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Secretary General

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Mr Brian Nilsson
Director for Counter Proliferation Strategy
National Security Agency
Eisenhower Executive Office Building,
1650 Pennsylvania Avenue, NW
Room 361
Washington DC 20504, USA

Subject: Reform of the US Export Control Laws

Dear Mr Nilsson,

We are writing this letter in response to the encouragement for comments and proposals for the proposed reforms of the US Export Control Laws by several government officials.

The European Association of Aerospace and Defense Industries ("ASD"), represents businesses in Europe that encounter the highest exposure to the International Traffic in Arms Regulations ("ITAR") and that also have significant exposure to the US Export Administration Regulations ("EAR").

ASD has a working export control committee whose membership includes export compliance professionals from our member companies. These export compliance professionals have every day practical experience in dealing with issues of compliance with the ITAR and EAR in the procurement, development, manufacture and sale of high technology goods in the international marketplace.

At the outset, we wish to make it clear that ASD does not challenge or question in any way the policies, measures and regulations adopted or implemented by the United States in its sovereign capacity to control exports of sensitive goods.

However, because the laws and regulations of the United States of America ("US") have to be applied within Europe by European industry, we are taking the liberty to provide comments on the consequences of this application and how reforms could be used to create conditions more conducive to international trade without adversely affecting the security interests of the US. We will provide you with several examples that we believe demonstrate that there may be unintended consequences in Europe that result from the present implementation of such laws and regulations.

Cost of Compliance

From the viewpoint of European industry, the calculation of the cost of US-origin goods must include the costs of compliance with US export laws and regulations and not only the cost of procurement. Normally, for high technology parts and components, US manufacturers enjoy the benefits of higher cost efficiency



and the economies of scale. However, European industry is coming to realize that the cost of compliance with US laws and regulations may make US-origin goods actually more expensive than comparable parts and components from non-US sources.

Some of the costs of compliance are:

- Tracking and tracing of US-origin goods and the restrictions applicable to each US-origin item from the time it leaves the US and enters the European supply chain until the end-item is delivered to the end-user - indeed, until the item is finally scrapped;
- Preparing and submitting reports and information to US suppliers and US regulatory agencies;
- Preparing, submitting and tracking re-export and retransfer authorizations, which are often duplicative of national authorizations;
- Product redesign and part/component requalification when mistakes in classification are made by US suppliers.

Consideration of these costs inexorably leads to consideration of "ITAR free" products or even "US free" products that do not have a competitive disadvantage of a "tail" of obligations and additional costs. It must be stressed that this is not because European industry wishes to sell products to end users unacceptable to the US but because of the burden placed on industry by compliance with US regulations when selling to destinations which are acceptable, indeed close allies to, the US.

Please be aware that the consideration of "ITAR free" or "US free" products is not solely being pushed by economic concerns of industry but also European governments, for sovereign and political reasons, are increasingly requiring European industry to offer "ITAR free" products. The notion of "ITAR free" is creeping into MOD procurements with increasing frequency. Recently, even the Government of Canada has requested "ITAR free" proposals in response to solicitations for procurement of military vessels.

Allocation of Risk

Until now, purchasing controlled goods from the US has equated with "buying export compliance risks" and their potential effects like high penalties. In particular, European prime contractors and manufacturers of higher level assemblies have had to bear the consequences for changes and delays in programs caused by export compliance mistakes (in particular export classification mistakes) made by US suppliers. These risks mainly have been incurred with respect to items subject to the ITAR (i.e., United States Munitions List ("USML) articles) but also have been incurred with respect to some items subject to the EAR (i.e., Commodity Classification List "CCL" articles).

We would like to commend the actions of the leadership of Directorate, Defense Trade Controls ("DDTC"), for recently adopting policies to rectify this problem. European prime contractors and manufacturers of higher level assemblies can now purchase high technology parts and components from US suppliers with some assurance that the risk of compliance for past deliveries remains with the US supplier. We look forward to the publication of this new policy on DDTC's web site and recommend similar action by the Bureau of Industry and Security ("BIS"). However, the risk of additional cost for redesign and penalties still remains.

Yet there are other risks remaining like conflict between US requirements and European national laws (in particular, employment and anti-discrimination laws), and the hiring of US persons (see below).

In this context also the "see through" rules have to be recognized. Even a minor subcomponent (e.g. a bracket) with no potential for misuse or which even might lose its original identity because it is incorporated, "taints" the final product only because it was "specifically designed for military purpose" and hence delivered under an ITAR license¹

¹ The NATO study on Transatlantic Defense Industrial Cooperation („TADIC“) even identifies as an example a toilet seat to be subject to the ITAR.



Clean Sheet Approach to Reform

We have heard statements from various US Government officials that export reform in the US needs to be done with a clean sheet approach. We applaud this open minded approach. In this spirit we would like to propose that US authorities consider the following recommendations from the perspective of European aerospace and defense industry.

1. Open General Licenses – The European Union (“EU”) is moving toward adoption of policies that recognize and rely on the internal compliance practices of “certified companies” and mutual trust by governments of each others’ export controls. We urge consideration by the US Government of the concept of “Open General Licenses” for exports to “certified companies” in closely allied countries for parts which are normally not technologically significant or fall under the ITAR only because they are “specifically designed for military application.” Items that are going to be licensed in any event should be eligible for export under an “Open General License” . We urge use of a positive list of “certified companies” (e.g., companies that are certified by their host governments to meet the compliance requirements being adopted in the EU). We also urge the use of a negative list of items excluded from an Open General License (e.g. “any other items than SME listed in this paragraph may be exported pursuant to an Open General License to approved defense contractors in NATO and EU member nations”).

The US Government might also consider approving European programs (e.g. EUROFIGHTER, A400M, GRIPEN, etc.) for being eligible for license exemptions. The present practice means a double approval process in some instances. First, each and every part delivered from the United States needs an export license. Second, normally the finally assembled product is approved again via General Correspondence if exported to a country not originally approved²

2. Global Project License Revision – The ITAR was amended during the Clinton Presidency to adopt a Global Project License. We believe that both US industry and European industry agree that this license form has not been used as it was intended. We believe the Aerospace Industries Association (“AIA”) has well documented the views of US industry.

Please be aware that the concept of a Global Project License was endorsed in the Framework Agreement (so called “LOI”) signed in 1998 by France, Germany, Italy, Spain, Sweden and the United Kingdom. More recently the Intercommunity Transfer Directive “ICT” of the European Union (“EU”) mandated that Global Project Licenses shall be implemented by the EU Member Nations by 2011 and that Global Project Licenses shall have preference over single export licenses. We would be pleased to provide you with more specific information of how “Global Project Licenses” are implemented in the European countries.

From the perspective of European industry, one of the main shortcomings of the implementation of Global Project Licenses in the US was the exclusive focus on US prime contractors and the exclusion of projects involving European prime contractors. We understand that the AIA is proposing a Global Project Authorization concept that will solve most of the issues that prevent US and European companies from using the Global Project License.

We suggest that it would be beneficial for a Global Project Authorization regime to accommodate projects involving European prime contractors. As you know, most programs in Europe are cross border cooperations, which may involve multiple main contractors in multiple countries, and multiple second tier, third tier and n-tier subcontractors also located in multiple countries and usually involve hundreds, if not thousands of different individual parts and components sourced in the US.

A majority of licensing paper work incurred today on such projects could be avoided if the Global Project Authorizations would accommodate European prime contractors and a defined list of allowed consignees.

² This case may occur in programs which are originally approved for a certain list of countries – hence the US export licenses are issued for this list. Later on, additional countries may be added, but parts have to be used which were delivered earlier.



The designate prime contractor(s) should be responsible for informing DDTC of the technical scope of the project, informing DDTC which companies are included in the project (including the exporters and intermediate consignees), and which MoDs are included in the Project. Individual US supplier companies would obtain their own expedited export license under the umbrella of the Project Authorization that would authorize delivery of articles within the boundary prescribed by the prime contractor or contractors and authorize subsequent retransfers of the articles through the manufacturing chain until delivery to one of the ultimate consignees named by the Global Project Authorization. Such an approach would greatly reduce the paperwork required for authorizations to retransfer parts within such projects.

3. NATO Exemption – The ITAR presently authorizes the retransfer of USML articles exported under a valid export license and incorporated into defense articles delivered to NATO, NATO agencies, a government of a NATO country, or the governments of Australia, Japan, or South Korea (ITAR § 123.9). There has been considerable confusion about the correct interpretation of this exemption with respect to contractors to these governments. Our members have, in fact, received conflicting advice from DDTC personnel about this issue. We suggest clarification and broadening of this exemption in two ways:

- Extension of the "NATO exemption" to prime contractors of the allowed governments and
- An extension of the exemption to cover retransfers from NATO governments back to their contractors and subcontractors for repair cases.

It is suggested that these two changes would e.g. reduce the requirement for General Correspondence cases, and speed up repair cases and would benefit NATO allies without compromising the level of control by the US Government.

Furthermore, the addition of Sweden as member of the above mentioned European Framework Agreement ("LOI") to the exemption may be considered.

4. Employment of US Persons – The world is becoming an increasingly more global market place not only for the production of articles but also for employment of educated and skilled workers. However, the present interpretation of the ITAR serves as an effective ban on the employment of US persons in technical positions by European firms because of the requirements for such persons to be registered and to obtain Technical Assistance Agreements.

The result is not beneficial for US interests, not beneficial for European companies and certainly not beneficial for the US persons involved. It is suggested that the ITAR should not be applied to US persons who are not actually transferring technology developed in the United States by US companies. DDTC staff has indicated in several public fora that this interpretation should be applied. However, it does not appear that his interpretation is being implemented at the working level of DDTC. We suggest that, at a minimum, no registration be required for US persons working for firms incorporated in EU or NATO member nations and who are not transferring technology related to USML articles that have been developed in the US. We believe such a change would avoid situations involving circumstances not intended to be covered by the Arms Export Control Act.

5. European Nationals – DDTC should be applauded for adoption of ITAR §124.16, which facilitates the participation of EU nationals in TAAs. It is suggested that this concept be extended so that it would no longer be necessary to include such a clause in a TAA (automatic coverage) and extend the same concept to licenses for hardware.

Third country nationals

The rules governing transfers to dual and 3rd country nationals is a problem for companies, especially because of the determination by nationality based on place of birth / country of origin. "Discrimination" on ground of nationality is illegal under EU law. The nationality should be determined by "citizenship", as it is the practice in Europe.

6. Exemption for Retransfer to the US – Under present regulations, a re-transfer of defense articles from Europe to the United States containing US components requires a re-transfer approval by DDTC (by the way of a General Correspondence) if the components were originally not approved for retransfer to the US (but e.g. for Malaysia). This requirement precludes flexibility and has been proven to be disadvantageous for US military customers. Any reform of the ITAR should allow any re-transfer to the



United States for end use by US Government end-users and their contractors without separate authorizations.

7. Repair and Replacement Exemption – The ITAR currently has an exemption that allows articles exported under valid export authorizations to be returned to the United States for repair or replacement and then be re-exported without a license. ITAR 123.4(a)(1)

European industry is increasingly encountering the situation where European articles are lawfully permanently imported into the United States and then face delays and unanticipated costs arising from licensing the export of parts and components for the repair or replacement by their European manufacturers. It is asserted that a reciprocal exemption for repair or replacement of European parts and components incorporated into articles lawfully imported into the United States would be a common sense improvement in the ITAR.

8. Increased Reciprocity – ASD promotes the concept that the US is a reliable destination for European defense articles and that national laws should consider this fact. In several nations, the national authorities are comfortable with allowing exemption from licensing of export of dual-use articles to the US in all but certain sensitive cases. We urge consideration of reciprocal treatment of reliable European entities (governments and industries) also the US is exempt from licensing requirements for the majority of dual-use items.

In summary, we would like to emphasize that ensuring compliance with US export laws and regulations is of the greatest interest for all major European companies that would be covered by the "Certified Companies" label. These companies are dependent on deliveries from the US and are dependent on continuous access to US items and technology. Reforms along the lines suggested in this letter reduce attempts to avoid or reduce ITAR content or to develop "ITAR free products".

We believe we do not need to repeat the arguments of the Coalition for Security and Competitiveness but wish to express the full support of ASD for their initiatives.

We believe that an analysis of the consequences abroad may provide a different perspective about the export control reforms than the perspective achieved from a purely US domestic vantage point. In the spirit of constructive cooperation, ASD offers and would highly welcome a dialogue about the European industrial perspective of the consequences of US Export Control Laws and proposed reforms. We believe we have the mutual objective of avoiding unintended "collateral damage", and together, contribute to the global security.

Very truly yours,



François Gayet
Secretary General

cc: Ms. Ellen Tauscher, Under Secretary Arms Control and International Security at DoS
Mr. Robert S. Kovac, Managing Director, DDT at DoS
Mr. James A. Hursch, Acting Director, DTSA at DoD
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