



European Semiconductor Industry Association

# Comments

## in support of the trilogue negotiations on the recast of the Dual-Use Regulation

*Brussels, 10 December 2019*

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### Introduction

The European Semiconductor Industry Association (ESIA) represents the interests of the Europe-based semiconductor industry and advocates for its international competitiveness. Semiconductors enable key innovative sectors in which the EU has a competitive advantage: automotive, aeronautics, secure banking, and many others.

Further to the proposal by the European Commission to recast Regulation (EC) 428/2009 (hereinafter the 'Dual-Use Regulation') in 2016, the European Parliament approved its position in 2018; the Council's mandate for the negotiations with the Parliament was adopted in June 2019. ESIA would like to support the ongoing trilogue negotiations with a series of recommendations, detailed in the below paragraphs.

### I. EUGEA for Intra-Company Transmissions

ESIA strongly supports the introduction of an EU General Authorisation (EUGEA) on intra-company transmission of software and technology as it allows to keep R&D activities in Europe, while enabling effective and efficient collaboration with production and development facilities in third countries. The EUGEA is intended to be used by companies in their internal secure environment, where intellectual property and other confidential information are protected.

The EUGEA improves the global level playing field: in the United States, exporters benefit from a specific license simplification for intra-company transfer as part of the encryption commodities, software & technology (ENC) licence exception. In the EU, no such facilitation exists.

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However, the EUGEA as amended by the Council in June 2019 presents several limitations, which threaten to restrict the usability of the EUGEA:

- The EUGEA can only be used in case of export from the parent company to its subsidiaries; however, the prevalent case of exchanges between subsidiaries of the parent company (provided that the parent company is headquartered in the EU or in EU001 countries) is not covered.
- “*The exported software and technology will be returned to the exporter and completely deleted by the subsidiary when the development activity has been completed*”. This provision has no clear rationale, it is difficult to apply in practice, and it imposes a heavy burden on the subsidiary company.
- The export of technology goes hand in hand with the export of prototypes to demonstrate, develop or support the technology. The EUGEA should allow the transfer of supporting materials such as prototypes; otherwise, its effectiveness will be greatly reduced.
- The exclusion of some key countries (e.g. China) drastically limits the applicability of this general license.
- The possibility for Member States to expand the provisions of subparagraphs 2(2) and 2(3) might lead to a lack of uniformity in the license application across the EU, in practice losing the added value of having an EUGEA.

**In order to make the EUGEA on intra-company transmissions actually usable by companies, ESIA recommends the following:**

- **The EUGEA should be usable for exchanges between the parent company and its subsidiaries as well as for exchanges between the subsidiaries.**
- **It should also apply to transmissions of prototypes and samples.**
- **The obligation to destroy and delete the technology once it has been developed by the subsidiary should be removed.**
- **It should not include a country list, as it is meant to be used internally in the same group, regardless of location. The countries subject to arm embargoes are already excluded by the standard EUGEA provisions. Therefore, an additional country list is not necessary in our view.**
- **Once the recipient of the technology is known (the authorities should know which subsidiaries receive technology), reporting should consist of a declaration done only the first time a technology transfer is made to a new subsidiary. No new or additional reporting should be required. New or additional reporting are also incompatible with the typical rapid flow of information among subsidiaries cooperating, for example, on R&D projects.**

## II. EUGEA for Encryption

ESIA supports the introduction of an EUGEA on encryption as it brings simplification and improves the global level playing field in significant innovation areas, for example the Internet of Things (IoT), connected cars, secure banking, etc.

Currently, EU exporters are at disadvantage versus U.S. exporters. U.S. operators benefit from exemptions for exporting encryption, as per overview in [Annex 2](#). Similarly, there are significant export licensing discrepancies within the EU: e.g. exporters in Germany can use the national general export authorisation 'AG16' ([Annex 3](#)). The AG16 avails - despite certain restrictions and various administrative requirements - significant simplifications which are not possible under the EUGEA for encryption as amended by the Council. A comprehensive EUGEA can reduce these disproportions in licensing systems within the EU: it would remove the need for similar national general export authorisations (if the coverage of the EUGEA is broader or at least matches national general export authorisations).

The proposed EUGEA as amended by the Council presents two broad scope of exceptions outside Annex I of the Dual-Use Regulation, as well as highly burdensome reporting requirements and complex licensing conditions, and limitations in scope (please see [Annex 1](#) for more details). In addition, the proposal contains elements which are also available under the U.S. license exception ENC<sup>1</sup>. However, it should be stressed that, despite some similarities, the scope of the U.S. license exception ENC is much broader than the scope of the EUGEA on encryption as amended by the Council.

**To create a European and global level playing field, the EUGEA for encryption should:**

- **At least match scope and conditions already available under national general export authorisations within the EU. For example, the so-called AG16 authorisation in Germany has a broader scope & conditions, and reporting requirements are less complex and time-consuming.**
- **At least match the scope of license exceptions ENC in the U.S., which are much broader (tiered risk-based model with very broad scope).**
- **Avoid categorisation from outside of Annex I to the Dual-Use Regulation for eligible items: this creates additional work for exporters and, in certain cases, may be very difficult to determine whether products qualify for authorisation.**
- **Avoid relying on international encryption standards as this would require constant monitoring to determine whether items qualify (standards change).**
- **Cover a broad list of countries as otherwise the use of the authorisation will be very limited, i.e. China should be included.**

<sup>1</sup> U.S. Commerce Control List (CCL) 740.17 Encryption Commodities, Software and Technology (ENC) for mass market items. The full text of the license exception ENC can be found in the Export Administration Regulations by the Bureau of Industry and Security (Department of Commerce of the United States) in paragraph 740.17.

- **Make sure that the scope of the EUGEA is not overly narrow, e.g. items having information security as primary function or those classified under 5A002.a.4 were excluded in the Council’s proposal. Generally, there should be no exclusions other than 5A004.**
- **Avoid excessive reporting requirements, e.g. details required prior to the first export of the item, or disproportionate amounts of technical details needed. These bring unnecessary administrative burden for exporters and authorities.**
- **Enable a good level of control for authorities if exporters meet the conditions required: the right balance is needed between compliance obligations required to maintain good level of control versus simplifications available to exporters. For example, if compliance obligations are too burdensome exporters will avoid this authorisation and use other licensing solutions instead.**

### **III. EUGEA for Low-Value Shipments**

ESIA welcomed the 2016 Commission proposal to establish an EUGEA on low-value shipments. ESIA regrets that the Council negotiating position does not include such an EUGEA. ESIA strongly recommends including it in the recast.

### **IV. Cyber-surveillance Systems**

ESIA favours an internationally aligned approach, as it contributes to strengthening the global level playing field. As such, ESIA does not support the introduction of autonomous EU lists: we recommend an approach in line with international export control regimes. Hence, we support the elimination of the unilateral EU listing (Category 10 'Other items of cyber-surveillance technology').

### **V. Catch-all Clause Extended to Human Security**

On human security, ESIA understands the need to improve the corresponding export control mechanisms. However, as to the extension of the catch-all (Article 4) to human rights violations / acts of terrorism, ESIA favours an approach whereby authorities issue targeted sanctions. In our opinion, “*bad actors*” should be identified by governments so that exporters can perform an effective screening in their IT systems.

ESIA recommends keeping the consultation procedure between competent authorities that the Commission had proposed (Article 4 covering the extended catch-all clause) to ensure the EU-wide application and validity of catch-all decisions. Such procedures and the regular exchange of information between the Commission and Member States, supported by a catch-all database as proposed by the Commission, could also be used for decisions taken by competent authorities based on Article 8, with reference to authorisation requirements on non-listed goods for reasons of public security or for human rights considerations.

## Conclusion

In conclusion, ESIA strongly encourages EU institutions to enhance their commitment towards modernising, harmonising and simplifying export controls in line with ESIA's recommendations.

ESIA strongly supports the introduction of an EUGEA on intra-company transmission of software and technology as it allows to keep R&D activities in Europe, while enabling effective and efficient collaboration with production and development facilities in third countries.

ESIA also strongly supports the introduction of an EUGEA on encryption as it brings simplification and improves the global level playing field in significant innovation areas, among other for example the Internet of Things (IoT), connected cars and secure banking.

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## **ABOUT ESIA**

*The European Semiconductor Industry Association (ESIA) is the voice of the semiconductor industry in Europe. Its mission is to represent and promote the common interests of the Europe-based semiconductor industry towards the European institutions and stakeholders in order to ensure a sustainable business environment and foster its global competitiveness. As a provider of key enabling technologies, the industry creates innovative solutions for industrial development, contributing to economic growth and responding to major societal challenges. Being ranked as the most R&D-intensive sector by the European Commission, the European semiconductor ecosystem supports approx. 200.000 jobs directly and up to 1.000.000 induced jobs in systems, applications and services in Europe. Overall, micro- and nano-electronics enable the generation of at least 10% of GDP in Europe and the world.*

## ANNEX 1

### **Examples of complex license conditions, limitations in scope, and reporting requirements in the Council proposal, which do not facilitate the created global level playing field:**

Firstly, the scope of products for which the EUGEA can be used is significantly narrower. The exclusion of 5A002.a.1 and 5A002.a.4 in the Council proposal is in particular a source of concern as it would negatively affect exports in high-growth commercial fields of applications, ranging from automotive, to secure banking and to SIM cards, without a clear rationale:

- 5A002.a.1 – Items having “*information security*” as a primary function. This excludes all semiconductor devices known as “*secure microcontrollers*”. These devices are used in applications utilised in the banking sector, in telecommunication SIM devices that are shipped to the customer as a pure hardware and not as a “*System-on-Chip*”, meaning that when they are shipped, the cryptography is not “*locked*”, in the sense that that it can only be used for authentication or money transaction. It is to be noted that, when the cryptography is locked, the corresponding devices are no longer controlled under Category 5 – Part II due to the technical note 1 and due to technical note 2.
- 5A002.a.4 – Items, not specified in 5A002.a.1 to 5A002.a.3, where the “*cryptography for data confidentiality*” supports a non-primary function of the item; and it is performed by incorporated equipment or “*software*” that would, as a stand-alone item, be specified by Category 5 – Part II. This is the case of many semiconductor devices known as microcontrollers. However, similar to the above case, it is not “*locked*” (meaning it could also be used for other usages than the ones excluded from Category 5 – Part II by technical notes 1 and 2).

Secondly, the exclusion of China from the destination countries is a unique feature in line with our previous recommendations. The EUGEA on encryption should have at least the widest scope of authorisation – both in terms of product and geographic scope – currently available in EU Member States. Destinations should include China and India. This would also enable a global level playing field and reflect the realities of industrial developments. A significant amount of software development activities takes place in India. China remains the biggest single-country market for semiconductors, with information security as one of the top growth areas.

Thirdly, the provision according to which “*the exporter will prior to the first export of each item submit technical data to competent authority of the Member State where he is resident or established*” mandates huge efforts by exporters. Such submission is not required under other global export licenses, and it is a very cumbersome requirement for exporters. In addition, the task of analysing the submissions implies significant additional efforts by licensing authorities as well, with delays for industry to obtain export licenses, and thus will result in decreased competitiveness. The rationale behind the inclusion of such submission is not clear to ESIA.

Fourthly, according to the Council position, the listed products are all subject to exceptions / conditions based on technical parameters which are not mentioned in the Dual-Use Regulation. The Council position instead refers to items that have “*all of the following criteria*”.

These represent additional criteria for which, at present, there is no guidance or reference<sup>2</sup>. While some of these criteria are similar to those found in licensing systems of other jurisdictions, the new criteria in general require a significant interpretation effort by exporters, which increases the risks of misinterpretation; this, combined with the above product and geographic exclusions results in a much more restrictive and difficult-to-use EUGEA.

In summary, ESIA is concerned that the scope of authorisation provided by the EUGEA for encryption, as amended by the Council, is too narrow and will not improve the global level playing field as it is neither in line with international practices nor with currently existing national licenses.

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<sup>2</sup> For example, on one of the 5A002.a classes covered (5A002.a.2 – Digital communication or networking systems, equipment or components, not specified in 5A002.a.1), there is a strong focus on system and equipment: these are identified based on many technical capabilities like throughput, maximum endpoints number, transmission range, etc. Such mentioned technical parameters are not tracked in the Annex 1 of the Dual-Use Regulation, and as such are not currently tracked in the ICT systems that companies use to handle export control rules. This means that all the products falling in this category would have to be re-evaluated from scratch, and all ICT system should be amended to incorporate the outcome of this new evaluation. Furthermore, some of 5A002.a.2 products are commodities, meaning that they are not designed to be used in a specific system with a given throughput, a given endpoint number, or a given range. Sometimes these data are not even reported on the component datasheets, because they are not referring to the component performance, but to the performance of the end system.

## ANNEX 2

Summary overview of the US license exception ENC<sup>3</sup>:

Under the **US license exception ENC**, exporters can ship almost all encryption Integrated Circuits with no need to apply for an export license, except to countries in country group E (Cuba, Syria, Sudan, Iran and North Korea).

- There are different types of exceptions under ENC:
  - No registration or classification needed
    - 740.17 (a)(1): For internal development and/or production of new products with headquarters located in a country group mentioned in sub 3.
    - 740.17 (a)(2): Exports and re-exports to US subsidiaries
  - Registration required (with classification request or self-classification): scope of classification, and products are mentioned per sub paragraph:
    - 740.17 (b)(1) Immediate Authorization for export to all countries except Cuba, Iran, Syria, Sudan and North Korea
    - 740.17 (b)(2) Classification request required, 30 days later authorized to export to all countries except same 5 countries
    - 740.17 (b)(3) Classification request required for specific items (including Integrated Circuits with encryption), 30 days later authorized to export to all countries except same 5 countries

<sup>3</sup>The full text of the U.S. license exception ENC can be found in the Export Administration Regulations by the Bureau of Industry and Security (Department of Commerce of the United States) in paragraph 740.17.

## ANNEX 3

### Extract from the German *Allgemeine Genehmigung Nr. 16 – Telekommunikation und Informationssicherheit (AG16)* – unofficial translation:

#### I. Preliminary remark

The General Authorization No. 16 of January 19, 2012 (Federal Journal p. 490), last amended by Announcement of March 16, 2018 (Federal Journal AT 29.03.2018 B9), is extended beyond March 31, 2019 until March 31, 2020.

In addition, the General Authorization is to be amended to include Thailand and Ukraine in the circle of the approved destinations.

Furthermore, Tajikistan and Turkmenistan are to be removed from the circle of the approved destinations. Here there is the requirement to verify such exports by means of individual license procedure.

There result no further changes to General Authorization No. 16. For clarity purposes, the General Authorization No. 16 is completely new published.

For information purposes, you can find a consolidated version of the general authorization No. 16 on BAFA's Internet page under [www.ausfuhrkontrolle.info](http://www.ausfuhrkontrolle.info).

#### II. General Authorization

##### 1. Title of the General Export Authorization:

General Authorization No. 16 (Telecommunication und Information security).

##### 2. Issuing authorities:

Federal Office of Economics and Export Control (BAFA), Frankfurter Straße 29-35, D-65760 Eschborn.

##### 3. Validity:

3.1 This is a General Export Authorization in accordance with Article 9 (2) of Regulation (EC) No. 428/2009. This Authorization is valid in all Member States of the European Union in accordance with Article 9 (2) of the mentioned Regulation.

3.2 This General Authorization is not valid,

- if the exporter has been notified by the Federal Office for Economics and Export Controls (BAFA) that all or some of the goods in question for one of the end-uses within the meaning of Art. 4 (1), (2) or (3) of the EC Regulation or § 5c or § 5d of the Foreign Trade and Payments Ordinance ( A W V ) are destined, or may be destined, to one of the countries mentioned there, or if the exporter is aware that the goods are destined for the end-uses specified in those regulations
- if at the moment of the export the exporter has the knowledge that the goods are to be used for nuclear, military or missile technology (among others rocket constructions) purposes.
- if the goods in question are exported to a free zone or free warehouse, which is located in a final destination covered by this General Authorization;
- if it is established that offenses have been negligently, recklessly or willfully committed under the terms of §§ 19 or 20 of the Law on Control of Military Weapons; all other licensing regulations and prohibitions (e.g. embargo regulations and regulations or orders on the application of restrictive measures for the prevention of terrorism) remain unaffected in the individual case
- for goods in accordance with No. 4.1 and 4.2 and 4.3
  - if the exporter has been notified by the Federal Office for Economics and Export Controls (BAFA) that the goods in question are used in connection with the violation of the Human rights, the principles of democracy or freedom of opinion, as they are defined in the EU Charter of Fundamental Rights, by the use of interception techniques and devices of the digital transfer of data, in which mobile telephones and text messages can be monitored or the use of the Internet can be observed selectively, or if the exporter is aware that the goods are destined for the end-uses specified in those regulations,
  - especially if the exporter is aware that the purchaser or recipient is the military, paramilitary, police or intelligence services or that the goods are intended for the civil administrative agencies that work for the mentioned bodies;

- as long as the European General Export Authorizations No. EU001, No. EU002, No. EU003, No. EU004, No. EU005 or No. EU006 (Annex IIa to IIc of the regulation (EC) No. 428/2009) are applicable.
- if the goods are to be exported with IT-security functions according to § 37 of Closure Instructions (VSA), which have been approved by The Federal Office for Information Security (BSI) pursuant to the VSA or for which an approval has been applied for the use in connection with information, which is classified as VS – ONLY FOR INTERNAL OFFICIAL USE or higher only according to § 4 (1) of the Act on the prerequisites and procedures of the security checks of the federation (Security Examination Law – SÜG)

#### 4. Approved goods:

This General Export Authorization relates to the following goods:

Export of items that are specified in Annex I of the regulation (EC) from the customs area of the European Union (§2 (25) Foreign Trade Law (AWG) as follows:

- 4.1 a) Goods including specially designed or developed components or accessories therefore, which are specified in Positions 5A001 b) No. 2 and 5A001 c) and d) of Category 5 Part 1;
  - b) Goods specified in 5B001 and 5D001,
    - if it is test, inspection or production equipment and software for the goods stated under a)
- 4.2 Technology specified in 5E001a) if it is absolutely required for the installation, Operation, maintenance and repair of this goods in accordance with 4.1 and is intended for the same end recipient
- 4.3 Goods, including specially designed or developed components or accessories therefore, which are specified in Category 5 Part 2 (cryptographic Information Security) Sections A to D, as follows:
  - a) commercial, civil cellular radio base station receiving equipment, with all the following characteristics:
    1. restricted to the use with radiotelephones in which traffic is encrypted solely on the direct connection between the radiotelephone and base station (known as air interface) and
    2. not suitable for encrypting traffic, except via the air interface;
  - c) equipment specified in 5B002 for the devices stated under a);
  - d) Goods specified in the following and whose cryptographic functionality is not or has not been specially developed or specially modified for authorities in the Federal Republic of Germany (apart from Deutsche Bundespost):
    - 5A002a;
    - 5D002a1, if this relates to software that has been specially developed or modified for use of equipment specified in 5A002a;
    - 5D002c1, if this relates to software that has the characteristics of the equipment specified in 5A002a or performs or simulates the functions of the equipment;
    - 5D002b;”
- 4.4 Technology for use only of the goods specified in 4.3 a) to c) and also technology under position 5E002b.

#### 5. Approved destinations:

- This General Export Authorization is valid for exports to the following destinations: All countries except
- Countries which are subject to a weapons embargo according to Article 4 (2) of regulation (EC) No. 428/2009 as well as
  - Afghanistan, Egypt, Pakistan, Syria, Tajikistan, Turkmenistan, Uzbekistan and Yemen and also for goods in accordance with No. 4.3 d except
  - Angola, Burundi, Ethiopia, Mozambique, Nigeria, Tanzania and Uganda

#### 6. Conditions

This General Export Authorization is granted subject to the following requirements:

- 6.1 When the exporter intends to use this general authorization he has to register himself as user by the Federal Office of Economics and Export Control (BAFA) before or within 30 days of the first export. This notification about the registration for use of this general regulation is to be created and submitted electronically through ELAN-K2 program. For the use of ELAN-K2 program it is required a registration in advance for this system. This program is accessed via a link “ELAN-K2 Ausfuhr System” on the website of the Federal Office for Economic Affairs and Export Controls (BAFA) at [www.ausfuhrkontrolle.info](http://www.ausfuhrkontrolle.info) using the search terms “Antragstellung, ELAN-K2 Ausfuhr“.
- 6.2 Exports of goods carried out on the basis of this General Authorization are to be reported by the exporter using the Federal Office of Economics and Export Control (BAFA’s) ELAN-K2 program. The declarations can be recorded on a data medium with defined format and data record layout directly on ELAN -K2 program or through one of the Federal Office of Economics and Export Control (BAFA’s) available interfaces by uploading an XML file. All goods under this export list number of Annex I of the EC

Regulation, which are listed with reference to General Authorization No. 16, must be entered on this declaration. Shipments of multiple goods under this export list number to one consignee must be added together.

The declarations' period consists of a half year (January 1<sup>st</sup> to June 30<sup>th</sup> and July 1<sup>st</sup> to December 31<sup>st</sup>). The declarations are to be submitted from 01<sup>st</sup> to 30<sup>th</sup> January and from 01<sup>st</sup> to 31<sup>st</sup> July for the preceding half year. The declarations must be submitted to the Federal Office of Economics and Export Control (BAFA) on the ELAN-K2 program correctly and clear in the periods mentioned above.

If no exports have been made on the basis of this general authorization during the declaration period, this circumstance must be reported electronically (Nullmeldung).

6.3 The Federal Office of Economics and Export Control (BAFA) may revoke this General Authorization in full or in part, where so required by the criteria specified in Art. 12 of the EC Regulation. Such revocation will be announced in the Federal Journal. The same applies for the subsequent inclusion, amendment or extension of an incidental provision.

This General Authorization may also be revoked in respect of individual exporters if so required, in the individual case, by the criteria specified in Art. 12 of the EC Regulation, particularly in the event of infringements against the export regulations including the terms of this General Authorization. The subsequent inclusion, amendment or addition of an incidental provision is reserved.

The General Authorization may, furthermore, be revoked in respect of individual exporters who fail to provide adequate safeguards to ensure compliance with the relevant export control regulations and with the requirements and incidental provisions of this General Authorization. The guidelines for the reliability of exporters (§ 3 (2) first sentence of the Foreign Trade and Payments Law AWG) apply accordingly.

6.4 This General Authorization remains valid until March 31, 2020.

## Notes:

The exporter must enter "X002/A16" in field 44 of the export declaration or export control notification.

The export consignment does not need to be depreciated by customs.

The amendment publication of the General Authorization No. 16 is hereby made public in accordance with § 41 (3) second sentence of the Administrative Procedures Act (VwVfG). It comes into effect on 01.04.2019.

This General Authorization and a notice on right of appeal may be viewed, in accordance with § 41 (4) second sentence of the Administrative Procedures Act (VwVfG), at the Federal Office of Economics and Export Control (BAFA), Frankfurter Straße 29-35, 65760 Eschborn/Taunus, during normal office hours.

Notes and templates related to the registration and declaration procedure are available on the homepage of the Federal Office of Economics and Export Control (BAFA) ([www.bafa.de](http://www.bafa.de)) under „Merkblatt für die Nutzung von Allgemeingenehmigungen“.