

Company-internal Organization of an Export-Control-System

1. Export control/ legal basis

Foreign trade is limited by the interests of Germany concerning foreign affairs and security as well as by international arguments. Accordingly, concrete prohibitions and obligations to obtain permits are existing, in particular with respect to export controls of weapons and armaments. However, certain goods, services, software and technology that can be used both civil and military purposes (Dual-use-items), are also subject to the duty to obtain a permit.

In this context the legal basis mainly consists of German Foreign Trade and Payments Law (Außenwirtschaftsgesetz [AWG]) in connection with German Foreign Trade and Payments Subordinate Legislation (Außenwirtschaftsverordnung [AWV]) as well as EC-Dual-Use-Regulation (Number 428/2009).

2. Export Control Officer

Any company exporting weapons and armaments or goods, services, software or technology mentioned in the European or German control-list of Dual-Use-items, must appoint a person responsible for export controls (Export Control Officer). Applications concerning export permits are processed by the competent authority only, if it is signed by the named Officer (or one of his deputies).

The appointment of the Export Control Officer must be provided in writing to the German Federal Office of Economics and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, hereinafter "BAFA"). This person must be member of the general management. Depending on the legal form of the company, the officer might be a member of the board of (executive) directors, a managing director or a managing partner.

3. Legal consequences of statutory violations

The Export Control Officer is responsible for compliance with the applicable legal export-control regulations.

Infringements of such regulations might lead to the denial of the company's reliability as exporter by BAFA. As consequence, export applications may be defeated and

granted permits may be revoked, if necessary. Dismissal of the Export Control Officer in charge might be required to avoid these consequences.

Moreover, penalty fees in high amount against the company as well as a forfeiture of the direct and indirect economical benefits of the transaction by order of the authorities are possible consequences, which may lead to massive harm/losses (that may jeopardize the existence of the company)

Finally, infringements committed by the Export Control Officer often cause considerable personal penal consequences.

4. Duties of the Export Control Officer

The essential duties of the Export Control Officer are the following:

- Selection of employees:

The Export Control Officer must ensure the appointment of trustworthy employees with sufficient legal and technical knowledge in all departments of the company which are closely connected to foreign trade (export-control).

- Advanced training and information:

The Export Control Officer must – on regular basis - train the employees dealing with export-controls issues and inform them about relevant developments in this area of foreign trade law.

- Supervision:

The Export Control Officer must supervise and control, whether the regulations concerning export process organization stipulated by him are complied. Therefore, spot inspections and controls on a regular basis are required, including regular inspections of the established export-control-system regarding its efficiency.

- Organization of internal export-control-system:

The Export Control Officer must organize an efficient internal export control system (see below sec. 5).

5. Organization of internal export-control-system

5.1.

To create an internal control-system it is useful to develop a written process schedule/system which should start with development phase of a new product, include customer order acceptance and end with delivery of a product to the customer. Every step within the process schedule possibly referring to export-control-issues should trigger concrete control actions.

The Export Control Officer (resp. the department for export controls) should be involved as soon as possible within the process schedule. This procedure allows when indicated to stop a project at an early stage, if corresponding exports are, for instance, not allowed (as in case of embargos).

The abovementioned process organisation should contain regulations concerning competences as well as specific dates and actions referring each control-step; the Export Control Officer should also stipulate detailed rules of conduct/guidelines for the employees of each department of the company.

In any case, the organization of the intended process schedule should be linked with internal IT-system of the company, too.

5.2

Reading a certain size of the exporting company the Export Control Officer will no more be able to administer all relevant duties regarding export controls due to the quantity. Hence, in this case a department should to be created to administer the export control duties. The department`s employees have to be chosen, trained and supervised very carefully by the Export Control Officer.

A certain independency is required for the export control department within the company`s organizational structure in order to safeguard a proper execution of its duties. It is important that no conflicts of interest occur (e.g. conferring export control duties on sales and distribution staff might be problematically). The export control department shall be under the supervision of the Export Control Officer.

For export control purposes unlimited and comprehensive communication and access to information is essential. Hence, all departments of the company shall be advised that relevant information (e.g. regarding end customers and designated purpose of delivery) have to be forwarded immediately.

Furthermore, the export control department has to be entitled to obtain any information of all company's departments on demand.

The export control department should be also entitled to (temporarily) cancel the execution of exports with immediate effect (at least until the person in charge of export has decided).

5.3.

For bigger companies the organization of processes is even more important to safeguard the effectiveness of the company's internal export control system.

For any legal support in this regard please contact

MELCHERS Rechtsanwälte
Rechtsanwalt Dr. Bodo Vinnen
Darmstaedter Landstraße 108
60598 Frankfurt/Main, GERMANY
tel.: 069/ 653 000 6-62
fax: 069/ 653 000 6-40
email: b.vinnen@melchers-law.com