

# Export control impacts on the employment of third-country nationals: EU and German perspectives



There are no direct equivalents in EU or EU Member State law to the US ‘deemed export’ concept. But there are plenty of considerations to take into account when hiring non-EU persons, especially for sensitive projects in the European Union. In the first of a two-part series on export controls and employment issues, Jonathan Esser and Katharina Bätzel explore the considerations and the regulatory terrain.

## 1. INTRODUCTION

In recent years, employment of and collaboration with foreign (i.e., non-EU) citizens has become increasingly common. This can be attributed to several factors: a growing shortage of skilled labour has pushed companies to seek talent from beyond their own borders, while refugees from crisis regions are often available to fill resulting gaps in the workforce. Meanwhile, sanctions-driven closure by EU parent companies of Russian subsidiaries has resulted in European companies relocating operations and hiring foreign staff. Taken together, these factors make hiring foreign workers a key solution to the need to maintain business operations in a globalised economy.

In addition, information flows both within countries (between industry, academia, research institutions etc) and between countries within the scope of, *inter alia*, international cooperation, joint research projects, foreign subsidiaries and overseas production increases, and involves an exchange of items and (technical) information with people of different nationalities all over the world.

In this context, the increasing importance of intangible technology transfers – such as the verbal exchange of sensitive know-how (‘knowledge in mind’) and potential access to critical technologies – poses significant export control challenges. In both cases, the provision of technology does not take place in a tangible way and it is thus difficult to assess



the risk of an authorised or even prohibited activity.

Prior to hiring or cooperating with persons from certain countries it is necessary to assess the relevant licensing requirements and, where necessary, take appropriate action to ensure compliance with applicable export control laws.

This article addresses the requirements related to the employment of foreign persons – with many considerations more broadly applicable to (technical) cooperation in general – in the European Union, using German law as an example of Member State application of export control provisions. It considers citizenship, residence or habitual abode, and (limited/open-ended) residence permits or immigration status.

## 2. RELEVANCE OF EXPORT CONTROLS AND SANCTIONS FOR EMPLOYMENT OF FOREIGN NATIONALS

Under both European and German law, the nationality of a potential employee is generally not decisive. This means that for transactions within one Member State, without cross-border provision of data, most export control provisions generally do not apply.

However, specific embargo regulations stipulating prohibitions or licensing requirements for certain activities – such as technical assistance<sup>1</sup> and data access (a form of electronic export) in conjunction with a foreign national and (usually) certain goods – constitute an exception to this.

Since individual person- and country-related embargo

regulations take precedence over the general European and German licence requirements for certain activities in connection with listed and non-listed items, those provisions must be given priority.

## 3. ANALYSIS OF EU EXPORT CONTROLS AND SANCTIONS

### 3.1 EU sanctions/embargoes

In terms of embargoes, the Russian embargo regulation No. 833/2014 of 31 July, 2014<sup>2</sup> is a well-known example which prescribes comprehensive prohibitions on, among other activities, the direct or indirect provision of technical assistance and further services related to a large number of listed items to natural or legal persons, entities, or bodies in Russia or for use in Russia.

Another common example which might be even more relevant for the employment of foreign nationals is the Iranian embargo regulation No. 267/2012 of 23 March 2012,<sup>3</sup> which is worth mentioning as its provisions refer to any Iranian person – defined in the regulations, *inter alia*, as ‘any natural person in, or resident in, Iran’. Accordingly, the licence requirements and prohibitions apply to Iranian persons worldwide, regardless of where they are located, if they meet the requirement of residency in Iran. Similar wording can be found in the Syrian embargo regulation No. 36/2012.<sup>4</sup>

Further, both embargo regulations include the condition ‘for use in Russia/ Iran’. Although this is not defined in the regulations themselves, the European Commission points out in its FAQs on sanctions against Russia and Belarus that this wording ‘is a standard

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formulation used to avoid the circumvention of the measures as it ensures that products and services sold/supplied/provided to third country persons, but to be used in the country subject to sanctions, are also prohibited’.<sup>5</sup> For this reason the same wording is used in almost all current EU embargo regulations.

Consequently, these definitions and reference points need to be considered when employing nationals of sanctioned countries within an EU Member State,

so as to determine whether a prohibition, or licence requirement, applies.

From a practical perspective, technical assistance in conjunction with items that are sanctioned under the lists of goods contained in the annexes of the respective embargo regulations, or with the risk of resulting in a use of, e.g., acquired technical know-how within a sanctioned country, must be avoided (noting that provisions relating to technical assistance can also apply to situations within the Member State and do not require to be conducted abroad).

But the main challenge is to identify foreigners who are residents within and/or nationals of sanctioned countries, or who are only temporarily within the territory of the EU. This is explored further below.

### 3.2 EU Dual-Use Regulation (Regulation (EU) 2021/821)

Most export control restrictions concern exports, or cross-border activities governed by the EU’s regulation on dual-use exports, Regulation 2021/821 (‘the Regulation’).<sup>6</sup>

However, the present article deals with the export control requirements applicable to the employment of foreign nationals within the European Union in the absence of any direct cross-border activities, thus most of the provisions of the Regulation do not apply. Nevertheless, it remains necessary to take a closer look at article 8 governing technical assistance at the EU level.

Article 8 and its licence requirements apply to the provision of technical assistance in conjunction with dual-use items and related to end uses as defined in article 4 (1) of the Regulation.

But article 8 does not specify whether these restrictions apply only when the technical assistance is provided directly in the countries covered by article 4 (1), which are third countries, or whether technical assistance within the EU to nationals or residents of these countries is also restricted.

In this regard, reference should be made to article 2 (10) (c), according to which the provider of technical assistance includes ‘any natural or legal person or any partnership resident or established in a Member State that provides technical assistance to a resident of a third country temporarily present in the customs territory of the Union.’

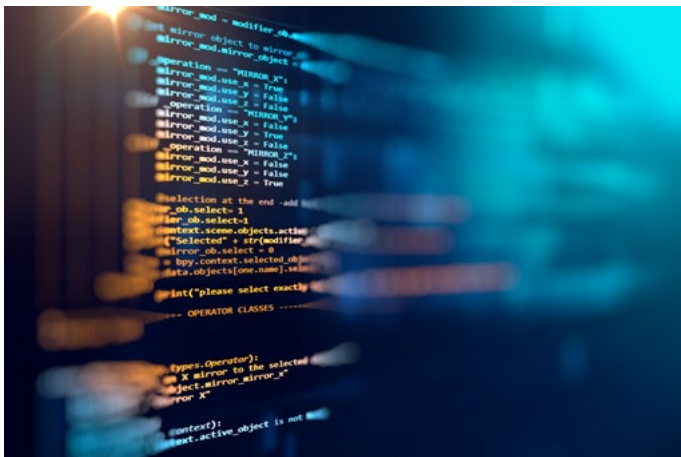
Thus, article 8 also applies to provision of technical assistance within the territory of the European Union if the recipient of the technical assistance is only temporarily present therein.

In summary, the restrictions relating to the provision of technical assistance that are found in article 8 could be seen to generally apply to the employment of foreign nationals within the European Union, recalling however that article 8 requires the technical assistance to be related to (listed) dual-use items and to be used in connection with chemical, biological or nuclear weapons or other nuclear explosive devices, including missiles capable of delivering such weapons, or in connection with a military end use in a country that is subject to an arms embargo.

Exceptions to this apply, particularly in the cases of Australia, Canada, Iceland, Japan, New Zealand, Norway, Switzerland including Liechtenstein, the United Kingdom and the United States, and in relation to information that is in the public domain or constitutes basic scientific research according to article 8 (3).

### ADDITIONAL NATIONAL EXPORT CONTROLS – THE VIEW FROM GERMANY

Several EU Member States, including Germany, have made use of the discretion permitted by paragraphs 4, 5 and 6 of article 8 to allow Member



### NO DIRECT EQUIVALENCE TO US ‘DEEMED EXPORT’ CONCEPT

Many readers will be familiar with the concept in US trade compliance of ‘deemed export’, which refers to the way that the release of controlled technology or source code to foreign nationals within the United States is considered an export to the foreign person’s most recent country of citizenship or permanent residency (see 5 CFR 734.13; 22 CFR 120.50). This means that a US export licence must be obtained before releasing or otherwise transferring controlled technology to foreign nationals, regardless of their physical location in the United States. Deemed exports and reexports are examined in detail in a subsequent instalment of this article. But it should be noted that while there is no direct equivalent of deemed export controls in European legislation, as this article shows, comparable restrictions exist, at least to some extent.

States to implement additional provisions for technical assistance.

This means that German companies and organisations must observe additional restrictions relating to technical support when hiring, employing or cooperating with foreign nationals, the scope of which depends on the place of performance of the respective support, the intended end use and the recipient. The section below evaluates the scope of these national provisions.

#### 4.1 Foreigners

As already indicated, the nationality of the respective person is generally not a decisive factor in isolation, so much as is the concept of 'centre of life' according to the definition of 'foreigners' in the German Foreign Trade and Payments Ordinance ('AWV'). Accordingly, 'Foreigners... shall include such natural persons whose residence or habitual abode in Germany is limited to a maximum of five years' (see section 51 Para. 5 AWV in conjunction with section 2 Paras. 5 and 15 Foreign Trade and Payments Act ('AWG')).

As German export control law does not define the terms 'residence' or 'habitual abode', the definitions in the Fiscal Code of Germany ('AO') – which contains general provisions and fundamental regulations on the German tax and duty law – is a legitimate aid for interpretation. According to section 8 of the AO, residence is to be understood thus: 'Persons shall be resident at the place at which they maintain a dwelling under circumstances from which it may be inferred that they will maintain and use such dwelling.'

And pursuant to section 9, habitual abode is described as:

'... the place at which they are present under circumstances indicating that their stay at that place or in that area is not merely temporary. An unbroken stay of not less than six months' duration shall be invariably and from the beginning of such stay regarded as an habitual abode

**While this creates a licensing requirement for exports of or connections with listed military items (licences for which are not usually issued) but not for the technical support itself, knowledge exchange with Chinese nationals, particularly Chinese guest scientists, should be handled with caution given the potential for transfer of sensitive technologies for military use.**

in the territory of application of this Code; brief interruptions shall be excepted. The second sentence shall not apply where the stay is undertaken exclusively for visiting, recuperation, curative or similar private purposes and does not last more than one year.'

The tax law definition for residence seems to also make sense in the context of export controls, as it refers to the place for living and the intention to keep and actually use this place.

The AO's definition of 'habitual abode', however, is at odds with the AWG's reference to a five-year period prevailing in the context of an export control assessment.

To conclude, from the national (German) point of view, in addressing questions on the application of restrictions for technical support, nationality alone is not decisive but must be considered in conjunction with residency and habitual abode. And, while EU sanctions regulations provide no binding definitions on this issue, neither does German national law. However, the five-year period prescribed by the AWG does at least provide orientation for both the EU embargo provisions and the German foreign trade law.

#### 4.2 Restrictions on technical support

As regards restrictions on the provision of technical support to foreigners by residents, the licensing requirements regulated in section 51 AWV particularly apply.

Accordingly, caution and possibly authorisation are required for uses in connection with chemical, biological or nuclear weapons or other

nuclear explosive devices, including missiles capable of delivering such weapons, if the technical assistance is provided to foreigners who are not resident in one of the following countries:<sup>7</sup> Member States of the European Union, Australia, Canada, Iceland, Japan, New Zealand, Norway, Switzerland including Liechtenstein, the United Kingdom, and the United States.

Furthermore, prior approval is required in connection with a military end use if the technical support is to be provided to foreign nationals resident in a country that is subject to an arms embargo according to article 4 (1) b of the Regulation. At present, this includes<sup>8</sup>:

- Belarus;
- Democratic Republic of the Congo;
- Iraq;
- Iran;
- Lebanon;
- Libya;
- Myanmar (Burma);
- Democratic People's Republic of Korea;
- Russia;
- Zimbabwe;
- Somalia;
- Sudan;
- South Sudan;
- Venezuela; and
- Central African Republic.

In addition to section 51 AWG, and for the sake of completeness (as in practice it would seem to constitute an exceptional situation), the licensing requirements in relation to the construction or operation of nuclear facilities as regulated in section 52 AWG deserve mention because technical support by a German or resident is generally restricted if it is destined for the following (additional) countries: Algeria,

Iran, Iraq, Israel, Jordan, Libya, the Democratic People's Republic of Korea, Pakistan and Syria. However, it is to be highlighted that section 52 does not apply to citizens of those countries *per se*.

The licence requirements of both sections are thus detached from those relating to technical assistance around hardware and software listed in the Regulation and in Part I of the German Export Control List.

With reference to military end use, China should also be mentioned. China is not subject to an arms embargo in the sense of article 4 of the Regulation, but at a national (German) administrative level, based on the Declaration on China adopted by the European Council on 26 June 1989.

While this creates a licensing requirement for exports of or connections with listed military items (licences for which are not usually issued) but not for the technical support itself, knowledge exchange with Chinese nationals, particularly Chinese guest scientists, should be handled with caution given the potential for transfer of sensitive technologies for military use. China's advancements in fields such as artificial intelligence, quantum computing and biotechnology have dual-use potential and there is a risk that foreign research could unintentionally support China's defence capabilities. Syria, which is not an arms-embargoed country in the sense of article 4 of the Regulation so is not covered by section 51 of the AWV (in contrast to Russia and Iran), illustrates why persons from embargoed countries call for particular attention even where there is no link to nuclear facilities or armaments. As stated previously, the embargo regulation No 36/2012 includes a definition of a Syrian person that focuses on residence in Syria, and also the wording 'for use in Syria', while prescribing restrictions on technical assistance in connection with items listed in the embargo regulation (e.g., dual-use items). Attention should also be given to persons from countries considered to present the greatest risk of circumvention

of the sanctions against Russia. Particularly in the case of short-term assignments within the framework of internal cooperation, the handling of persons from countries such as China, Türkiye, the United Arab Emirates and India as well as countries in Central Asia and the Caucasus (e.g., Armenia, Georgia, Kazakhstan, Kyrgyzstan, Uzbekistan)<sup>9</sup> can be questioned if red flags point to a questionable end use with respect to the destination country. In general, embargo regulations do not restrict technical assistance for these foreign persons in Germany, and the restriction of section 51 AWW cannot be applied as these countries are currently not arms-embargoed according to the Dual-Use Regulation. Nevertheless, the application or cooperation may be intended to circumvent the Russia regulations.

Lastly, exemptions from the licence requirements could apply to items (e.g., in the case of information in the public domain, basic scientific research, non-listed items) that are regulated in section 53 AWW, whereas the EU provision precedes national law.

In summary, and with a focus on the majority of cases in practice, it can be said that whenever a foreign national from an arms-embargoed country is employed and their involvement in projects related to military applications cannot be excluded, the residency and habitual abode of this person must be assessed. Practically, this means that not only the foreign national themselves must be part of the export control assessment, but also their intended work area and relevant projects.

#### 4.3 Limited/open-ended residence permits

When it comes to employment of foreign nationals in Germany requiring a stay, a residence permit generally must be issued. The German Residence Act (*AufenthG*) governs seven types of this permit that are either limited or unlimited.<sup>10</sup>

In terms of export controls, it could be questioned whether it makes a difference for the evaluation if the person has...

- **Option A:** An open-ended residence permit, such as the EU long-term residence permit or a settlement permit.
- **Option B:** A limited residence permit such as the EU Blue Card or ICT card, but
  - a. no residence in DE/EU, or
  - b. a residence in DE/EU for several years, thus having a habitual residence in DE/EU.

The answer is (as is often the case): it depends.

Apart from embargo regulations, as mentioned above, section 51 AWW is the predominant applicable law for technical support in Germany stipulating the five-year rule and focusing on the centre of life, i.e., the residence or habitual abode is the decisive factor. The kind of residence permit should be considered of secondary importance because of the different conditions on the periods of stay.

Option A could constitute a (restricted) reliable criterion because the issuance of these open-ended permits usually<sup>11</sup> requires, *inter alia*, a residence permit for at least five years so that the five-year rule, according to export control law, is met.

With a view to Option B, a limited residence permit should not be used as a sole exclusion criterion in the assessment, but again in conjunction with the centre of life. The reason is shown in the following example in a simplified way, considering both the five-year rule and the Iranian embargo regulation:

**Example:** The residence permit of a person with Iranian nationality has been constantly limited for over six years in Germany. However, this person can prove that there was no stay in Iran during this period and that their centre of life is in Germany, or at least outside Iran. Furthermore, there are no indications that the support is for use in Iran. Consequently, there is little risk that the person will take the technical knowledge gained back to their home country. Neither the embargo regulation nor the licence requirements according to section 51 AWW are relevant.

Further, especially in the case of guest scientists who will only be in Germany or the EU temporarily, the use of the residence permit as an assessment criterion is not a practical approach.

#### CONCLUSION, OUTLOOK AND DISCLAIMER

In principle, the sole employment of a foreign national in Germany (or generally also other EU Member States) is not prohibited under European and German export control laws. As outlined in this article, caution is generally required in the case of persons from embargoed countries, and if the technical assistance takes place in connection with a sensitive end-use or dual-use-listed and sanctioned items according to embargo regulations.

This article has the aim of raising awareness of the issues from an export control perspective. It's also necessary to appreciate the relevant labour laws, data protection laws, anti-discrimination laws or similar laws that can have an impact on an export control-oriented assessment.

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#### LINKS AND NOTES

- <sup>1</sup> Means 'any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, advice, training, transmission of working knowledge or skills or consulting services, including by electronic means as well as by telephone or any other verbal forms of assistance'; see article 2 (9) of the Regulation (EU) 2021/821.
- <sup>2</sup> See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0833-20241217>, version 17/12/2024.
- <sup>3</sup> See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02012R0267-20240913>, version 13/09/2024.
- <sup>4</sup> See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02012R0036-20241125&qid=1741550276818>, version 25/11/2024.
- <sup>5</sup> See [https://finance.ec.europa.eu/publications/consolidated-version\\_en](https://finance.ec.europa.eu/publications/consolidated-version_en), version 20/12/2024, page 106, no. 2.
- <sup>6</sup> See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02021R0821-20241108>, version 08/11/2024.
- <sup>7</sup> See section 51 Para. 1 in connection with Annex II section A Part 2 of the Dual-Use Regulation.
- <sup>8</sup> See BAFA, Overview of the country-specific embargoes (in German only), [www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk\\_embargo\\_uebersicht\\_laenderbezogene\\_embargos.html](http://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk_embargo_uebersicht_laenderbezogene_embargos.html); or EU sanctions map, <https://www.sanctionsmap.eu/#/main>.
- <sup>9</sup> See [www.europarl.europa.eu/RegData/etudes/BRIE/2023/753943/EPRS\\_BRI\(2023\)753943\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753943/EPRS_BRI(2023)753943_EN.pdf); <https://2021-2025.state.gov/new-measures-targeting-third-country-enablers-supporting-russias-military-industrial-base/>; Notice to economic operators, importers and exporters ((2022/C 145 I/01), [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022XC0401\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022XC0401(04)&from=EN)).
- <sup>10</sup> See [www.bmi.bund.de/DE/themen/migration/aufenthaltsrecht/einreise-und-aufenthalt/einreise-und-aufenthalt-node.html](http://www.bmi.bund.de/DE/themen/migration/aufenthaltsrecht/einreise-und-aufenthalt/einreise-und-aufenthalt-node.html).
- <sup>11</sup> See [www.make-it-in-germany.com/de/visum-aufenthalt/dauerhaft-in-deutschland/niederlassungserlaubnis](http://www.make-it-in-germany.com/de/visum-aufenthalt/dauerhaft-in-deutschland/niederlassungserlaubnis).