

# Position

## Bitkom on the draft for the guidelines for the export of cyber-surveillance items under Article 5 of the EU Dual-Use Regulation

The protection of human rights is at the heart of the export control regime and supported by the hard work of the ICT industry. To achieve this common goal, the industry needs guidelines that reflect the current state of technology, create legal clarity and guarantee an efficient and thus successful process. With this in mind, Bitkom recommends the following changes to the draft:

- **Change the definition of “specifically designed” to reflect the realities of export control.** The current draft of the guidelines defines “specially designed” vague and in a way that diverges from current export control practice of member states. The draft defines something as being specifically designed if an item is *at least suitable* to objectively enable covert surveillance of a natural person. This new phrasing drastically reduces the threshold when an item is to be considered “specifically designed”. In effect the new guidelines will require the reclassification and control of the end-use of any potential item that could be in the purview of Article 5. The definition will therefore strongly increase bureaucratic workload for companies and competent authorities alike. In contrast, the current case law interpreting the Dual-Use-goods list as well as the legal commentary literature understands this criterion as objectively requiring that a technical materiality threshold is exceeded, for which not every minor modification of a civilian good is sufficient. Instead, a special constructive purpose is required, primarily on the basis of objective technical characteristics.

To keep the workflow for exporters and competent authorities to a level that is more manageable, allows for due diligence and therefore the effective prevention of human rights violations, we recommend deleting the last two sentences of the proposed definition of “specially designed”.

- **Reflect that fact that users knowingly emit data.** As part of modern digital world users knowingly emit various data into their environment. This is, for instance the case, when an IP address is transmitted while connecting to a public Wi-Fi hotspot. Therefore, the definition of “covert surveillance” should exclude signals that are knowingly transmitted by the emitter with the knowledge that third parties can receive, store, take note of and analyze them. Additionally, we recommend an explanation and examples of when such a situation is deemed unproblematic by the Commission.

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- **The definition of “natural persons“ should include examples of identifiers of natural persons.** This would provide more clarity on the question of when a natural person is concerned, for instance in the case of machine-to-machine communication. Identifiers can be, for example, location, billing information, e-mail addresses, login names, device operating times, SIM, IMSI and PUK numbers, and MAC and IP addresses.

Additionally and to improve the understanding of what a “natural person” is, the guidelines should clarify the difference between a natural person and someone acting in an official capacity as a soldier. Soldiers act in a sovereign capacity and are qua office in principle not part of the civil legal sphere. Therefore, it should be made clear that Article 5 is not concerned with soldiers being the target of any kind of surveillance. Otherwise, a large number of items currently classified as zero goods but commonly used in defense and security applications would be export restricted.

- **The guidelines should define what the meaning of “cyber” in “cyber surveillance” is.** The current document does not reflect on what “cyber” means. However, the Commission made the conscious decision to focus Article 5 on “cyber surveillance” and not only on “surveillance”. To prevent any legal issues around this we recommend a clarification.

This is especially important in regard to the definition of information and telecommunications systems. In our opinion “cyber”, is understood to define IT infrastructures, telecommunications networks used for IT applications and computer processing systems that act as carriers of the Internet. Therefore, we recommend the exclusion of radio systems that are based on the transmission of digital processes but do not serve as carriers of the Internet from the definition of information and telecommunication systems.

Furthermore, we recommend that paragraph II.2.5 includes an example for the differences between equipment and systems.

- **We recommend deleting the passage on “location tracking devices”.** Tracking technologies are widespread in every-day technology. It is practically impossible to differ between critical and non-critical use. Furthermore, IMSI-catcher are already controlled in Pos. 5A002 f No. 2 annex I, so there is no need to include tracking devices as part of the guidelines.

If export restrictions on certain tracking devices are to be considered we would recommend including this as part of accepted multilateral arrangements with a typical listing position, if deemed necessary.

Bitkom represents more than 2,000 member companies from the digital economy. They generate annual sales of 190 billion euros with IT and telecommunications services alone, including exports of 50 billion euros. Bitkom members employ more than 2 million people in Germany. The members include more than 1,000 medium-sized companies, over 500 start-ups and almost all global players. They offer software, IT services, telecommunications or internet services, manufacture devices and components, are active in the field of digital media or are part of the digital economy in other ways. 80 percent of the companies are headquartered in Germany, 8 percent each come from Europe and the USA, 4 percent from other regions. Bitkom promotes and drives the digital transformation of the German economy and advocates broad social participation in digital developments. The goal is to make Germany a globally leading digital location.