Export Control and Sanctions

Guide | 2015

Gorrissen Federspiel
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Introduction

Welcome to Gorrissen Federspiel’s guide on export control and sanctions.
In today’s increasingly globalised world, where companies operate in a complex regulatory environment and with a diversity of international business partners, it is critical to understand the regulatory areas of export control and sanctions.

Export controls and sanctions affect large multinational companies, and smaller companies alike.

Public authorities are increasing their enforcement efforts, both in the form of conducting investigations and increasing the severity of penalties.

This practical guide provides an overview of the relevant export control regulations and sanctions rules, from a Danish perspective. It highlights issues which may be especially relevant for Danish companies active in international trade, whether this be the manufacture and export of goods, transportation or other business.

We explain how compliance with export control and sanctions can be integrated in a company.

We hope you will find this guide useful, and encourage you to contact us should you have any further questions.

DISCLAIMER: This guide should only serve as a general introduction to the topic of export control and sanctions as of October 2015, and should not be considered or relied on as legal advice. Gorrissen Federspiel does not assume any liability for damage or losses which directly or indirectly are related to the use of the information.
About the authors

Camilla C. Collet (Gorrissen Federspiel, partner, Compliance & CSR and Corporate/M&A) has extensive experience advising Danish and international businesses on contractual matters, mergers and acquisitions and compliance issues, specialising in anti-corruption and export controls, in conjunction with lecturing on these areas. Further, Camilla has extensive transactional experience within life sciences, insurance and other regulated industry sectors.

Søren Stæhr (Gorrissen Federspiel, partner, Compliance & CSR, Corporate/M&A, Dispute Resolution) is especially experienced in advising on the structuring and organisation of international commercial trade. Furthermore, Søren has extensive experience within all aspects of establishment of and implementation of project deliveries in international construction work/turn-key projects both onshore and offshore.

Jesper T. Rokkjær (Gorrissen Federspiel, lawyer, Compliance & CSR and Corporate/M&A) has extensive practical experience ensuring and incorporating compliance measures in mergers and acquisitions as well as in cross-border commercial transactions. Jesper has extensive experience in drafting and negotiating international commercial contracts and compliance requirements.

Paul Wilkinson (Gorrissen Federspiel, solicitor, Compliance & CSR and Shipping/Offshore/Transportation) is a UK qualified lawyer, specialising in international trade and transportation. He has practical experience in advising all entities within a supply-chain on their compliance obligations.

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The purpose of export control is to secure international peace and stability. Some goods and technologies can potentially be dangerous. They can be used for the production of weapons of mass destruction e.g. chemical or nuclear weapons. Export control is intended to prevent such goods and technologies from being sent to certain countries or entities/individuals identified as high-risk.

Export control can generally be divided in two types of regimes:

1. General export control: Export regulation and procedures for specific products and technologies to critical countries and/or critical end-users, and
2. Sanctions: Specific targeted sanctions against certain countries, persons or groups.

General export control regulation has received increased political attention since the terror attacks in New York on 11 September 2001 and is considered an important legal tool to prevent future terrorist attacks. Furthermore, targeted sanctions have been used against specified terrorist groups and named persons and continuously play a major role in many ongoing political crises, e.g. regarding the nuclear dispute with Iran and the annexation dispute between the West and Russia regarding Crimea and Eastern Ukraine.

The above world map shows (coloured orange) some of the countries which are currently subject to EU, UN or US sanctions.
On an international political level, four international bodies predominantly influence the development of export control rules and are regarded as ‘Multilateral Export Control Regimes’:

- **Wassenaar Arrangement (WA):** on export controls for conventional arms and dual-use goods and technologies.

- **The Missile Technology Control Regime (MTCR):** aims to control the spread of missiles and missile related technology, as well as systems intended for the delivery of weapons of mass destruction (WMD).

- **The Australian Group (AG):** through harmonisation of export controls seeks to ensure that exports do not contribute to the development of chemical or biological weapons.

- **Nuclear Suppliers Group (NSG):** seeks to control nuclear and nuclear-related exports and technologies to prevent the proliferation of nuclear weapons.

These international bodies of cooperation are all solely politically binding and aim to harmonise rules as well as serve as platforms for the participating countries, where they can share information regarding risk assessments and experiences with critical countries and/or end-users. Denmark participates in all these four international bodies along with approximately 35 other countries.

In addition to the political cooperation in the four international bodies, Denmark has also ratified numerous multilateral Conventions and Treaties which aim to limit the proliferation of potentially dangerous goods and technologies.

On a legal level, Danish exporters are mainly regulated by EU legislation. The EU has implemented the international commitments via regulations, mainly the Export Control Regulation (EC) No 428/2009¹ as amended (the ‘Regulation’), which is directly applicable in Denmark.

The Regulation requires Member States to control exports of dual-use goods, software and technology that are normally used for civilian purposes but may have a military application or may contribute to the proliferation of weapons of mass destruction – in order to contribute to international peace and security. Items and technologies can be subject to general export control either by way of being explicitly listed on the Annex I to the Regulation (‘the control list’) or by way of the catch-all provision in the Regulation.

The relevant procedures in relation to the Regulation have been implemented in Denmark by the Law on the Use of Certain of the European Union Acts on Economic Relations with Third Countries etc. as most recently announced by Executive Act No 635 of 9 June 2011 and Executive Order No 475 of 14 June 2005 on exports of dual-use items and technologies.

Other items such as certain chemical products, weapons and war material are also subject to export restrictions.

2.1 Dual-use items

Dual-use items are goods, materials and technologies that may be used for both civilian and military purposes. Most dual-use trade controls specifically target dual-use items that can be used to develop and build weapons of mass destruction (biological, chemical and nuclear weapons) or their means of delivery (e.g. missiles).

Dual-use trade regulation is a major part of the EU’s strategy on non-proliferation of weapons of mass destruction. Thus, the EU control list regulates items that can be used for both civil and military purposes (‘dual-use’ items). Dual-use items being exported outside the EU are subject to export control, and exports of such products and technologies must be authorised prior to export. Dual-use products are also subject to specific rules on record-keeping and inclusion of information on commercial documents, such as invoices.

Annex I of the EU control list contains the entire list of items that are subject to export controls. If you intend to export a product included on the control list out of the EU, then you must first seek authorisation from the Danish Business Authority. If you wish to export within EU borders, most of the items are, however, subject to more relaxed rules.

Annex IV is an excerpt from Annex I. Annex IV contains the most critical dual-use items. An export authorisation is always required with respect to items listed in Annex IV. This is also the case if it is a matter of intra-EU exports.

The control list is amended at least once a year, and therefore it is important to keep updated on any changes to the control list and the export control rules in general.

The control list is divided into 10 categories in accordance with different business sectors – see next page.

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2 https://www.retsinformation.dk/Forms/R0710.aspx?id=137448
3 https://www.retsinformation.dk/Forms/R0710.aspx?id=27046
4 The most recently published EU control list can be found at: http://exportcontrols.danishbusinessauthority.dk/file/538601/control-list-no-1382-2014.pdf
2.2 Catch-all
A product may fall under the export control rules, even if it is not contained on the EU control list.

Thus, the Export Control Regulation (EC) No 428/2009, contains a ‘catch-all’ provision in article 4. The catch-all provision acts as a ‘safety net’ for products which are, or may be intended in their entirety or in part, for use in connection with weapons of mass destruction, or in violation of an international arms embargo. Such products and technologies are also subject to the export control regime and exporters must obtain an authorisation from the Danish Business Authority prior to exporting the goods or technologies.

To determine whether a product could fall under the catch-all provision, consider what the prospective end-use of the product is, in the hands of the specific user.

Questions to ask yourself include:

1. **Is there something suspicious about the customer or the trading situation?**
   - For example, the method of payment or the delivery requirements.

2. **Are you exporting critical products and technologies?**
   - For example, laboratory equipment or advanced electronics.

3. **Are you exporting to a critical market?**
   - For example, to markets where the danger for developing and building weapons of mass destruction is commonly known.

The Danish Business Authority has indicated that suspicious circumstances and issues relating to the export can be, for example, that:

1. the customer provides a particularly favorable contract or that the contract contains unusual payment terms.
2. the customer demands special diversion of delivery routes, or that requirements for the order size, packaging, delivery route or place of delivery seem unusual.
3. the customer requests a customisation of the product, which is contrary to the normal usage, design or industry of the ordered product.
4. the customer refuses to sign and/or issue an End-User Statement (see below).

When exporting products, which are dual-use items, outside of the EU, consider requiring the recipient to complete an End-User Statement. End-User Statements are used in order to document the use of the exported product and that the end-user is the final recipient of the exported product. Suspicious circumstances are especially likely to occur when exporting to countries in respect of which the danger regarding developing and building weapons of mass destruction is commonly known. Your company should be extra cautious if you are exporting to these critical markets.

If there is information on suspicious circumstances or conditions, the exporter should contact the Danish Business Authority, which will assess the case and the risks involved.

2.3 Authorisation
There are three types of export authorisation that can be obtained from the Danish Business Authority:

1. **EU general authorisation**: as a starting point, all exports of dual-use items out of the EU must have individual authorisation. However, there are seven closely related countries where authorisation can be generally obtained under a eased regime – Australia, Canada, Japan, New Zealand, Norway, Switzerland and USA.

2. **Individual export authorisation**: can be obtained for single exports of more critical exports and should always be obtained for exports of products or technologies under the catch-all provision.

A template of an End-User Statement can be found at [http://eksportkontrol.erhvervstyrelsen.dk/slutbrugererklaering](http://eksportkontrol.erhvervstyrelsen.dk/slutbrugererklaering)


6 A template of an End-User Statement can be found at [http://eksportkontrol.erhvervstyrelsen.dk/slutbrugererklaering](http://eksportkontrol.erhvervstyrelsen.dk/slutbrugererklaering)
3. **Global export authorisation**: can be obtained for simple exports of regular less critical exports of specific products to civilian end-users in specific countries. It is a condition of the authorisation that the exporter maintains detailed records of all exports made under the issued authorisation. Furthermore, there are a number of additional requirements and conditions attached to the authorisation. The authorisation is valid for two years from its date of issue.

2.4 **Legal implications**

It is the responsibility of the exporter to determine whether its goods, technologies or trading partner(s) fall under export control and to seek the appropriate authorisation. It is also the responsibility of the exporter to obtain the correct end-user declaration in connection with applying for authorisation.

The Danish Business Authority has a useful tool to preliminarily determine whether your product or technology could be subject to export control.\(^7\) Furthermore, it is always possible to request an end-user check from the Danish Business Authority. The end-user check is free-of-charge.

Failing to seek the correct authorisation can result in fines and/or imprisonment of the responsible persons of two years or up to six years in aggravating circumstances, cf. the Danish Criminal Act art. 114h. Failure to obtain the pre-authorisation can also have extensive negative reputational impact on your company.

A freight forwarder or carrier may in some cases also be punished for violation of dual-use rules. This applies if the freight forwarder or carrier has actual knowledge or should suspect that dual-use products are to be used for weapons of mass destruction, and yet concludes agreements with the exporter about transportation.

If you are in doubt as to whether a product is covered by the Danish export control rules, contact the Danish Business Authority for advice or requests, for example a check on an end-user.

2.5 **US export control**

It is important to note that the US export control rules can also cover the export business of Danish companies.

The US export control rules are complex and can apply outside of the US, for example the re-export by Danish companies of US products, or export of products that contain US components or software.

Furthermore, the penalties associated with breaching US export control rules are considerable, including significant fines and imprisonment. It is therefore recommended to consider carefully whether the US export control rules could apply to your business.

Gorrissen Federspiel is able to assist on the specific application of US export control rules to your business, by arranging relevant advice from one of the US law firms with which we have close relationships.

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7 The tool can be found at: http://eksportkontrol.erhvervsstyrelsen.dk/quickguide/0/27
Sanctions

The general purpose of sanctions is to pressure a targeted country, government, entity or individual to change a policy or activity.

Sanctions are used as a foreign policy tool to respond to political challenges and developments, such as a country persistently violating international conventions and agreements, for example on human rights or the illegal development of nuclear weapons.

Sanctions can be diplomatic, economic or military related in their nature and can include, among other things, weapons embargoes, individualised travel restrictions, imposition of asset freezes, or restrictions or bans on import/export of specific products.

3.1 UN and EU sanctions
The UN and the EU have sanctions in place against numerous countries and individual persons and groups. Some of the countries subject to sanctions are shown on the world map in section 1. Generally, sanctions are imposed as a reaction to the country, person or group persistently violating international conventions and agreements.

In addition to adopting measures imposed by UN Security Council resolutions, the EU is also able to autonomously impose sanctions as part of the Common Foreign and Security Policy. Businesses operating in EU territory must comply with such sanctions.

There are numerous laws which govern the sanctions regime of the EU. For ease of reference, the EU has compiled a list of sanctions\(^8\) (also called ‘restrictive measures’) categorised by country and including references to the relevant EU laws. To determine whether your business operations could be affected by the EU sanctions regime, first consult the compiled list, and also check recent updates, for which daily notices are published.\(^9\)

Countries especially critical and subject to extensive sanctions currently include Iran, North Korea, Syria and Russia. Companies should pay particular attention if they conduct business within these markets.

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\(^8\) The list can be found at [http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf)

It is important to note that customers and other business partners can be indirectly owned or controlled by a separate legal entity which is subject to the sanctions regime. It is the responsibility of your company to ensure that your customers and other business partners are not subject, directly or indirectly, to the sanctions regimes, and therefore it is recommended to consult the EU guidelines regarding implementing and evaluating restrictive measures.

3.2 US sanctions
Danish companies can also be subject to the wide-reaching US sanctions regime, which in some instances has extraterritorial effect. Under the US rules, ‘export’ is interpreted broadly, and, in some circumstances, the rules will also apply to non-US products which include US components. US sanctions against Iran, Cuba, Syria and Sudan are currently the most comprehensive.

As an example, Danish companies should take note that the US sanctions regime can:

(a) Apply to all transactions that occur in the US, i.e. a transaction physically undertaken or agreed in US territory.

(b) Apply to all transactions using US Dollars, e.g. transactions in USD involving a sanctioned person/entity must be blocked by the US correspondent banks.

(c) Apply to all US persons, e.g. an American employee working in a Danish company cannot conduct transactions (of any currency) which would contravene the US sanctions rules.

(d) Apply to all non-US persons operating in the US. A Danish parent company is unlikely to be directly liable for the actions of a subsidiary operating in the US (although the US subsidiary is covered), but if the Danish company is acting in the US through an agent or a branch, then it may be subject to the US sanctions regime.

(e) Create an offence for any person to facilitate a US person to breach the US sanctions regime by e.g. stripping the payment details to a transaction, so that a US person is unable to identify and block the payment.

The US sanctions regime can also restrict business travel and sharing of knowledge and know-how.

3.3 Legal implications
Breach of the EU sanctions can result in a fine or imprisonment of up to four months, or four years in aggravating circumstances, cf. the Danish Criminal Act art. 110c.

The penalties for breaching the US sanctions regime are significant, and include imprisonment and/or a large fine.

Credit and financial institutions should be particularly careful in ensuring compliance with the various sanctions regimes, as financial transfers and transactions are a primary focus of sanctions.

Freight forwarders and transport companies should also be cautious when arranging export of products to countries subject to sanctions. They may risk criminal liability for violation of the sanctions. This may apply, for example, if the freight forwarder or carrier knew or had reasonable grounds to believe that the products were sanctioned, or that the recipient was subject to freezing of assets.

It is the responsibility of your company to ensure that it does not infringe any applicable sanctions regimes.

Due to the complexity, and ever changing nature of sanctions, it is highly recommended to seek legal advice if in doubt as to the application of sanctions to your business.

Gorrissen Federspiel is able to assist on the specific application to your business of EU sanctions. With respect to US sanctions we can also arrange relevant advice from one of the US law firms with which we have close relations.

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10 The guidelines can be found at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209068%202013%20INIT
This section includes advice on how to implement an effective export control and sanctions compliance programme.11

4.1 Management commitment – Know your business
The most important steps when initially addressing export control issues in your company are to:

- ensure that senior management is committed to compliance with export control, and make this apparent in your company; and
- know your company and your business, and make a full risk assessment.

It is vital that you know the products that your company trades in, including the jurisdiction in which any components of the products were produced, who your company trades with, which markets it trades in, and the supply chain. It is also important to identify any “hot spots” such as any third parties (for example intermediaries, freight forwarders, agents, suppliers and brokers) in the supply chain with which your company interacts and may carry an export control risk.

Conducting a risk assessment to identify existing and emerging risks both internally and externally, and then prioritising and managing these risks, is essential when working with export control and sanctions compliance.

4.2 Develop a compliance programme
To address export control and sanctions compliance, it is essential to establish a compliance programme, with written policies and procedures. The compliance programme should also identify who has responsibility for the task of ensuring compliance with export control, outline how the task is to be performed, what activities are prohibited and what the penalties are in the case of non-compliance.

The compliance programme should be endorsed or sponsored by the senior management, to ensure it carries sufficient attention and importance. Adequate resources, including a compliance function, should be allocated to developing and implementing the programme. This may consist of a compliance officer, and in larger companies a compliance organisation or network of individuals supporting the programme.

The compliance programme should also include a system to keep updated with changes in the export control dual-use list and sanctions, and to monitor developments in critical markets. Note that changes in this area of law

11 This section includes recommendations from the U.S. Department of Commerce Bureau of Industry and Security – Compliance Guidelines, issued June 2011.
can occur swiftly, and therefore your company’s export control compliance function needs to also be able to react promptly to such changes.

Having a well-developed and thoroughly implemented compliance programme has a number of benefits:

- Your company will have a better understanding of export controls and sanctions, thereby minimising the risk of non-compliance and a loss of reputation and goodwill resulting thereof.
- Any fines or penalties may be reduced by the authorities if your company can demonstrate management commitment and a proper compliance programme.
- Your time and cost of compliance will be minimised, for example new employees can more easily be trained.
- Your company can develop a good reputation in the export control field, enhancing its business.
- Your company may be in a position to seek general export authorisations from by the Danish Business Authority, subject to their approval.

4.3 Contractual considerations
Consider implementing terms and conditions in any trading documents or contracts in order to regulate compliance responsibilities.

Where your company does business in sanctioned or potentially sanctioned jurisdictions, consider also implementing a “get out” clause in any long term contracts, in case further sanctions are implemented or amended on a relevant business, trading partner, goods or jurisdiction.

4.4 Training
For an effective compliance programme it is essential that your company trains the relevant employees; employees working with export-related tasks require comprehensive training.

Training can be conducted in various ways, for example via seminars and presentations or online, and should be tailored to the audience. Explaining the reason behind the rules, providing practical examples and FAQs, and clearly identifying a person to contact when in doubt are all very important aspects to effective training. Furthermore, training needs to be conducted periodically, taking into account changes in the law and employees.

In addition to training, consider the need to monitor the effectiveness of export control processes and procedures via periodic auditing.

4.5 Screening and security measures
The programme should include appropriate compliance security and screening measures. This is sometimes known as “Red flag screening” which entails due diligence screening on relevant parties in your transactions. Continuous screening is ideal, and also screening prior to any transaction. Also be aware of indirect business – i.e. where a legal person/entity may be controlled by another sanctioned person/entity. There are a number of tools and procedures available in the market to assist your company’s screening and due diligence processes.

4.6 Record keeping and documentation
Proper records should be kept of all export transactions, in line with legal requirements.

When exporting products, which are dual-use items, outside of the EU, consider requiring the recipient to complete an End-User Statement, as outlined in section 2.2 above.

When unsure as to a product or customer, check with the Danish Business Authority.

4.7 Monitoring and auditing
Proper procedures shall be established for monitoring and auditing the compliance programmes. The best way for a company to assess the effectiveness of its compliance programme is to conduct a formal audit/assessment of all elements. This may be done by ongoing internal assessments, internal corporate audits, or external audits by a third party law firm or compliance expert. Audit reports should be provided to your company management and any corrective actions taken.

4.8 Handling and reporting problems and violations
An effective notification procedure for reporting suspected non-compliance incidents, and how these should be reported to the relevant authority should be implemented. Corrective actions may need to be taken to handle any non-compliance incident.

If you have conducted business that is or could be in breach of export control regulation Gorrissen Federspiel has extensive experience in examining such transaction(s). If your transaction(s) have breached any export control regulation, we can help ensure a competent disclosure process if relevant, including preparation of the relevant documentation and seeking resolution with the relevant authorities.
5.1 Designing a compliance programme
An effective programme is key to compliance with export controls and sanctions. We can assist assessing compliance risks, and developing a new tailor-made programme or updating your existing programme. We have prepared and implemented compliance programmes for a number of clients across a variety of industries.

5.2 Transaction review
Individual export transactions may need careful checks when trading with certain countries or commodities. We can assist assessing the compliance risks of a specific transaction. This may consist of reviewing a transaction in full, providing a second opinion, or assisting in seeking approval from the authorities depending on the circumstances.

5.3 Due diligence
Our Corporate / M&A teams are well used to undertaking due diligence processes, both as part of M&A transactions and daily commercial work. We can undertake compliance due diligence reviews, either as a stand-alone assessment of a specific transaction (for example, a sales contract with an end user), or as part of a larger M&A deal.

5.4 Contract review and preparation
Danish and international companies increasingly seek to regulate compliance rights and responsibilities in their contracts or standard trading conditions. Not only does this assist regulating the parties’ obligations, it may also assist in case of a violation and consequent action by an authority. We undertake reviews of compliance terms, including assessing how these apply to a specific transaction, the associated risks, and preparing specific terms and contract forms for your business.

5.5 Training
We are able to design a customised training programme suited for your needs, and also assist in implementing this. Our team has extensive experience in collaborating with clients on training and can provide this in person, webinar or as required.
5.6 Investigation and disclosure
Where a non-compliance incident is suspected or detected, it is important for a company to investigate fully and consider how to handle the incident. We can provide an objective and confidential review of an incident. If your transaction(s) have breached any export control or sanctions, we can help assess whether the breach should be self-disclosed and, if relevant, assist in the disclosure process, including preparation of the relevant documentation and seeking resolution with the relevant authorities.
How to get in touch

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- Our offices are located in the center of Copenhagen
- 20 minutes by car from Copenhagen Airport
- 5 minutes walk from Copenhagen Central Station or Vesterport Station
- Gorrissen Federspiel has limited free parking space available

Public parking a few minutes away at:
- Jernbanegade 1, 1608 Copenhagen V
- H. C. Andersen Boulevard 18, 1787 Copenhagen V
**Gorrissen Federspiel | Aarhus office**

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8000 Aarhus C  
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- Our offices are located in near the center of Aarhus  
- 60 minutes by car from Billund Airport  
- 20 minutes walk from Aarhus Central Station  
- Gorrissen Federspiel has limited free parking space available

Public parking just next to our offices at:  
- Silkeborgvej 2, 8000 Aarhus

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