

dual-use

EXPORT CONTROLS

in international transit and transshipment



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NORWAY

by Hugo Munthe-Kaas and Pernille Engstrøm Skaug

Norwegian export controls have gradually become stricter, partially due to certain mistakes made public over the last several years. For example, in 2011 it was revealed that the Norwegian government indirectly supplied Muammar al-Gaddafi's elite soldiers with military equipment. This led to a systematic examination of Norwegian export policies. A stricter export policy has not only been applied to the export of weapons and military equipment, but also to the export of dual-use items.

In general, pursuant to Norwegian law, export of dual-use items requires a licence. It is the exporter's responsibility to ensure that there is a valid licence for the relevant export. If a licence is not obtained before exporting the goods, the exporter may incur penalties. The Norwegian Ministry of Foreign Affairs is responsible for the export control of dual-use items. A subgroup under the Ministry, the Section for Export Control, administers the applications based on Norwegian legislation.

The purpose of these export controls is to ensure that the export of goods from Norway takes place in accordance with Norwegian security and defence policy. Secondly, the purpose is to prevent the export of goods contributing to the spread of weapons of mass destruction (nuclear, chemical and biological weapons), particularly to countries experiencing a security or defence crisis.

LEGAL BASIS

General

As mentioned above, export control is based on national legislation administered by the Norwegian Ministry of Foreign Affairs (the Foreign

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Ministry), Section for Export Control. The law governing export control is the Act of 18 December 1987 relating to Control of the Export of Strategic Goods, Services, Technology, etc. (the Export Control Act). The provisions in the Export Control Act are relatively general and give the Foreign Ministry responsibility for drawing up regulations and guidelines with more detailed descriptions of the provisions governing the export control of defence-related items and dual-use items. The Foreign Ministry is given such authority to ensure that the export controls are implemented effectively. Furthermore, the Foreign Ministry may set conditions for granting licences under these regulations that are compatible with the purpose of the Export Control Act.

More detailed provisions laid down by the Foreign Ministry are found in the regulation dated 19 June 2013 relating to the export of defence-related products, dual-use items, technology and services (the Export Control Regulation). It gives a detailed description of provisions governing the export control of defence-related and dual-use items.

In addition, more detailed provisions with respect to the Foreign Ministry's grant of export licences are provided by the guidelines of 28 February 1992, in particular, applications concerning the export of defence-related products, as well as technology and services for military purposes (the Export Control Guidelines).

Export control regulations

Pursuant to clause 4 of the Export Control Regulations, an export licence from the Foreign Ministry is required for selected products and related technology. The products and technology that are subject to licensing requirement are specified in List I and List II, which constitute Appendix I and Appendix II to the Export Control Regulation. List I references defence-related products and List II dual-use items (see www.regjeringen.no/globalassets/departementene/ud/vedlegg/eksportkontroll/140121-regulations-endelig-versjon---for-2013-06-19-718-eksportkontroll_2013_eng.pdf). List II includes civilian products and related technology and services not included in List I that may also have military uses. The lists are the result of negotiations within the multilateral export control regimes in which Norway participates. The lists form an integral part of the legislation and are updated regularly. An amendment to the legislation in 2005 expanded the scope of application to include controls on the export of strategic goods and technology that could be used for acts of terrorism.

In addition to the licensing requirement for dual-use items, clause 5 of the Export Control Regulation specifies that an export licence from the Foreign Ministry is also required for services related to, *inter alia*, dual-use items. An export licence is also required for other services that may develop the military capability of a country, and that are provided abroad or in Norway for use abroad.

Where there is doubt, the Foreign Ministry will, according to clause 3 of the Export Control Regulation, decide whether or not the products, technology or services are subject to the licensing requirement. The licensing requirement also applies to the export of products from customs warehouses.

Pursuant to clause 8 of the Export Control Regulation, some dual-use items are exempted from the licensing requirement. Examples of products that are exempted are dual-use items that are returned to a foreign owner after temporary import to Norway for exhibition, demonstration or repair. The same applies to rescue equipment and oil spill response equipment exported in connection with rescue operations. Products, services and technology for use on the Norwegian continental shelf is also exempted from the licensing requirement. It is important to note that dual-use items that are solely destined for passage through Norwegian customs territory, if both the sender and recipient are located outside Norwegian customs territory, are excepted from the licensing requirements.

GUIDELINES FOR THE EXPORT CONTROL ACT

The purpose of the Export Control Guidelines is to set out the procedures and criteria used by the Ministry of Foreign Affairs when dealing with export licence applications. Pursuant to clause 2.3 of the Guidelines, an application shall be rejected, *inter alia*, if the export of the goods is inconsistent with Norway's international obligations, or if the export would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of destination. An application shall also be rejected if there is a clear risk that the intended recipient would use the military technology or equipment to be exported aggressively against another country or to assert by force a territorial claim.

When dealing with applications, the Foreign Ministry shall take particular account of the national security of Norway, as well as that of friendly and allied countries. In the evaluation, the behaviour of the buyer country towards the international community shall also be taken into consideration, in particular its attitude to terrorism, the nature of its alliances and respect for international law. An assessment shall also be made to determine whether there is a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions. The Foreign Ministry shall also consider the compatibility of the exports of the military technology or equipment with the technical and economic capacity of the recipient country, taking into account that states should meet their legitimate security and defence needs with the least diversion of human and economic resources for armaments. When considering whether to grant a licence, an assessment shall also be made as to whether there is a risk of the arms or items being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

Under the Export Control Guidelines, an export licence for dual-use products shall normally be given if the country of final destination is a Nordic country or a member country of NATO if satisfactory evidence of end-use and end-user is submitted. A licence to export dual-use items will generally not be granted to countries where there is a war or a threat of war; countries where there is a civil war; countries to which, on the basis of a careful assessment of the foreign and domestic policy situation in the area, it is very difficult to export arms and military equipment and components; or countries covered by binding sanctions adopted by the UN Security Council or other arms embargo regimes and measures that Norway has aligned itself with, unless special considerations should be taken into account.

THE MEANING OF EXPORT

Pursuant to Articles 1 and 3 of the Export Control Regulation, an authorisation is required for 'export' of dual-use items listed in List II. According to Article 2(3), 'export' means any export from the Norwegian customs territory of products, services or technology covered by the Export Control Regulation. Contrary to exports between countries in the European Union, Norwegian law requires a licence for all exports to countries of destination within the European Economic Area. Consequently, dual-use items contained in List II cannot, in general, be transferred freely out of the Norwegian customs area.

However, as mentioned above, dual-use items that are solely destined for passage through the Norwegian customs territory, where the sender and recipient are located outside the Norwegian customs territory, are - pursuant to clause 8e - exempted from the licensing requirement. An antithetical interpretation of this provision implies that other dual-use items in transit in the Norwegian customs area are subject to export control.

CATCH-ALL PROVISIONS

Even though an item is not listed in List II, it may be subject to export control if the goods fall within the scope of the catch-all provisions in the Export Control Regulation. Regardless of the lists, an authorisation is always required for export of goods to areas where there is war or a threat of war. The same applies in cases where the exporter knows that the goods will be used for the development, production or maintenance of nuclear, chemical or biological weapons, or missiles capable of launching such weapons. In other words, the catch-all provision focuses on the end-use and/or end-users of the goods. If the goods fall within the scope of any catch-all provision, the Foreign Ministry will order the exporter to apply for an authorisation pursuant to the catch-all provision.

PENALTIES

Clause 5 of the Norwegian Export Control Act contains a penalty provision for violation of the export control provisions regarding export of dual-use items in List II. Unless the matter is subject to more severe penal provisions pursuant to provisions in the Norwegian Criminal Code, an exporter is liable to fines or a term of imprisonment not exceeding five years, or both, if they export dual-use items contrary to the provisions in the Norwegian Export Control Act or any regulation issued pursuant thereto. The Norwegian Police Security Service is the prosecuting authority in the event of contraventions of export control legislation.

Pursuant to clause 2 of the Norwegian Export Control Act, every person has a duty to provide the Foreign Ministry with any assistance or information required to ensure compliance with the provisions in the Act or any regulation issued pursuant thereto. For this purpose, the Foreign Ministry may conduct inspections and require access to recorded accounting information, accounting records, business documents and other documents that may be important. If an enterprise or person does not comply with the duty to provide information set out in clause 2, the Foreign Ministry may order the payment of a continuous daily fine until this duty has been fulfilled. The amount of the coercive fine to be paid is set according to how important it is to ensure compliance with the order.

A challenge for both exporters and inspectors today is the increasingly rampant international division of labour. To take one example, a portion of a product may be made in the USA, another in the Czech Republic, a third in Sweden, only to be completed in Norway. In such cases it is important to note that a Norwegian exporter cannot free themselves from their responsibilities to obtain an export licence, even though the goods are mainly produced abroad.

HOW TO APPLY

Exporters must initially assess whether a product, technology or service is covered by List I or II and consequently which licence is required. An exporter who concludes that a specific product, technology or service does not require an export licence must be able to provide documentation to substantiate this. The Foreign Ministry can help with such assessments, which are called product assessments.

Licence applications shall be submitted in writing using a digital application form, signed by a person authorised to act on the supplier's behalf. Agreements on the export of products to which the licensing requirement

applies should always include a proviso stating that the export is subject to a successful application for a licence.

The exporter can be granted two different licences. Firstly, the exporter can be granted an individual licence for one delivery and/or shipment to an identified consignee. Secondly, the exporter can be granted a general licence for unlimited shipments within a given period. However, to obtain a general licence, the country of destination must be a participant in one of the four multilateral export control regimes (the Wassenaar Arrangement, the Nuclear Suppliers Group, the Australia Group or the Missile Technology Control Regime).

It is the individual exporter's responsibility to ensure that applications for export licences are submitted in advance of the export; that the application is correctly completed; and that all required attachments and documents are included. Even though the main responsibility lies with the exporter, the transporters and freight forwarders have a complicit responsibility.

A complete application must include (i) information about the delivery in full, including information about the buyer, the shipping address, the end-user and the products; and (ii) additional documentation in the form of either an end-user declaration or documentation demonstrating the end-use, end-user or the circumstances surrounding the delivery.

The processing time for licence applications may vary, but the exporters should count on a minimum of ten working days before an application is processed. Enquiries about prior assessment of the licence duty and specific recipient countries often requires extensive processing. The more complex the case, the longer the processing time.

The normal validity of an export licence varies from six to 12 months. The validity date is evident on the licence. The effective date of the licence may be extended if the exporter reports to the Foreign Ministry the reason for the request and further indicates a desired date of validity.

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