurisdictions;
- Provide additional legally binding guidance on practical issues relevant to everyday compliance and business operations, including remote maintenance, software support, diagnostics and cybersecurity updates that rely on cross-border digital connectivity, ensuring that these essential service activities are not subject to disproportionate or uncertain licensing requirements; and
- Ensure the highest possible degree of harmonised implementation across the Member States.

3. Catch-all provisions

a. Articles 4 and 5

The Regulation in its current form places increasing emphasis on exporter due diligence and risk-based compliance assessments. While German industry supports a risk-based approach in principle, significant legal uncertainty remains in general regarding the practical interpretation of concepts such as awareness, knowledge and reasonable grounds for suspicion under both Article 4 and Article 5. Although these concepts play an increasingly important role for compliance decision-making, exporters often lack clear legally binding guidance regarding the level of investigation expected by competent authorities.

The practical implementation of the Article 4 and Article 5 catch-all mechanisms, therefore, remains extremely challenging. The introduction of a licensing requirement for certain non-listed cyber-surveillance items as part of the Regulation's last recast has proven to be complicated and burdensome for companies, increasing already immense compliance costs. The effectiveness of a catch-all provision in general depends on exporters being able to identify relevant risks and understand their compliance obligations. However, the very nature of the assessment of potential security and human rights risks in foreign jurisdictions often requires intelligence and geopolitical information as well as highly specified contextual understanding that companies do not and often cannot possess.

The BDI, therefore, considers legal certainty a central prerequisite for effective implementation. That is to say: Exporters should not be placed in a position where they are expected to make speculative assessments concerning future end-use scenarios. National authorities must remain the primary decision-makers on sensitive foreign-policy and human rights determinations. Furthermore, challenges persist with regard to divergent national implementation and uncertainty surrounding the practical application of end-use controls for non-listed items. The recent Commission guidance on cyber-surveillance controls represents a first step, but further efforts are needed to ensure consistent interpretation across Member States. Divergent national approaches risk undermining the level playing field within the Single Market and creating uncertainty for companies operating across multiple jurisdictions.

The BDI therefore recommends:

- Increasing legal certainty regarding due diligence expectations under Articles 4 and 5;
- Improving administrative guidance and practical implementation and increasing the frequency of updates to Annex I to reflect advances in cyber-surveillance technology;
- Developing additional legally binding EU-level guidance on risk indicators, due diligence expectations, and human rights assessment methodologies;
- Enhancing cooperation among licensing authorities to ensure harmonised application;

- Avoiding any shift of responsibility for sensitive foreign-policy assessments from public authorities to exporters.

b. Potential expansion of catch-all provisions to emerging technologies

The Commission's evaluation lays further emphasis on emerging technologies and explores whether catch-all mechanisms ought to be expanded to cover a broader set of emerging technologies, such as artificial intelligence, quantum technologies or biotechnology.

The BDI recognises the growing security relevance of such technologies as well as the increasingly complex geopolitical and geoeconomic environment in which technological advances, access to critical raw materials and key components for technological innovation are increasingly weaponised. Against this backdrop, recent updates to the EU control list have already introduced additional controls in areas such as quantum technologies, advanced computing, semiconductor manufacturing equipment, and additive manufacturing. However, the BDI strongly rejects both the implied suggestion of expanding the scope of the Regulation beyond its central aim of non-proliferation and national security to matters of so-called economic security as well as attempting to manage this challenge through an expansion of catch-all provisions. An extensive technology catch-all covering large categories of emerging technologies could produce significant unintended consequences:

Inherently vague and, by definition, prone to subjective interpretation, using economic security interests as a basis on which to reach export licensing decisions carries an immense risk of legal ambiguity, frequent redefinition as well as subsequent incalculability for companies and investors active in highly innovative sectors when determining whether future products, software, or technologies might eventually fall within licensing requirements.

From the perspective of German industry, the suggestion of expanding existing catch-all provisions to include emerging technologies would not only exacerbate the above-mentioned problems inherent to catch-all mechanisms in general, but it would also risk causing immense damage to Europe's innovation ecosystem as well as hamper European companies' ability to cooperate and compete internationally in cutting edge technologies, ultimately also endangering value-creation within the EU.

Furthermore, it would create a break with the strong tradition of European export controls being rooted in multilateral regimes, thereby encouraging and actively contributing to the fragmentation of the international export control landscape at a time when more, not less cooperation is imperative.

Therefore, as in the case of cyber surveillance technology, the BDI stresses that list-based controls should remain the preferred instrument wherever possible. The BDI therefore suggests:

- Prioritisation of controls agreed through multilateral export control regimes;
- Use of regular updates of Annex I to address technological developments;
- Deployment of targeted temporary controls only where concrete security risks are clearly demonstrated;
- Ensuring thorough consultation with industry before any expansion of catch-all provisions;
- Conducting competitiveness and innovation impact assessments for all proposed controls on emerging technologies.

4. Simplification & improved usability of control lists

An important objective of the ongoing evaluation should be the simplification and modernisation of the EU export control framework. While discussions often focus on the addition of new controls, e.g. for emerging technologies, equal attention must be given to the systematic review and removal of outdated or commercially obsolete items from control lists.

The pace of technological innovation means that certain products, software, and technical parameters included in Annex I may no longer reflect current technological realities or strategic sensitivities. Controls that were justified when a technology represented a cutting edge capability may become disproportionate once the same functionality is widely available globally, integrated into mass-market products, or superseded by newer technologies. For example, the energy density threshold for battery cells set out in 3A001e will soon become outdated due to the rapid advancement of battery technology. To avoid slowing the deployment of innovative e-mobility technologies, regulatory requirements should be updated in a timely manner to keep pace with

technological progress. At the same time, the annual updates of the EU control list continually add new items and technical specifications in line with international commitments. Therefore, a modern and effective export control regime must be dynamic in both directions, making periodic overhaul and deletion of obsolete controls increasingly important.

From German industry's perspective, outdated controls generate unnecessary compliance costs, consuming administrative resources within companies and licensing authorities. For small and medium-sized enterprises in particular, complex licensing obligations relating to low-risk or obsolete technologies can represent a disproportionate burden without generating meaningful security benefits. Treating periodic overhaul and deletion of outdated controls as a matter of priority would, therefore, strengthen the credibility, efficiency, and competitiveness of the EU export control system while allowing authorities to focus resources on emerging risks and genuinely sensitive technologies.

Furthermore, the Commission should assess whether Annex I entries could be supplemented by references to potentially applicable EU General Export Authorisations or other relevant licensing mechanisms. Such an approach could improve transparency, facilitate compliance and reduce unnecessary administrative effort without altering the underlying control framework. Similar approaches already exist in other export control systems (e.g. in the U.S.).

The BDI, therefore, calls on the Commission to focus its evaluation on how a more rigorous "regulatory housekeeping" and simplification process could be integrated as part of future reviews of the Dual-Use Regulation's Annex I. Such a process should:

- Systematically assess whether existing controls continue to address concrete security or non-proliferation risks;
- Identify items that have become widely available commercial technologies and work towards de-listing them accordingly;
- Evaluate whether technical thresholds remain relevant and appropriately calibrated;
- Involve regular consultation with industry and technical experts;
- Remove or simplify controls that no longer contribute meaningfully to the objectives of the Regulation; as well as

- Supplement Annex I with references to potentially applicable EU General Export Authorisations or other relevant licensing mechanisms.

5. Conclusion

The evaluation of the Dual-Use Regulation should focus on improving implementation, harmonisation and regulatory efficiency rather than fundamentally redesigning the existing framework. The BDI supports robust export controls that effectively address security, non-proliferation, and human rights concerns while preserving legal certainty, technological leadership, and international competitiveness for European industry. The current framework, based primarily on multilaterally agreed control lists and complemented by targeted end-use controls, continues to provide a sound basis for achieving these objectives.

National General Export Authorisations should remain a key pillar of an efficient, risk-based export control system and, where appropriate, serve as a basis for greater EU-wide harmonisation. The lagging regulatory framework for intangible technology transfers (ITT) must be remedied as a matter of urgency, with increased legal certainty and reduced divergences in licensing practice as key priorities. The BDI, therefore, calls on the European Commission to revise the definition of what constitutes an export in the context of ITT, taking into account cutting edge encryption methods used by companies to control access to sensitive data. State-of-the-art definitions used by other like-minded jurisdictions' competent authorities could serve as best practice in this regard.

With respect to the catch-all provisions in Articles 4 and 5, the priority should be greater consistency among Member States, enhanced legally binding guidance for exporters, and more predictable implementation of the existing catch-all mechanism rather than the introduction of broader or more discretionary controls. Regarding emerging technologies, the BDI urges the Commission to continue prioritising multilateral and list-based approaches. Catch-all controls should remain exceptional instruments reserved for clearly identified risks that cannot be addressed through existing control-list mechanisms. Any future extension of catch-all provisions should be subject to rigorous consultation with industry and careful assessment of impacts on innovation, research cooperation, and global competitiveness.

At the same time, the evaluation should not focus exclusively on adding new controls. An equally important objective must be the simplification and modernisation of the regulatory framework through the systematic review of existing controls. Technologies that have become widely available, commercially commonplace, or no longer present a meaningful strategic risk should be removed from control lists or have their parameters adjusted accordingly. Regular "regulatory housekeeping" would reduce unnecessary compliance burdens for companies, improve the efficiency of licensing authorities, and enable export control resources to be concentrated on genuinely sensitive technologies and emerging security challenges.

About the BDI

The Federation of German Industries (BDI) communicates German industries' interests to the political authorities concerned. She offers strong support for companies in global competition. The BDI has access to a wide-spread network both within Germany and Europe, to all the important markets and to international organisations. The BDI accompanies the capturing of international markets politically. Also, she offers information and politico-economic guidance on all issues relevant to industries. The BDI is the leading organisation of German industries and related service providers. She represents 38 inter-trade organisations and more than 100.000 companies with their approximately 8 million employees. Membership is optional. 15 federal representations are advocating industries' interests on a regional level.

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