

Legal Requirements for Exports to Iran: New Insights – Between Restrictions and Opportunities to Shape Transactions

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Given that the EU Iran Embargo has been tightened by EC Regulation 961/2010, chances are reduced that a German company's application for an export license to Iran will be successful. In this respect, three examinations in particular must be conducted:

- an analysis relating to the item itself (is the item listed or is its use sensitive?)
- screening of persons (customer, etc.) and
- a special analysis in regard of US export law.

In respect of the sensitivity of the item as well as of the person, some margin may be created by appropriate interpretation or shaping of the transaction to make the license application successful; however, there is an increasing number of cases where there is scarcely any chance of the export license being granted.

Step 1: Analysis relating to the item itself

The item-related analysis must first establish whether the export of the items to Iran is prohibited under Annexes I, II, III and VI of the Iran Embargo Regulation 961/2010 or whether they are subject to a license requirement pursuant to Annex IV of this EC Regulation. A violation of this Regulation is an embargo violation, which is subject to severe penalties in Germany: imprisonment from six months up to five years in case of intent and heavy fines or imprisonment up to three years in case of negligence. Then it must be ascertained whether the export item is subject to a license requirement under general export law, because it is listed in the EU list of dual-use items or in Germany's export control list. In addition, a license requirement may exist for non-listed items if there are red flags that they may be utilized for sensitive end-uses, specifically: for WMD purposes worldwide, for military end-uses in the EC embargo countries and two German so-called "Country List K" countries, or for nuclear reactors in the ten nuclear-sensitive countries under § 5d German Regulation Implementing the Foreign Trade Act (*AWV*) (Iran belongs to the embargo countries and the nuclear-sensitive countries). Unlicensed exports are subject to a civil fine of up to €500,000 for each viola-

tion or heavy fines or imprisonment up to three years under German Law.

One of our cases concerned a measuring device using a radioactive caesium emitter. The German export agency BAFA claimed that this device fell under a listing in Annex II of the Iran Embargo Regulation, which reads: "Nuclear detection systems for detection, identification or quantification of radioactive materials". BAFA assumed that the detectors in the measuring device were covered by this position, that they were principal components of the machine and that therefore the entire machine was listed. In a detailed legal opinion we were able to prove that this listing was inapplicable for a number of reasons. Specifically, it could be deduced from WTO law that such export prohibitions have to be restrictively interpreted in conformity with WTO law. It was not intended to prohibit the export to Iran of all possible machines that use radiation or x-rays, but rather only of those that correspond to the narrowly interpreted intent of the Iran Embargo, namely nuclear proliferation. Since a typical nuclear use was not possible here, an export prohibition to Iran was excessive. In addition, the detector could not be seen as a principal component. Within six months we were able to convert the former export prohibition into a *Nullbescheid*, i. e. a decision that no export license is required. An example where there was no room for an alternative interpretation concerned a not-listed machine. One of its components was a listed sensor, which, however, did not lead to the listing of the entire machine because the sensor was not a principal component. But when the company began to export this sensor as a spare part, it became necessary to obtain an export license – the company was not aware of this point. It could no longer be argued that the sensor's listing ceased to apply due to its installation in the machine: Since the sensor was exported separately, it remained listed. Since no manoeuvring room was left, the only way left was to negotiate a settlement order with the prosecutor to terminate the proceedings upon payment of a fine to a charitable organization.

It is possible to structure transactions in case of exports of entire plants to Iran, provided

that the exporter screens the deliveries of his suppliers very carefully to determine whether elements of these deliveries are listed components. If this is the case, it may mean that the supplier's entire delivery is listed and therefore prohibited or subject to a license requirement when delivered to Iran. If the supplier's delivery is essential for the plant being delivered, this may under certain circumstances lead to the entire plant being subject to this prohibition or license requirement. Therefore it is not sufficient simply to rely on the information given by the supplier. Rather, the exporter must undertake all reasonable measures to conduct a plausibility check of the supplier's information. If this initial screening produces any red flags, the exporter is required to further clarify the matter in respect of a listing. If the exporter is unable to resolve doubts about a listing of individual items, he must inform BAFA about these doubts as a last resort. BAFA will then bindingly determine whether or not an export license is required. It is most crucial that the exporter fully clarifies the factual situation in respect of a listing of individual items; only then do they have the ability to shape matters, because they can demand delivery of not-listed items. If the exporter fails to clarify the factual situation, he depends on BAFA's decision, which, in view of the increasingly tougher climate surrounding exports to Iran, is more likely to come to a negative result.

Step 2: Screening of persons

The second step is to screen whether the buyer, end-user or other persons involved are listed in Annexes VII and VIII of EC Regulation 961/2010 or in the EU terror lists. If this is the case, any transaction with this person/entity is prohibited – a violation would be punished to the same extent as an embargo violation. If this is not the case, it must further be investigated whether these persons are to be considered sensitive for other reasons and the export is therefore subject to a license requirement. At least in the latter case there is still room to shape matters.

In one case neither the items being exported nor the buyer or end-user in Iran was sensitive; this could be derived from a positive BAFA

decision to a preliminary inquiry. The issues under export law resulted solely from the fact that the buyer had engaged an Iranian commercial representative for the technical execution of the transaction, who was listed on the *Frühwarnliste* (a government early-warning list indicating red flags for proliferations concerns). Thereupon BAFA expressed legal concerns related to the export in respect of this client's entire Iranian transaction. We proposed a contractual solution, which ensured that this Iranian commercial representative would not have power of disposition in law or in fact over these items. This issue has been decided positively, i.e. an export license was then granted. It would be excessive if the entire Iranian transaction were to fail because of one marginal person, who does not have any power of disposition over the exported items. By contrast, in another case it was not about a marginal figure, but rather about the corporate group to which the Iranian buyer belonged: this corporate group was suddenly under suspicion of being involved in proliferation activities. Since the relationship between the Iranian buyer and its corporate group was very tight, a contractual solution was not available. This was a bitter pill for the client to swallow, because until recently his competitors had been supplying this Iranian customer with identical goods. Additional screenings of persons are required in respect of banks and other service provid-

ers involved. EC banks have a monitoring duty to fulfill in respect of the Iranian banks listed in Art.23 and their European affiliates: If the EC banks see any red flags for proliferation risks when financing the export, they must report this to the FIU (financial intelligence unit), in Germany to the German Federal Reserve Bank (*Deutsche Bundesbank*). In 2010, the number of persons and entities listed in the Annexes VII and VIII has nearly tripled compared with 2009; now listed are 72 persons and 189 entities.

3. Special analysis of US export law

In addition, German companies must examine whether the items to be exported to Iran contain US components with a threshold value of 10% of the foreign-made product. In this event, an export to Iran is prohibited under US export law, since the necessary US re-export license will not be granted for Iran. A re-export without a license is a crime under US law, which is punishable by heavy fines (up to \$1 million) or imprisonment (up to 20 years) for each violation. Especially for complex export items such as entire plants, this is a rather time-consuming procedure because each individual supplier must be asked whether US components are contained in their deliveries and, if this is the case, what the percentage value of the US components is in relation to their deliveries. In cases of

doubt, the value of the US components has to be calculated as a percentage of the entire plant. Only if this value is clearly below 10% of the plant's value are there no restrictions under US law for the export of this plant. To be on the safe side, the German exporter should request that documented evidence be provided that no US components are in the deliveries or that their percentage value is very small. The German exporter only has room to manoeuvre if he has carefully examined these points, because then he may demand deliveries which do not include US components, or deliveries containing only a minimal percentage value of US components.

4. Summary

The risks and penalties for exports to Iran are very high. It is therefore extremely important to minimize these risks considerably with the help of an export attorney. This includes *inter alia legal* opinions on the risks and measures for risk minimization, contractual agreements minimizing the influence of sensitive persons, etc. or voluntary self-disclosures and quick settlement orders to settle criminal proceedings upon payment of a fine to a charitable organization. There are thus opportunities to shape Iranian transactions appropriately, even if the climate for Iran exports in the EC has become increasingly restrictive in 2010.



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Attorney Dr. Harald Hohmann of the law firm Hohmann & Partner Rechtsanwälte in Büdingen near Frankfurt (www.hohmann-partner.com) is "one of the leading names in export control" (*Juve Handbook*). Legal advice at the highest level, long experience in business law firms, a global network of cooperation partners, numerous publications and worldwide inhouse and other seminars (especially in the EU, US and Japan) demonstrate that this internationally active firm is renowned both in international trade law (customs & trade law) as well as in chemicals and foodstuff law. He consults companies in the EU Member States and in the US, China, Japan and Switzerland on: EU and US export law, EU and US customs law, criminal law (esp. export and customs violations), international contract law, international product marketing (incl. international transport law and sales agent law), as well as chemicals and food stuff law (including law of biocidal products). In addition, Dr. Hohmann gives lectures at the Universities of Frankfurt/Main and Osaka.