



January 14, 2022

Ms. Eileen Albanese
Director, Office of National Security and Technology Transfer Controls
Bureau of Industry and Security
Department of Commerce

**Re: Request for Public Comments Regarding Areas and Priorities for U.S. and EU
Export Control Cooperation Under the Trade and Technology Council, BIS–
2021–0044**

Dear Ms. Albanese:

These comments are submitted by the National Foreign Trade Council (NFTC) in response to the request by the Bureau of Industry and Security (BIS) for input regarding areas and priorities for U.S. and EU export control cooperation under the Trade and Technology Council (TTC).

About NFTC

NFTC is dedicated to making America more competitive in the global economy with full recognition of the national security imperatives governing global commerce.

NFTC's membership spans the breadth of the national economy. It includes sectors such as energy products, capital goods, transportation, consumer goods, technology, healthcare products, services, e-commerce and retailing. Our companies account for more than \$3 trillion in total sales worldwide, employ over five million Americans and produce a huge share of our nation's total exports.

We offer the following general comments, priorities for harmonization, and suggestions for further consultations:

Aligning U.S. and EU export control efforts and creating transparent licensing exceptions

We applaud the leadership of Presidents Biden and von der Leyen to launch the TTC. The TTC presents a unique opportunity for the United States and EU to work together at the highest levels to shape the transatlantic and global technological landscapes and support inclusive, open, secure and resilient digital and physical supply chains.

We encourage the ECWG to address unnecessary burdens and frictions imposed on U.S.-EU trade and joint development efforts, and to redress the differing scopes of existing U.S. and EU regimes.

Specifically, the United States and EU should establish a goal of reaching general authorization of licensing exceptions common to the U.S. and EU regimes for dual use items and alignment of procedures to require licenses for policy reasons. The Parties should pursue whole program instead of item-by-item authorization in the interest of promoting the joint development of frictionless U.S.-EU approaches.

In general, the TTC should ensure commodity classification is aligned, that items receive same treatment through regulation by U.S. and EU authorities by establishing common classification and enforcement criteria.

The TTC presents an opportunity to rectify present disparities resulting, for example, from U.S. deemed exports control rules, licensing requirements based on destination and “Reason for Control,” differing treatment of software as a service, questions of technical data from cloud storage, treatment of software and technology resulting from publication and fundamental research, treatment of military end user and use, and foreign availability beyond U.S. and EU domains.

Consultations on levelling the playing field and the expansion of the objectives of export controls

As the Bureau of Industry and Security website observes, “The United States imposes export controls to protect national security interests and promote foreign policy objectives.”

NFTC believes that export controls should be imposed to achieve these focused and well-defined purposes. Export controls should not be deployed as a tool to protect markets or achieve economic objectives that fall outside the parameters of protecting national security interests and promoting clear and achievable foreign policy objectives.

Annex Two of the TTC Inaugural Joint Statement enumerates an array of uses for export controls, including supporting a global level playing field, responding to human rights abuses, addressing legal, ethical and political concerns around emerging technologies, and avoiding disruption to strategic supply chains, that could go beyond the purpose and definitions of export controls articulated by the United States.

NFTC strongly recommends the ECWG engages with private sector stakeholders to discuss the intent behind, and potential implementation of, these potential use cases for export controls and whether cooperation would lead the United States to seek an expansion of the rationale for controls.

Harmonizing Human Rights controls

Given the wide availability of technologies implicated in addressing shared human rights concerns, controls will necessarily focus on end-use and end-users. The United States and EU should harmonize, to the extent possible, standards and lists to promote effective implementation of human rights-focused controls, including with respect to items controlled for surveillance and crime control.

Intangible Transfers

The EU's definition of "export" is ambiguous as it relates to intangible transfers of software and technology. Through the TTC, we recommend that the two parties discuss their respective approaches to intangible transfers, and in particular suggest that the EU adopt the U.S. approach, which clarifies that the provision of cloud services is not subject to export controls. Furthermore, the two sides should clarify that, if an export occurs in the cloud, the cloud user, not the cloud service provider, is the exporter.

Encrypted Data

We encourage the TTC parties to consult on U.S.-EU harmonization as it relates to the treatment of encrypted data under their respective export control rules. Specifically, we suggest that the EU adopt a similar rule to the U.S. rules stating that, e.g., sending, taking, storing, or accessing appropriately encrypted data is not subject to export controls. Aligning these approaches would simplify the compliance obligations of companies in both jurisdictions and encourage companies to use robust encryption to protect sensitive data.

End Use and End User Controls

We encourage the TTC Parties to exchange information on specific end users of concern, and to transparently communicate these concerns to industry. Publishing an aligned list of end users to whom both jurisdictions wish to restrict the export of sensitive items would simplify and reduce the due diligence burdens and associated costs, and level the playing field for exporters in the United States and EU.

Thank you for the opportunity to submit comments. We look forward to continuing to engage with the Commerce Department on these issues.

Sincerely,

A handwritten signature in black ink that reads "Jake Colvin". The signature is fluid and cursive, with a horizontal line extending from the end of the name.

Jake Colvin
President