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| From: | SE Delegation |
| To: | Working Party on Dual-Use Goods |
| Subject: | Sweden - comments on Articles discussed during the Video Meeting of the DUWP on 6th May 2020 |

**Swedish Comments to Commission Compromise Proposal WK 4535/2020 INIT**

Sweden thanks the Commission for its compromise proposal related to Member States' efforts (in the proposed new Art 8a) to devise a mechanism that would allow MS to react quickly and in a coordinated fashion to new risks associated with non-listed dual-use technology.

We note that the Commission proposal is based on an expansion of the catch-all provision in Article 4, building upon an approach previously suggested in its original draft recast text (2016/0295, new Art 4.4).

Harmonised rules creating a level playing field for industry is a very basic objective of EU policy in the trade area. This is why a restrictive approach has so far been maintained to the application of national-level controls on non-listed items. The current Dual-use regulation contains (a) catch-all provisions in Article 4, enabling ad hoc controls on non-listed items but limiting such controls to items associated with WMD applications, or with military goods subject to embargo, or exported in contravention of regulations; and (b) controls in Article 8 for a potentially much broader range of public security or human rights reasons, but where an assumption of national listing sets a higher threshold for use.

Using an Article 4-approach to create a quick-reaction mechanism therefore presents us all with a dilemma. On the one hand, it is desirable to have a quick-reaction mechanism with as broad a scope as possible, since we cannot be sure in which areas of technology or in what types of applications new risks may arise in the future. On the other hand, a broad expansion of the scope of catch-all controls risks undermining the uniform application of the Dual-use regulation, as it would allow ad hoc national-level controls in a much broader range of situations.

In attempting to strike a balance between these two extremes, we risk creating a quick-reaction mechanism of very limited value, while at the same time weakening the uniform application of the controls set out in the Dual-use Regulation.

In more practical terms, Sweden has the following comments and questions to the Commission's compromise proposal:

**Art 4.1 General comment**
In line with the introduction above, Sweden believes MS and COM need to discuss the tradeoff between on the one hand broadening catch-all controls to ensure MS ability to respond quickly to a broad range of (today unforeseen) new challenges, and on the other hand limiting catch-all in order to safeguard a reasonably consistent implementation of the DU regulation. Can a meaningful quick-reaction mechanism be achieved without causing significant harm to the level playing field so important to avoid distorting competition and weakening the stable regulatory environment that industry requires in order to function efficiently?

**New Art 4.1(b)**
The new formulation potentially covers a very broad spectrum of military end-uses and associated non-listed items, which is positive for a quick-reaction mechanism but negative for the goal of a uniform application of dual-use controls.

Sweden feels very strongly that the current Council mandate text that defines 'military end-use' [4.1(b) (i-iii)] should be re-introduced. In its absence, the broadening of the catch-all instrument reaches truly epic proportions.

**Old Art 4.1(c)**
The same applies to the proposed deletion of the text relating to military items exported without authorisation or in violation of an authorisation. This is not really covered by the revised broader formulation of Art 4.1(b). Is there a particular reason for this deletion? The absence of this text tends to undermine enforcement of the DU regulation. First you break the rules, then you get the spare parts.

**New Art 4.1(c)**
Reference to 'acquisition by terrorists' does not in SE's view provide an adequate legal basis for enforcement. We need to make an effort to identify a more adequate formulation, or else the provision should be deleted.

**New Art 4.1(d)**
It would be interesting to learn why cybersurveillance items should be singled out, and what items might be intended here. All the items identified by the EP as relevant from an HR perspective have been included in the WA list. To retain this formulation would, in Sweden's view, undermine MS contention that the issue raised by the EP has now been addressed.

**Art 4.2**
To as far as possible maintain conformity with the Council mandate, Sweden suggests changing 'must' to 'shall' on the 3rd line. At the same time, the shift from 'him' to 'it' is supported (here and everywhere else in the Recast text).

**Art 4.2 and 4.3**
These two sub-articles reflect equivalent texts in the current Regulation (Art 4.4 and 4.5) and are, as such, not controversial. They outline two possible levels of due diligence requirements on industry: 'aware' and 'has grounds for suspecting'. With a considerably broadened scope for catch-all, a serious assessment needs to be made of the impact on industry. The open-ended nature of the two concepts is such that individual producers have not been able to base their actions on a clear answer to the question 'how much is enough?' In this grey zone some (mainly larger) producers have applied the rule-of-thumb that more is better than less, and devoted significant resources to assessing risks in order to avoid possible legal challenge or reputational damage. Other (mainly smaller) producers have considered the due diligence requirements disproportionate to their resources and done little more than hope for the best. If a considerably broadened scope is added to this uncertainty, the burden could be seen as unreasonable even by major producers. If the broader scope of the Commission proposal is retained, some thought needs to be given to avoiding that already established due diligence requirements become a disincentive for industry to act responsibly.

**Art 4.4**
Is there a particular reason for deleting the previous requirement to inform the national customs authorities and other relevant national authorities? It would seem appropriate still.
This paragraph includes a much clearer justification than previous drafts for withholding information on a national catch-all decision from other Member States and the Commission. This could contribute significantly to undermining the uniform application of the Regulation. It also undermines the possibility of MS reacting in a coordinated fashion to new risks. In Sweden's view, a quick-reaction mechanism that does not contain a significant element of coordination does not add much to the current regulation.

**Art 4.5**
The clear obligation to consider information received and to react in a timely fashion is supported. However, against the background that the proposed mechanism could generate a significant amount of 'noise' in the form of many new ad hoc catch-all decisions of no relevance to the identification of new control needs, the obligation could prove quite burdensome.

**Art 4.6**
In essence, a consensus requirement is set up to trigger publication in the C series. Such publication may be seen as a rather indirect exhortation (not obligation) to place non listed items under control when a systematic new risk has been identified. The consensus requirement per se is strongly supported by Sweden. But it raises a number of follow-on questions: How often will consensus be reached (i.e. how often will a real need for a coordinated response be identified)? To what extent will the expanded use of catch-all simply lead to a very diverse application of export controls on non-listed items in different MS? How large a proportion of the catch-all decisions taken under the proposed broader catch-all regime would be of purely national relevance, penalizing the affected national industry without the quid pro quo of other EU competitors being subject to the same control, thereby contributing to undermining industry's confidence in- and acceptance of the Regulation?

**Art 4.7**
This article regulates the reverse procedure, where consensus is required if the originating MS (or any other MS) sees a need to modify or withdraw a catch-all measure published by consensus in the C Series. If consensus cannot be reached on modification / de-listing, the MS requesting a change can still apply it on a national basis (since observation of the C Series notice is not mandatory) thereby benefiting national industry and penalizing EU competitors and introducing further distortions to the level playing field.

**Art 4.8**
Sweden cannot support the proposed change in this sub-article (replacing 'cases' with 'denials'). Catch-all may be understood as a form of licensing requirement, which in practice can result in both authorisations and denials. At a purely technical level, Art 15(1) and (5) cannot be applied to denials, only to cases. Art 15(1) provides the basis for revoking or suspending authorisations granted, which is important and

necessary also for authorisations granted under a catch-all ruling. We submit that the link to Art 15 should be retained as drafted in the Council mandate of 31 Jan.

**Old Art 4.6**
This text, now deleted, subjects national legislation adopted on the basis of Art 4.3 to the stronger information obligations in Article 8(2), (3) and (4). It has been replaced by the looser arrangement proposed in Articles 4.4, 4.5, and 4.6. Art 4.3 allows MS to require that their national industry observe the more stringent requirement 'grounds for suspecting'. Sweden believes it is important to maintain an overview over national legislative initiatives in the area covered by the Regulation, and that the stronger information obligation therefore should be retained.

Sweden would like to explore the possibility of a much broader application of the Article 8 approach, given the support that it would provide for coordinated action against new risks. The main drawback is that these more stringent information requirements would also affect a large volume of purely national catch-all decisions of no relevance to a quick-reaction mechanism. The MS Art 8a proposal firmly linked the quick-reaction mechanism to national listing. This represents a higher threshold, since national listing would probably not be considered for once-only ad hoc national catch-all decisions. Instead, national listing would hopefully be undertaken as a response to a recurring pattern of problems (which is arguably of greater interest also to other MS) - and hopefully only generate a manageable number of cases per year. Could such an approach somehow be accommodated within the Commission's proposal?

**Art 4.9**
This requirement is supported, given the difficulties of ensuring commercial confidentiality and other legitimate secrecy concerns when measures by definition are ad hoc and therefore not possible to 'hide' in the broader volume of trade.

Based on the latest Council mandate (31 Jan) and the latest PCY draft text, the reference in this sub-article to Art 20(3) should be changed to Art 20(5).

**Art 4.10**
Equivalent to current Council mandate Art 4.7 and supported by Sweden.

**Addition**
Sweden would like to see a text incorporated into the proposal stating that identification of a significant new risk by Member States should be followed by concerted efforts to achieve multilateral listing of the affected items, in order to ensure that export controls are applied also to major non-EU suppliers. This would provide a degree of assurance that EU export control efforts to counter a new international threat are not undercut by lack of regulation elsewhere.