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CONTRIBUTION

From:	SE Delegation
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Subject:	Sweden - Comments to Presidency's compromise proposal for EU controls on non-listed items

Sweden - Comments to PCY's compromise proposal for EU controls on non-listed items

Sweden would like to thank the Croatian Presidency for its proposal, which is a valuable contribution to the efforts to find a compromise on what remains a difficult issue.

The control of non-listed items is an important topic for the future operation of an EU Dual Use Regulation, against the background of new technologies coming on stream which have been primarily developed for civilian use but which are assessed to have significant military applications, or which prove to be instrumental to human rights abuses in certain destination countries. While the response to such new challenges should primarily be generated at the multilateral level in order to extend control to the broadest possible range of potential suppliers, it may in certain cases be important to the EU and its MS to impose controls at a stage where multilateral controls have not yet been initiatied or are not yet finalised. Such a quick reaction-mechanism needs to cover a range of potential situations.

Sweden strongly supports the overall approach of the PCY proposal, which combines the two existing ways in which a MS can react to a non-listed item posing risks that are of concern not just nationally, but to the broader international export control community: (1) an authorisation requirement under the catch-all provisions of Art 4, and (2) a national listing under Art 8. These two approaches complement each other.

Both Art 4 and Art 8 derive from articles that can be found in the current Dual Use regulation. Both have historically been designed to be narrowly applied, in the interest of maintaining as far as possible a uniform application of EU Dual Use controls. Sweden believes that when combined, the different ways in which the two articles were designed allow for a quick-reaction mechanism that has a minimal impact on uniform application of the Regulation.

- Article 4 has a limited scope and can be used also for measures taken for short-term national reasons, but the quick-reaction mechanism proposed for Art 4 allows MS to share only those authorisation requirements that have broader international implications.
- Art 8 introduces the concept of national listing, which in most MS is a cumbersome process that would hardly be used for national short-term needs. Due to this, it has been possible to allow a much broader scope in Art 8 than in Art 4. A broad scope is important since it is impossible to predict today in which areas new technologies of concern may arise in the future, and it is desirable to have a quick-reaction mechanism that remains relevant over time. Placing such a broad scope in Art 4 instead would have the side effect of allowing national ad hoc measures in a very wide range of circumstances, thereby undermining the important goal of ensuring a "uniform and consistent application of controls throughout the Union" (recital 23).

Detail:

Sweden strongly supports the proposed drafting of Art 4.1 (a)-(c), and the deletion of the previous (c) in its current form ('acquisition…by terrorists'), which we feel is too

loose to provide a reasonable degree of legal clarity (terrorism is covered also by the proposed Art 8 and 8a, but with a different formulation).

Sweden also supports the inclusion of Art 4.1 (d). But since the focus here is human rights, the definition in Art 2.21 should make clear that this sub-para covers items that enable the covert surveillance of individuals in the context of a specific destination. Other potential human rights concerns, not linked to cyber surveillance, are covered by Art 8a in the PCY's two-pronged approach.

Sweden supports the proposal in Art 4.4 to use the imposition of an authorisation requirement as the 'trigger' for sharing information on relevant cases with other MS. At the same time, it is important to retain the final part of Art 4.4 ("unless it considers…") in order to avoid catch-all measures of purely national significance being brought up for assessment according to Art 4.5-6.

As a matter of drafting consistency, the word 'export' on the fourth line of Art 4.4 could be changed to 'requirement' or 'authorisation requirement', and 'transaction' on the sixth line to 'transactions covered'.

The proposed reference in Art 4.4 to Art 8 or 8a is not supported, since Art 8a already contains a mechanism specifically designed to facilitate the coordination of MS use of the instrument of national listing. Sweden is not opposed in principle to a reference somewhere in Art 4 to Art 8 or 8a. But a reference in Art 4.4 creates a confusion over which mechanism to apply.

The handling of information in the context of Art 4.4-4.6 could benefit from some additional work. As currently drafted, the text does not make any distinction between (1) the set of information exchanged between MS in order to determine whether a national authorisation requirement should lead to a 'watch list' listing, and (2) the set of information actually published in the 'watch list'. The first set needs to be fairly complete. For example, the mechanism's use in of the concept of 'essentially identical transaction' to define the object of coordinated controls means that information about end user or consignee must be a part of the information submitted to other MS for consideration. As currently drafted, the information provided by a MS under Art 4.4 could potentially be used under art 4.6 to generate a publicly available 'entity list', something that would have significant foreign policy repercussions. The mechanism in Art 4 needs to be drafted in such a way that MS are encouraged to provide as much information as possible for internal use by other MS. This can only be achieved by providing some form of assurance that sensitive information will not be included in the public 'watch list'. Such a result does not have to be attained by specifying exactly in the text of Art 4 which information is to be published. One alternative would be for the notifying MS to provide an explicit proposal for what information should be included in the public 'watch list', thereby subjecting the watch list text to the same consensus requirement that is used to decide whether a national authorisation requirement is included in the watch list or not.

Both Art 4.6 and Art 4.7 speak of authorisation requirements 'imposed' at the EU level. This does not accurately reflect the legal status of a notification in the C series of the OJ. Perhaps 'agreed' instead?

In Art 4.7, the concept of reviewing 'when appropriate' does not quite evoke the image of vigilant MS. As a drafting matter, Sweden would suggest modifying the first sentence of Art 4.7 as follows:

> *Member states shall regularly review authorisation requirements [~~imposed~~ agreed(?)] under paragraph 6 ~~when appropriate~~.*

The word 'regularly' can in Sweden's view be interpreted as according to a timetable (such as annually), but also more loosely to indicate a recurring / repeated action, but not necessarily implying that all authorisations must be reviewed at the same time.

Art 4.9 links the information requirements of Art 8(2), (3) and (4) to Art 4.3. In Art 4.3 MS are given the possibility of adopting/maintaining national legislation that requires industry to apply the stricter standard of 'grounds for suspecting' rather than the 'is aware' specified in Art 4.2. Sweden supports the link made in Art 4.9. But there is a problem in that Art 4.4 also includes a reference to Art 4.3, which links Art 4.3 to a different information requirement. Sweden could ultimately accept either approach, but both at the same time sets up conflicting requirements - which is something to be avoided.

Sweden would like to see an additional para in Art 4 that ties MS concerted action on a non-listed item into the equivalent multilateral process, in order that control be achieved across a broader spectrum of potential suppliers than just EU MS. A possible formulation could be:

> *Member States and the Commission shall consider supporting the inclusion of items listed pursuant to paragraph 6 into the control list work of the appropriate multilateral control regime, with a view to extending control to the broadest possible range of potential suppliers.*

The formulation takes into account the fact that controls agreed under Art 4.6 will often be end-user specific (due to the reference to 'essentially identical transactions') and therefore not in every case appropriate for a regime initiative.

Art 8a is meant to be read in conjunction with Art 8, and indeed contains references to Art 8. Consideration should be given to textually merging Art 8a and Art 8 in the same way that Art 4 (as proposed) contains both the basic provision for catch-all and the quick-reaction coordination mechanism.

If information handling in the Art 4 mechanism is further elaborated, consideration should be given to making the equivalent adjustments to Art 8a, so that information is treated the same way in both.

An extra paragraph similar to that proposed above for Art 4 could also be considered in for Art 8a.

As background, below is a short description of Sweden's preliminary views on how Art 8a could work in practice:

- An MS adds an item to its national list (the threshold created in Art 8a by requiring actual national listing is seen as desirable in its own right, as this particular measure presumably would not be used for more short-term national purposes). The resulting authorisation requirement is published by COM in the OJ C-series on a mandatory basis (as stipulated in art 8.2-4). Art 8a would give national listing a new relevance, but only in the limited circumstance of reacting to a new threat that is perceived as being general and more long-term.
- An automatic obligation kicks in for all other MS to apply the same control in the form of an authorisation requirement (not necessarily as a formal national listing), but the text at the same time provides the flexibility for individual MS to case-by-case opt out by simply not informing 'the exporter' in individual situations, if its assessment is that the concern expressed by one MS through national listing is not a general concern affecting all MS, or does not fall under the broad criteria described at the end of Art 8a.1. If the individual MS chooses national listing or prohibition instead, due to the seriousness of the perceived risk, the flexibility arguably no longer applies.
- If an authorisation requirement (set in place by one, several or all MS) leads to a denial we are, by applying Art 8a.2, in the familiar territory of art 15, which covers also denials of non-listed items issued under Art 4 or Art 8a, since the competent authority issuing such denials is 'acting in accordance with this Regulation' (Art 15.1). Proposed language in Art 4 further reinforces the link between denials of non-listed products and Art 15.
- Finally, Art 8a.3 introduces a 'where appropriate' information requirement on all MS that implement an authorisation requirement as a result of the obligation in Art 8a.1. Unlike Art 4, this action does not lead to any need for specific consideration by other MS, as the action is already mandated for all in Art 8a.1 and already included in the 'watch list' in conformity with Art 8.2-4. However, a MS that feels that the original concern is a general one would have an incentive to let other MS know that similar action has been taken, by providing 'relevant information'. Furthermore there is nothing in Art 8a that would preclude a MS not having any immediate need for an authorisation requirement from also informing other MS that it agrees that the issue covered by the initial national listing is of general relevance, thus adding further impetus to a process of coordination among MS.