

SUMMARISING THE GERMAN EXPORT CONTROL SYSTEM

Companies should be aware of EU export controls as well as German export control law, advise Dr Stefan Schrandt and Esther Mallach

Export activities very often involve unexpected and certainly unwanted consequences in the shape of strict export control measures that may culminate in criminal proceedings. It is this area of law that appears to be somewhat neglected in commercial trade in which Dabelstein & Passehl, a well-established German international shipping, transport and insurance law firm, has specialised over recent years.

Export controls have evolved significantly since the end of the cold war; different national control regimes have now given way to the European Export Control Council Regulation, which came into force in 1995. The Regulation is binding for all European member states and provides for a common list of dual-use goods that require prior authorisation if exported outside the EU. This common framework for export control has allowed free movement of at least some dual-use goods inside the community. Furthermore, the administrative co-operation between member states has improved to a certain degree. In practice, however, this European regime has not completely succeeded in creating a uniform system ensuring Europe-wide efficient export control. This is partly attributed to the fact that enforcement of the Regulation is left to the individual member states which makes it difficult for export businesses based in one EU country to keep track of the measures to be observed in another member state.

Exports from Germany into other countries outside the EU must be strictly in compliance with German export control law in terms of:

- listed goods (arms and weapons and dual-use goods) and
- non-listed dual-use goods (catch-all clause).

Relevant goods

The movements of listed goods are subject to special scrutiny by the prosecution and customs

authorities as dual-use goods are suitable for either military or civil use. Infringements of the relevant rules jeopardising, for example, national security and/or German foreign relations may well trigger criminal prosecution.

In addition, UN Embargoes must be strictly complied with. A further source of potential criminal prosecution are breaches of restrictions of financial transactions implemented in the wake of UN Resolutions or domestic parliamentary decisions against national and international terrorism.

The export of non-listed dual-use goods to specific countries is also restricted in respect of its potential for military purposes (catch-all clauses). As a measure of export control these goods require an export permission issued by the German Supervisory Board for Export Control (*Bundesamt für Ausfuhrkontrolle* – 'BAFA'). The very moment the exporting company is contacted by BAFA and notified of the requirement of an export permit, any act of non-compliance carries a considerable risk of criminal prosecution.

This also applies if the exporting company is aware of the intended use of the goods/technology but, nevertheless, fails to notify BAFA accordingly; especially if the transaction concerns ABC – weapons or any components with potential military end-use as well as weapons subject to an embargo by the EU, OSCE or UN, any transgression of the relevant rules and regulations can (and, in the present political climate are likely to) be prosecuted as a serious criminal offence.

German domestic law, furthermore, has implemented measures for the export control of components for civil nuclear purposes earmarked for the export to certain countries, among them currently Algeria, India, Iraq, Iran, Israel, Jordan, Libya, North Korea, Pakistan and Syria.



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Trade between EU member states

The transfer of goods between EU member states is subject to a different set of rules: only trading in very specific and sensitive dual-use goods carries the risk of criminal prosecution, such as, for example, aluminium tubes with special dimensions and of a specific alloy (see article 21 sub 1 council directive/dual-use).

German domestic law, however, extends investigation and control by applying certain catch-all clauses to goods/technology intended for final military use or for civil nuclear purposes if the above named countries are involved. This applies, for example, to transit trade covering the purchase of listed goods from EU or non-EU states and their subsequent sale to specific non-EU countries. These transactions are subject to BAFA control pursuant to Article 40 German Export Control Regulation (*Außenwirtschaftsverordnung*) and criminal prosecution if, *inter alia*, national security is compromised.

Technology transfer

In addition to transactions involving goods the supply of technological 'know-how' between EU entities and their non-EU counterparts – frequently referred to as technology transfer – is subject to a permission pursuant to article 2 b III council directive/dual-use. This includes any kind of information transfer by email or via other electronic means. EU law provides for the control of this technical support, only excluding generally available technological data.

These restrictions are comparable to the above-mentioned catch-all clauses and are subject to specific control in Germany. The products for which this support may become relevant include the full range of ABC-weapons and general weapons technology, any items with military end-use and goods for civil nuclear purposes if intended to be exported to specific listed countries.

While this summary is not meant to be an exhaustive account of the 'ins and outs' of export control it may highlight the significance of this area of law to company management. It is, after all, not always apparent from the goods concerned whether they are subject to export control restrictions; in order to avoid unpleasant surprises in any of the above areas, it is recommended that suitable advice is sought at an early stage. ■

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