Siemens welcomes the establishment of an EU-US Trade and Technology Council (EU-US-TTC) working group (WG7) on export controls.

We are a leading technology company focusing on industry, infrastructure, mobility, and healthcare. Resource-efficient factories, resilient supply chains, smart buildings and power grids, low-emission and comfortable trains, and advanced healthcare - we support our customers with technologies that bring them tangible benefits. By connecting the real and digital worlds, we empower our customers to transform their industries and markets, improving the everyday lives of billions of people.

Closer transatlantic rapprochement offers the EU and U.S. governments the opportunity to jointly shape multilateral controls such as the Wassenaar Arrangement while coordinating on unilateral controls and licensing policy, including the interpretation of controls and exemptions that apply to those controls.

The EU and U.S. face common challenges, and this working group should provide a platform for enhanced dialogue and cooperation, with the goal of promoting bilateral trade and investment. Forging alliances with other like-minded partners must also be a high priority to address common challenges and level the global playing field.

We would like to mention the following topics that we believe the working group should take up and address:

1. Harmonization SaaS
2. Evaluation of export control sensitive "dormant functions" in software

To 1. Harmonization SaaS

According to latest market research studies the global SaaS (Software as a Service) market is expected to grow by >25% each year in the next seven to eight years, thus becoming of crucial importance to global industrial software companies like ours.

Multinational companies face challenges aligning the German and U.S. regulatory requirements for provision of software through a SaaS model. SaaS offerings differ materially from traditional direct delivery of software.  In a SaaS model users cannot download the software offered by the SaaS provider.  Instead, a user remotely accesses the SaaS software stored in a cloud environment, utilizes the software for its intended purpose (e.g., to processes the data) thereby making use of the software's computational capacity, and receives the output of the software. In the SaaS model, software object code remains on the cloud host's server, it is not downloaded by the customer, and hence, the software object code does not cross international borders[1]Currently, the U.S. and German position on whether SaaS offerings constitute an export of software differ fundamentally. The U.S. regulatory regime does not consider the offering of software through a SaaS platform to be an export of that software to the jurisdictions where the users reside.  By contrast, the German BAFA, Federal Office of Economics and Export Control, treats such a SaaS service offering as an export of the software to the jurisdiction where the user is located. In practice, these different regulatory requirements mandate that international companies treat the same business situation completely different per jurisdiction where the SaaS servers are located. The fact that there is no aligned guidance on European level between the member states adds to the complexity that global corporations are confronted with.

Hence, in the light of the TTC's goal to promote convergent control approaches and the increasing importance of SaaS as the leading service distribution model for software worldwide in the coming years, we would wish for a harmonized approach in treating access to SaaS not as an export, thus enabling European industry to stay both compliant and competitive in the digital business.

[1]We note that in a SaaS model, a user will load information or data into the service provider's cloud environment to utilize the software and will receive output from that software. Cases may arise in which the user's information or data may be subject to export controls. In such situations, we believe it is appropriate to assert control over the user who is in fact directing and controlling the movement of export-controlled information across international borders.

**US-Perspective:**

The U.S. Commerce Department, Bureau of Industry and Security ("BIS") is the agency responsible for administration of U.S. dual-use controls (the Export Administration Regulations ("EAR")), including articulating the U.S. export control requirements as they relate to SaaS offerings (also referred to in U.S. regulatory language as "cloud computing"). BIS clarified the U.S. government's position on SaaS offerings through a series of three Advisory Opinions.[i]

Together, these Advisory Opinions clarify the different export control requirements for companies that provide SaaS offering and for companies that use SaaS services. The U.S. position is clear: SaaS providers are not engaged in exports by providing SaaS offerings. This determination is consistent with the way SaaS offerings are made – users access SaaS offerings by accessing a remote server, not by downloading software for storage and use on a user's premises. Through this model, the U.S. determined that "the service provider is not shipping or transmitting any commodity, software, or technology to the user." Accordingly, under the U.S. framework, the SaaS provider is not engaged in exports.

The U.S. position on SaaS offerings continues to enforce export control requirements by placing primary export control responsibility on the parties that are in fact engaged in cross-border transactions – the SaaS users. Users of SaaS offerings are the primary beneficiaries of any cross-border transaction and BIS has clarified that such users may be subject to export control requirements if they transmit export-controlled data to the cloud (in order to utilize the software stored in the cloud) or generate export-controlled data through use of software in the cloud. In such instances, the user – not the SaaS provider – has knowledge of the data it is transmitting/causing to be transmitted and is more appropriately responsible for compliance with export control restrictions. SaaS providers also have export control obligations in the U.S. mode. For example, SaaS providers continue to be prohibited from providing SaaS services to sanctioned countries and individuals, and well as providing SaaS offerings for restricted end uses (e.g., missile development).

To 2. Evaluation of export control sensitive "dormant functions" in software

Soon, we can increasingly expect software marketing to displace the product business.

Years of software development are creating ever larger software complexes with increasing modularity and embedded components/functions. This modularity makes it much easier for the manufacturer to adjust, fix bugs and issue new versions, as the individual modules are easier to maintain and adapt. (Microsoft MS365 the well-known Evergreen solution, which is based on SharePoint Technology is a good example for dormant functions)

However, given the large number of different functions, it is also possible that sensitive functions (according to Dual-Use Regulation 2021/821, Annex I) are present in the software complex or only become subject to approval via new item texts in Dual-Use Regulation 2021/821.

It is intended to market the complete software suite via modular- license keys which can be ordered by the customer and with which he can activate and use his ordered functions (or embedded APP's). Functions not ordered are included in the scope as "dormant" functions and cannot be operated by the customer.

Approach:

The Export Control Classification of a locked/blocked functionality should not affect the overall Software Suite Classification. Appropriate encryption of the software ensures that the customer cannot access all the functions it contains, but only those functions that it has ordered.

Therefore, from an industry point of view, and considering the faster marketing possibilities, it would make sense for "dormant" functions requiring approval to be unlocked via a license key. The license key must be ordered by the customer, is classified with an AL/ECCN as dual use good and can only be exported with the appropriate export license. The export license for the license key would then be issued by the authority of the respective country. Effective Export control processes is then in place.

Comparable to NSG item 3E225, there should also be license keys in the WAA for Cat. 2/3/4, which can be used to enable functions requiring a license. If, however, these functions are "dormant", provided with appropriate protection and thus cannot be used by the customer, there should be no listing here for the complete software complex.

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[i] BIS' Advisory Opinions are formal, and binding, interpretation of U.S. laws and regulations.