

## Our position

# Technology and software transfers in the context of export controls



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3 trillion in 2020, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

## Executive summary

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the steps taken in the Recast of the control for export, transfer brokering and transit of dual-use items<sup>1</sup> ('Recast') towards modernizing EU export controls. However, it lacks clarity on how export controls apply for intangible technology and software transfers. This results in divergent interpretations and approaches towards the application of controls within the EU and puts the EU at odds with the treatment of such transfers by other jurisdictions.

EU-headquartered and US-headquartered companies would benefit from a clear and harmonised approach to software and intangible technology transfers within Europe and from alignment between the EU, US and other like-minded countries (eg the other Five Eyes countries [Australia, Canada, New Zealand and the UK]). Through the publication of its own guidance<sup>2</sup>, the UK has already taken steps towards clarifying key aspects of software and technology transfers, and has aligned with the interpretations and approaches of the United States. To that end, the European Commission should also aim to introduce guidelines on intangible exports as it is outlined in recital 11 of the Recast. This will provide clarity on how export controls apply in the context of technology and software transfers, including cloud computing.

## Harmonisation is needed at EU level and globally

Businesses require clear and consistent rules globally. Managing divergent regulatory requirements and processes adds complexity and administrative burdens, reduces business agility and hinders competitiveness. A harmonised approach to software and technology transfers would:

- Ensure effective protection of international security and ensure equal opportunities for all.
- Provide clarity on what constitutes an 'export' when intangible items are transferred via IT providers, such as cloud computing.
- Simplify compliance with export controls by standardising processes across regions.
- Put exporters in Europe on equal footing and promote simplified trade between the two trading partners.
- Offer greater flexibility to exporters and reduce the disparity of administrative burden between EU and US exporters.

As US-headquartered businesses based in Europe, AmCham EU and its members welcome increased cooperation in the transatlantic relationship. We believe it would be hugely beneficial for both EU-headquartered and US-headquartered industry if EU guidelines on intangible technology transfers were to explicitly **align with certain regulatory approaches in the US**. This topic is, therefore, ripe for coordination within the EU-US Trade and Technology Council (TTC) in order to reach convergence on regulatory approaches.

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<sup>1</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2021:206:FULL&from=EN>

<sup>2</sup> <https://www.gov.uk/government/publications/exporting-military-or-dual-use-technology-definitions/export-of-technology-remote-access-and-the-use-of-cloud-computing-services>

The US advisory opinions on cloud computing<sup>3</sup> and other regulatory guidance<sup>4</sup> can serve as a key reference for the drafting work of the European Commission, and would ensure maximum alignment on dual-use exports between the EU and the US.

Without guidelines- or with a patchwork of potentially incompatible international guidelines - businesses operating in the EU are put at a disadvantage as they need to spend resources to manage divergent processes and obtain export authorisations not required in the US or in certain European countries. Please see the table below for examples of common scenarios when licenses or authorisations are not required in other countries but where businesses in Europe face a patchwork of regulatory approaches:

| Scenario  | US                     | UK                    | EU  |
|---|------------------------|-----------------------|---|
| <b>Storage of controlled technology on third country servers</b>    | No license required*   | No license required   | Subject to interpretation of Member State |
| <b>Administrative access by third country IT support / provider</b> | No license required*** | No license required** | Subject to interpretation of Member State |
| <b>Provision of Software as a Service to third country users</b>    | No license required    | No license required   | Subject to interpretation of Member State |

\* Providing data is unclassified, secured (using end-to-end encryption compliant with FIPS-142) and not intentionally stored in a country subject to US Arms Embargo / Russia. See 15 CFR § 734.18(a)(5) and 22 CFR § 120.54(a)(5).

\*\* Providing data is safeguarded as described in UK guidance.

\*\*\* The ability to access information in encrypted form is not an export or release, and transfer of access information to a third party does not require authorisation if there is no knowledge that the party will actually access controlled technology. See 15 CFR § 734.18(c), § 734.19 and 22 CFR § 120.54(c).

## Key recommendations

To provide clarity and remove the disparity in administrative burden faced by businesses in the EU, AmCham EU recommends that the following positions should be incorporated into EU level guidance:

### 1. An 'export' does not occur unless data is decrypted and accessed

US export control regulations, both dual-use and military (15 CFR § 734.18[a][5] and 22 CFR § 120.54[a][5]), affirm that there is no export when a technology transfer is secured using end-to-end encryption. It is generally only when the technology is decrypted and accessed that the export occurs. This approach recognises that encrypted technology remains completely undecipherable and unusable, and therefore cannot be used unless and until the technology is decrypted and accessed.

AmCham EU suggests that EU guidelines should likewise confirm that an **export does not occur when encrypted technology is transferred** outside the EU unless and until that technology is *decrypted*. Adopting this position in relation to encrypted technology will reduce the need for export authorisations and thereby lessen administrative barriers for both businesses and national export control authorities while still achieving the goals of the Recast. Additionally, this position incentivises and encourages the use of encryption, which will lead to increased data security for industry, governments and individuals.

<sup>3</sup> Advisory Opinion on [Cloud Computing and Deemed Exports](#); Advisory Opinion on [Application of EAR to Grid and Cloud Computing Services](#); Advisory opinion on [Cloud-based Storefronts](#).

<sup>4</sup> See U.S. Department of Commerce Frequently Asked Questions (effective September 1, 2016) (<https://www.bis.doc.gov/index.php/documents/compliance-training/export-administration-regulations-training/1554-ear-definitions-faq/file>).

## 2. No export license required in case of administrative access

The US, UK and the Netherlands have explicitly adopted positions that in most circumstances don't require an export authorisation for third country network administrators, systems providers, telecommunication companies and other similar infrastructure providers in order to access data stored on or transiting their systems as long as that data is appropriately protected (15 CFR § 734.18[c], § 734.19 and 22 CFR § 120.54[c]). For example, the US takes this position as long as the data in question is encrypted, while the UK requires that the data is protected from unintended access by, eg, industry standard encryption, identity and access management or other safeguards. We suggest that EU guidelines explicitly adopt a similar approach and confirm that when systems administrators, cloud service or IT providers have access to user data, it is not labelled as exports and, thus, does not require export licenses. In addition, the mere possession of access information (decryption keys) by network administrators or providers should not require an export authorisation if controls are in place to prevent actual access to user data.

## 3. The 'exporter' is the service user, not the service provider

EU-level guidelines also provide an opportunity to further clarify which entity is the exporter of software and technology, which is particularly relevant in situations where data storage or other IT functions are outsourced to third party service providers, such as cloud service providers. In its 2009 advisory opinion<sup>5</sup>, the US clarified this point by stating that the service provider is not the exporter when a cloud user exports data from the cloud, acknowledging that service providers have no control over when or where users choose to export their data. Germany, the Netherlands and the UK have adopted similar positions. This position is fully consistent with the existing EU definition of exporter<sup>6</sup>. Therefore, adopting such explicit guidelines would provide EU businesses with clarity as to what their role and responsibilities are regarding intangible transfers.

EU guidelines should also explicitly state that the IT service user - not IT service providers - is exclusively responsible for export compliance related to their technology, since it is the service user- not the service provider - who decides to export their software and technology outside of the EU.

## 4. Providing access to controlled Software as a Service is not an export

Software as a Service (SaaS) is a model where software is hosted on 'cloud' servers, which users can access from various locations via the internet. In the SaaS model, the software is not transmitted to users nor is it downloaded or retained by users, meaning that there is no actual export or re-export of the software itself. The US, through advisory opinions<sup>7</sup>, and the UK, though its technology export guidance<sup>8</sup>, have clarified that the provision of SaaS is not an export.

EU guidelines should likewise clarify that there is no export of software when providing SaaS to users in third countries, since there are no transfers of the software itself.

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<sup>5</sup> [Application of EAR to Grid and Cloud Computing Services](#), 1.13.2009

<sup>6</sup> Regulation (EU) 2021/821, Article 3 'exporter' means (b) any natural or legal person or any partnership that decides to transmit software or technology by electronic media, including by fax, telephone, electronic mail or by any other electronic means to a destination outside the customs territory of the Union or to make available in an electronic form such software and technology to natural or legal persons or to partnerships outside the customs territory of the Union.

<sup>7</sup> [Application of EAR to Grid and Cloud Computing Services](#), 1.13.2009; [Cloud Computing and Deemed Exports](#), 1.11.2011; [Cloud-based Storefronts](#), 11.24.14

<sup>8</sup> [UK Guidance: Exporting military or dual-use technology: definitions and scope](#)

## Conclusion

Export controls are most effective and unburdening for commercial operators when they are applied multilaterally in a clear, concise and uniform manner. By issuing software and technology transfer guidelines that align with the US and UK, the European Commission can give equal opportunities to exporters in the EU, while removing unnecessary administrative burdens for EU export control authorities and without compromising the effectiveness of the export control regime. AmCham EU and its members offer their help to provide further insights for implementing such guidelines and outlining how alignment would benefit business.