

Damien Levie
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DG Trade
European Commission
Rue de la Loi 200
1049 Brussels

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Dear Mr Levie,

We wish to thank you again for the fruitful conversation held at the Annual AmCham EU Competition Conference held in November 2020. Your intervention was greatly insightful and we hope to have you again in 2021.

Moreover, we would like to congratulate you on the inter-institutional agreement reached on **the Dual-Use Export Control Recast** ('Recast'). AmCham EU and our members have been following the legislative process and welcome the modernised Recast.

Now that the Recast is moving towards adoption, AmCham EU remains at the Commission's disposal to help ensure smooth and clear implementation.

We believe that in the context of ever-expanding technologies, it remains of the utmost importance that the Recast is clear and avoids legal uncertainty. This need for clarity rings particularly true when talking about the multilateral approach to export controls. The EU and US have an opportunity to strengthen the transatlantic partnership. The application of controls to intangible exports represents one such area where there are opportunities for additional clarity and better alignment.

In the Recast, there is still a lack of clarity on how export controls apply in the context of technology and software transfers, including in cloud computing. We would like to offer our support to work on guidelines in this context, in order to facilitate alignment with the US.

AmCham EU would also suggest that the Commission develops guidelines in the context of intangible exports, as is outlined in recital 7 of the Export Control Recast text. It would be beneficial for both EU and US industry if such guidelines were to align with the positions already adopted by the US. By introducing such guidelines, which offer additional clarity on what constitutes an 'export' when intangible items are transferred via cloud computing for example, the Commission will offer greater flexibility to exporters and reduce the disparity of administrative burden between EU and US exporters.

With this in mind, we would like to share an extract from the US Export Administration Regulation (EAR), which states:

CFR § 734.18: 'Activities that are not exports, reexports, or transfers.' (a) The following activities are not exports, reexports, or transfers: ... (5) Sending, taking, or storing "technology" or "software" that is: • Unclassified • Secured using 'end-to-end encryption'.... (b) Definitions: End-to-end encryption means (i) the provision of cryptographic protection of data such that the data is not in unencrypted form between an originator (or the originator's in-country security boundary) and an intended recipient (or the recipient's in-country security boundary), and (ii) the means of decryption are not provided to any third party. The originator and the recipient may be the same person.

We are also sharing three US advisory opinions, which are similar to EU guidelines, and may serve as additional information for the drafting of EU guidelines:

- Advisory Opinion 1, 13 January, 2009: US Department of Commerce, advisory opinion regarding the application of the Export Administration Regulation (EAR) to grid and cloud computing services.
- Advisory Opinion 2, 11 January, 2011: US Department of Commerce, advisory opinion application of Export Administration Regulation (EAR) to cloud computing service providers and deemed exports.
- Advisory Opinion 3, 13 November, 2014: US Department of Commerce, advisory opinion application of Export Administration Regulation (EAR) to cloud-based storefronts.

We hope that this information is valuable and AmCham EU stands ready to work with the Commission should you decide to publish guidelines on the exports of intangible items. If you have any further questions or would like to talk further on this issue, don't hesitate to reach out to me or my colleague, Maira Madala, Senior Policy Adviser (MML@amchameu.eu).

Yours sincerely,



Rudy Priem

Chair of the Security Defence and Space Committee (SDC)
AmCham EU