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Government Regulations concerning ITT and Constitutional Rights – a Conflict?

I. General remarks:

Challenges to Export Control through Globalization and Technology

Generally speaking, the traditional state function of providing security is being challenged by two developments:

On the one hand, the state-legitimising function as a guarantor of security becomes a more and more international task: In the course of the so-called globalization, it is no longer possible to draw a clear distinction between internal and external security.

On the other hand, the complexity and the globalization of social interactions are increasing. In the development of new technologies by science and business, the "uncertainty" of conditions for action and the lack of knowledge of potential effects and possible applications have become part of everyday life. At the same time information and communication interrelationships are being accelerated and globalized, with the consequence that new findings and the awareness of them are being spread world-wide at high speed.

These developments are reflected in the field of export control, where, for example, Intangible Transfers of Technology (ITT) are concerned. Traditional export control measures refer to tangible goods. In that area, it is possible to enforce control by the customs authorities (border controls and checks). A different situation pertains to the transmission of information. Difficulties arise when this information is not delivered by tangible means (paper, manually), but is transmitted by electronic or verbal means of communication (physical border checks are not possible). The issue of modern approaches to export controls involves the question of to what extent controls may interfere with individual constitutional rights of the potential suppliers of relevant information.

In particular with regard to the assessment of foreign and security policy concerns during the licensing procedure, a fundamental role is played by the "danger prognosis" and the associated difficulties in the ascertaining of the circumstances. If there is any uncertainty in this respect, the question arises of to what extent the state can resort to the “Precautionary Principle” in the context of ITT control.

II. From the Aversion of Danger to the Prevention of Risk

"Security" in the legal context has traditionally been defined as the absence of danger – guaranteed by the national instrument of "prevention of danger". The challenges outlined above raise the question as to whether, and if so, to what extent security also embraces the absence of risks – by ensuring the "prevention of risks". "Danger" in the legal sense is determined by the awareness of circumstances which, by way of a prognosis or on the basis of experience, with a certain probability indicate that damage to a legally protected right can be inferred. The "awareness" of potential damage is thus of central importance for the effective guarantee of security. The more dangerous and significant this potential damage, the smaller are the requirements for the probability demanded for the risk forecast. However, the mere possibility of damage is never sufficient for the assumption of a danger. This shows the extent to which security (with regard to dangers) depends on the ability to assess potential damage, damage processes and the probability of the occurrence of damage on the basis of general experience. If nevertheless certain clues hint at a remote possibility of damage, the border-line between danger on the one hand and risk on the other hand is reached. As a consequence of this, the task of the state to guarantee security has been widened by the task of the prevention of risks - mediated in terms of the "Precautionary Principle".

The "Precautionary Principle", which has its origin in environmental, health-protection and consumer-protection law, has now become an integral part of the law of the European Union and its member states, the law of the USA, the World Trade Organization and even a general principle of international law.

Following the conventional concept of security outlined above, "risk" can be defined as a state of affairs which - if the respective course of events is not stopped - will cause a situation or a behaviour *possibly* leading to an impairment of legally protected rights. It is therefore crucial that a concrete, sufficient probability is replaced by the pure possibility - the abstract concern - of the occurrence of damage. In the context of the establishment of the cause for precautionary action, the precautionary principle implies a reversal of the burden of proof, which - bearing in mind the restrictions of the rule of law - can work based on the pattern of a refutable danger assumption.

This precautionary principle has become relevant beyond environmental law for the entire "right to safety": In view of the so-called "modern endangerment situations ranging from organized crime to terrorism" it is stated - in reaction to actual and alleged security needs in society - that the authority of the state to guarantee safety is increasingly no longer measured

only with a view to its ability to cope with disturbances of public security and order after they occurred, but more and more according to its ability to provide for security preventively.

III. The Constitutional State as Guarantor of Freedom and Security

The most important consequence of the "Precautionary Principle" is the extension of the permissible moment of state interference in basic human rights. As a consequence, a situation of conflict with the principle of the rule of law arises.

Certainly the rule of law establishes not only the obligation of the state to respect fundamental rights in its own liberty-limiting actions, but also to protect them against violations by private third parties (as expressed by Art. 1 I 2 and Art. 1 III of the German Basic Law). Thus liberty and security in the constitutional state belong together as equal partners. This confirms the core of a sentence coined by William v. Humboldt in 1792: "Because without security there is no liberty". However, the questions arise of how this congruence is defined, and of which range between rights to liberty and claims for protection it describes. In the field of physical security, which is indispensable for all other fundamental rights and which therefore is to be protected in a special way, the state has no or only a relatively small margin of discretion and thus, with respect to the rule of law, the most extensive powers of interference in the freedom of third parties. In German police law this becomes particularly clear, for example with the strict obligation of the police to intervene if the life of a person is in danger.

Against this background, two general rules for the correlation between security and freedom as elements of the rule of law can be formulated. On the one hand: The smaller the correlation between the action by the state and the physical security of the citizen, the higher the requirements for its justification under criteria of freedom. On the other hand: The more indirect the correlation between the action by the state and the physical security of the citizens, the higher the requirements for its justification. In this context, it is also necessary to consider whether the national measure serves the purpose of defence against a concrete, sufficiently likely danger, or whether it serves the purpose of precaution against "only" a possible risk.

IV. ITT Control and Fundamental Right Protection in the Multi-polar Constitutional Law Relationship

The following section examines the question of how export control - in this case the control of Intangible Transfer of Technology, ITT - can be brought into a balance under the rule of law taking into account security concerns and freedom by virtue of human rights.

1. Relevant Fundamental Right Positions and Interferences in the Context of ITT Control

The main subject-matter of Germany's Foreign Trade and Payments Act is the restriction of the export of sensitive **goods** in order to prevent "proliferation". In addition, for legal reasons related to security, it may be necessary to restrict the export of **software and technologies** which are relevant for the production of weapons of mass destruction (WMD), missile technology and conventional weapons. Such know-how or knowledge transfer can take place **in various ways**: by scientific co-operation, joint research and development projects, exchange of scientific personnel, by the training of laymen on sensitive technologies in enterprises, and by lectures at conferences and symposiums, congresses, fairs or by permission for the unrestricted use of EDP mechanisms.

However, these controls (generally realised through obligations to obtain permission) on knowledge inevitably interfere with the freedom of science and research guaranteed by Art. 5 III of the German Basic Law. The personal scope of the freedom of science includes anyone who is or wants to become scientifically active. In addition to university teachers and assistants, therefore, scientists in national and private research institutions as well as private scholars also enjoy fundamental protection of their rights. Mutual communication and in particular sufficient information about research results are absolutely vital for the understanding of science as an ongoing process. Art. 5 III of the German Basic Law becomes relevant, for example, if technical support as broadly defined by the law of export control is granted by universities and research institutes. Here, it is difficult to distinguish between circumstances which are subject to approval or which are **fundamental or basic research** (which is not subject to controls). In this respect, difficulties result both regarding the statement of whether a certain piece of information is relevant in the sense of the Export List, and also concerning the question of whether the information, as a component of the knowledge about the technology itself, forms a sensitive component in the sense of an item on

the list. Often, a whole batch of different pieces of information is necessary to ensure the quality of the technology. Moreover, the question of the qualification of know-how as **"public domain"** is raised.

Beyond that, conflicts with the freedoms of speech and information guaranteed by Art. 5 I 1 of the German Basic Law can occur within the field of intangible data transfer. Art. 5 I 1 clause 2 of the German Basic Law guarantees the right to unhindered information for everyone from generally accessible sources. A “source of information” is, on the one hand, every possible carrier of information, e.g. documents, the spoken word or the internet, and on the other hand, also the item of information itself. The entire process of keeping oneself informed is protected, both the mere receiving and the active obtaining of information. A source of information is generally accessible if it is “suitable and meant for providing information to the public, i.e. a not individually definable group of persons”. Generally accessible sources are for example the internet, speeches held in public or public meetings. Technical assistance easily constitutes a source of information in the sense of the definition given above, too. As long as it takes place in public, for example at conferences, through lectures or through publication of scientific insight, technical support is generally accessible.

To this extent, licensing requirements can be problematic from a constitutional point of view, as far as generally accessible areas of the **"public domain"** are concerned. This particularly applies to the “first publication” of sensitive technologies, if these are actually to be made accessible to a limited number of persons only, but are pro forma made generally accessible via the internet. This harbours the danger of the evasion of export control through the establishment of proliferation and terrorism forums in the internet.

Alongside these constitutional rights there are other constitutionally guaranteed general positions which concretize the state’s responsibility for security. On the fundamental rights level, first the citizen’s (certainly still very abstract) right to protection comes into play, whose life or physical integrity (protected by Art. 2 II of the German Basic Law in conjunction with Art. 1 I, III of the German Basic Law) might be threatened by the export of sensitive technologies (for instance in case of a terrorist attack carried out with the help of sensitive technologies). The thus concretized right to life and physical integrity on the one hand, and the security of the Federal Republic of Germany, the constitutional commitment to peaceful co-existence of the peoples (Art. 26 I of the German Basic Law) and the duty to maintain and protect international relations (Art. 32 I of the German Basic Law) on the other hand are also constitutionally protected rights.

This leads to the development of a multi-polar constitutional law relationship for the field of ITT control.

2. The "Multi-polar Proportionality Test"

The "Multi-polar Proportionality Test" combines the rule of adequateness of both the right of freedom and the right to protection. In this context, a balancing is necessary to reach practical concordance between the respective legal positions of the multi-polar constitutional law relationship with regard to the action taken by the state within the framework of ITT control (e.g. a licensing requirement). The importance of the respective interests is to be determined on the basis of the "Multi-polar Proportionality Test". Interests with parallel contents shift the emphasis in the context of the balancing: If, for example, the concerns of the constitutional duty to protect and of the public interest are the same, they can be added together and thus strengthen that aspect of a certain national aim pursued by means of the action by the state, including all legally protected rights standing behind that aim. In principle, all legally protected rights can be limited to give them optimal effect.

Regarding the national export control legislation and the example of ITT, this multipolar constitutional approach results in the following steps to evaluate certain rights:

First Step - Relevance of Physical Security

The physical security of the citizens represents an important constitutional good and is therefore to be appropriately protected. Any interference with the freedom of the exporters (guaranteed by defensive constitutional rights) would be justified in the interest of physical security (controls on ITT could be regarded as constitutionally permissible), if a concrete danger to physical security might occur. ITT itself leads to a mere possibility or abstract concern and therefore a risk of abuse of sensitive technologies (lives of people *might* come to harm); if therefore any uncertainty exists in this respect (for example over the effects and possible applications of a sensitive technology through options for its misuse), ITT control leaves the field of the concrete averting of a danger and reaches the field of abstract prevention of risk. To this extent, ITT control serves the purpose of physical security only indirectly; it thus departs from the intersection of security and freedom, so that a greater weight can be assigned to conflicting constitutional rights. As a result, although the physical security of the citizens is affected, a consideration of the conflicting constitutional rights is therefore necessary.

Second Step: Evaluation - Freedom of Science and Basic Research

Any state regulation of ITT control interferes with the freedom of science laid down in Art. 5 III of the German Basic Law. The special importance of this fundamental right is shown by the fact that it is guaranteed without reservation. A limitation is permissible only in favour of other constitutionally protected rights through the creation of practical concordance. Doubts regarding the constitutionality of certain national regulations could therefore exist:

a) As a less restrictive instrument for the national control of licensing requirements, so-called self-regulation can be considered. This less restrictive instrument must be as appropriate or effective as the existing instrument of national control. Since, however, freedom of science does not give researchers the right in their activities to disregard the rights of their fellow citizens to life or health, or public interests, pure self-regulation through personal responsibility cannot *per se* have absolute priority. In fact, this can only apply if the protection of the conflicting security interests can be guaranteed just as effectively via self-regulation. Especially as far as the essential rights to physical security are concerned, having self-regulation as the only instrument does not appear justifiable, in view of the fact that the personal responsibility of the researcher in the "risk society", given the existence of individual interests, is ambivalent (self-dynamics of research, third-party funds, Nobel prizes, competition with other researchers). There is a danger that to this extent the rule of adequateness (or the duty of sufficiency) which concretizes the obligation to protect is infringed. Against this background, self-regulation cannot generally be considered an instrument less restrictive than and just as effective as national ITT control. A national ITT control regulation is therefore necessary in terms of the second step of the proportionality test.

b) However, let us now move on to some more detailed remarks on the regulations of the German law of export control: Sections 45 *et sqq.* of the Foreign Trade and Payments Ordinance rule that **technical assistance** is subject to licensing only if the scientist in question was informed beforehand by the Federal Office of Economics and Export Control (BAFA) about its connection with WMD or if the scientist informed the Federal Office of Economics and Export Control him- or herself. It is especially important to establish this linkage between technical assistance and a (potential) sensitive use. Thanks to this information and licensing mechanism, the freedom of science is limited to a lesser extent

than in an earlier version where the scope of the limitation of fundamental rights was regarded as too uncertain.

c) An important exclusion from the licensing requirement is technology which is generally accessible or which forms part of basic scientific research. The latter covers experimental or theoretical work for the acquisition of new findings about fundamental principles of phenomena or facts which are not primarily directed towards a specific practical goal or a specific practical purpose. In contrast to the field of movement of goods, in which sensitive goods can easily be recorded in an Export List, the service sector experiences substantial delimitation difficulties of relevance to the question about the factors which determine a licensing requirement in a given case. Therefore both the scientist and the Federal Office of Economics and Export Control may have doubts about whether or not a licence is required in an individual case (a piece of information as part of the complex knowledge of a certain sensitive listed technology? Is the information really from basic scientific research or is it rather directed towards a specific practical goal or a specific practical purpose? Is the information already generally accessible?)

All in all, a possible "precautionary" establishment of the licensing duty by the Federal Office of Economics and Export Control would amount to a kind of "pre-censorship" and would as such be incompatible with the freedom of science.

Second Step: Evaluation - Fundamental Rights of Communication and Information

ITT control can also interfere with the fundamental rights of communication. The licensing requirement in Sections 45 *et sqq.* of the Foreign Trade and Payments Ordinance for technical assistance does include a limitation of information and use of or access to the source of information (delay by the procedure of ascertaining whether a licensing requirement exists; denial of the license prevents the legal obtaining of the respective piece of information). Again, attention needs to be paid to the exclusions from the information and licensing requirements mentioned above: The information and licensing mechanism is not applicable if technical assistance takes place via the transfer of information which is generally accessible or which forms part of basic scientific research. The control of technical assistance therefore does not at all interfere with the freedom of information.

Constitutional problems can arise in the case of the crucial question of what qualifies a piece of information as being generally accessible. The transfer of sensitive knowledge which has not yet been published but which is only intended to be does *not* constitute a transfer of generally accessible information. The decisive factor is the time of the transfer,

to make sure that the future publication does not change anything. If they are made available to anyone in a library, dissertations, professorial dissertations or other scientific texts are generally accessible. Information which is freely available in the internet without restriction of access is usually also generally accessible. In these cases, the Federal Office of Economics and Export Control does not consider technical assistance being as subject to licensing. Moreover, scientific findings, the publication of which is imminent, can be regarded as being generally accessible. This can be justified on the one hand by the right of scientists to publish their findings. Also, many research institutes commit themselves in their statutes to publish the scientific results of their research projects. The individual scientist therefore often has not only the right but also the obligation to publish his or her findings. A preliminary decision about the licensing requirements by the Federal Office of Economics and Export Control would therefore constitute unconstitutional pre-censorship. Finally, there is the danger that information which was intended to be passed on exclusively to a specific or specifiable addressee will be published merely in order to make it accessible to the public. The *per se* existing licensing requirement would thus be circumvented by the publication. An effective ITT control would no longer be possible. The discussion about the general accessibility of information shows that, given the crucial importance of this qualification for the existence of a licensing requirement, criteria need to be developed in which the conditions of general accessibility are specified in greater detail.

All in all, a limitation of the freedom of expression and the freedom of information by a general law on the potential protection of the physical safety of a large number of persons or on the protection of the foreign and the security interests of the state can be constitutionally permissible. The question whether ITT control through the Foreign Trade and Payments Act and/or Ordinance is constitutional can, however, only be answered by a concrete consideration of the conflicting interests. To the extent that these instruments lack exceptions for generally accessible information, this is constitutionally problematic. Against this background, criteria would also have to be developed for the field of ITT control, on the basis of which it can be determined when the software or technology to be transferred bears a reference to a relevant position of the Export List and whether this reference is sufficiently intense to justify a licensing requirement.

3. Summary

As a result, the existence of a licensing requirement can only be checked on the basis of the concrete individual case. Nothing more than rules-of-thumb can be formulated in this respect, and these complement the other rules-of-thumb for the weighing of freedom and security mentioned above (direct or indirect reference to the physical security; defence against concrete dangers or prevention of abstract risks) in the field of ITT control: The less obvious or useful the use of transferred knowledge is for certain military purposes (rather appearing uncommon, remote or irrational), the more likely that it is part of basic scientific research and therefore simply not subject to licensing. On the other hand, licensing requirements should exist where the research is directed towards a specific practical goal or a specific practical purpose related to military use that is subject to export controls. Finally, controls are justified depending on how dangerous the type of armament based on it is, and on the degree to which there is a **concrete danger** to the physical security of the citizens and the peaceful co-existence of the nations.

On the basis of real-life circumstance surveys, a catalogue should be developed in the light of the rules-of-thumb mentioned above, forming the basis for the setting up of guidelines for future proceedings.