Freedom of Exporting in Germany – At the Discretion of Courts and Export Agency BAFA? Some recent developments

Harald Hohmann*

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Our former Of Counsel, Professor Werner Meng, saw especially two risks for the freedom of exporting: firstly, extraterritorial application of export measures, possibly in violation of international public law,[1] and secondly, export decisions enacted in violation of national Constitutional and administrative law or of European and international law.[2]

* Dr. Harald Hohmann is attorney at the Law Firm Hohmann Rechtsanwälte in Büdingen (near Frankfurt), Senior Lecturer (Privatdozent) at the University of Frankfurt/Main and Visiting Lecturer at the Osaka City University. Presentation at the Conference 'Current Developments in International Economic Law (in Memoriam Prof. Werner Meng)' at the Saarland University of Saarbrücken of 20 April 2018, organized by the Directors of the Europa Institute.

1 Cf. *Meng*, Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht, Beiträge zum ausländischen öffentlichen Recht & Völkerrecht Vol. 119, 1994, pp. 300 ff., criticizing the broad term of jurisdiction over citizens in foreign countries, and especially the broad US jurisdiction over components made in the USA.

2 Cf. several legal opinions by *Meng* for the law firm Hohmann Rechtsanwälte, especially related to legal issues around the Iran embargo (e.g. questions of a de-listing of a German bank, which was formerly listed on Iran Annex IX).

The Export Trade Law of Germany and the EU is based on the principle of freedom of trade/freedom of exporting. This means that exporting goods is protected under the Constitution.[3] This freedom, therefore, may only be restricted to protect enumerated constitutionally accepted[4] welfare goods,[5] as long as the principle of proportionality is complied with.[6] Is this balance between constitutionally protected individual rights and welfare goods adequately observed in the daily practice of the German export agency BAFA[7] and the Courts? After discussing two current cases, we will assess some recent developments.

1. Two Current Cases

a) Case 1: Protective Vests for Kazakhstan

Company G in Germany intends to export protective vests to K in Kazakhstan. K is a police unit, established to protect against terroristic threats, and it intends to use the vests to protect diplomatic missions. Unexpectedly, an export licence was denied, stating that criterion 2 of the Council Common Position 2008/944/CFSP (on governing the export of defence items) would speak against the granting of such a licence; the argument was as follows: The vests are goods of repression, intended for a repression country. G counters: These ballistic protective vests, which are worn underneath clothing, are used exclusively to protect against bullets. Their heavy weight of about 20 kilogram makes them not useful in situations like the suppression of demonstrations etc. G continues as follows: In accordance with the strict criteria published in the *User's Guide* for this Council Common Position, the rejection of the export licence is unlawful, because the vests are neither a repression item nor is the destination country a repression country. How will the Administrative Court decide a complaint filed by G?

3 Cf. especially Art. 12 Basic Law of Germany, as well as Art. 14 Basic Law and corresponding EU fundamental rights, like the following: CJEU case law, Arts 26 ff. TFEU, Arts 1 and 11 EU Reg. 2603/69, as well as several articles of the EU Charter of Fundamental Rights, like Arts 15-17 and Art. 47. Cf. *Epping*, Die Außenwirtschaftsfreiheit, 1998, pp. 66 ff. and 162; and *Hohmann*, Angemessene Außenhandelsfreiheit im Vergleich, 2002, pp. 421 ff. Cf. also *Bernsdorff*, in: Meyer (ed.), Charta der Grundrechte der EU, 3rd edition 2011, Art. 11, pp. 282 ff.

4 Cf. *Hohmann*, (fn. 3), p. 463 . Reason: From the Constitutional protected freedom of exporting follows also the right to be free from arbitrary, not constitutionally proteteced, welfare goods.

5 Cf. e.g. Sect. 4 para. 1 and para. 2 of the German Export Act (AWG).

6 Cf. e.g. Sect. 4 para. 4 AWG.

7 BAFA is the Federal Office for Economic Affairs and Export Control. Some export decisions are taken by the German Ministry of Econmics (BMWi) together with BAFA. When we are talking here about 'BAFA' decisions, this covers decisions by BAFA and the BMWi.

b) Case 2: PAN Cables for Iran

Company G in Germany produces PAN (Polyacrylnitrile)–cables for textile processing. G intents to supply customer I in Iran with this product. An export licence was denied, based on a list position in Appendix II of the EU Iran Embargo Regulation, position II.A1.019 c ('Fibrous or filamentary materials' … as follows: (c) Polyacrylonitrile (PAN) continuous 'yarns', 'rovings', 'tows' or 'tapes').[8] The authority's view was, that these cables are possibly suitable for the production of high-tech carbon fibres and therefore suitable for a military or nuclear purpose. G submitted a technical expert opinion, that such a use is more or less excluded because due to their technical properties the cables are not suited for such a purpose. Only *in theory* could such a sensitive use be achieved, and only under horrendous costs; but because much better-suited starting materials are widely available, such a use is more than unlikely. G, therefore, counters BAFA's decision by arguing, that a listing of its PAN cables under the embargo violates Constitutional and international law. How will the Administrative Court decide a complaint by G?

2. Resolution of these two cases

a) Kazakhstan-Case

The protective vests are defence items, listed in export list position 0013 d. Therefore, an export licence needs to be obtained.[9] According to Criterion 2 Council Common Position 2008/944/CFSP, a licence has to be denied, '*if there is a clear risk* that the military technology or equipment to be exported might be used for internal repression'. Such internal repression is defined as: 'torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments'.[10]

From the quoted wording that a *'clear' risk* has to be assessed, derives in our view the necessity of double evidence: Firstly, the destination country (in this case Kazakhstan) has to be a clear repression country, and secondly, the items to be exported have to be clear repression items. To prove the first issue, BAFA has to produce evidence that Kazakhstan as a typical repression country practices torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and the like. The second issue includes verifications that protective vests are typically used for committing such acts of repression.

8 This case was before the reform of the EU Iran embargo of 16 January 2016. Today, a list position of Annex II would allow only a license requirement, but not an export prohibition; before this reform, it allowed an export prohibition.

9 Sect. 8 para.1 German Export Trade Control Order AWV.

10 Criterion Two, sentence 5 of Common Position 2008/944/CFSP.

This interpretation is backed by the *User‘s Guide*[11] which is intended to help the competent authorities to interpret and apply this Council's Common Position. According to the *User's Guide*, BAFA has to answer the following questions:[12]

- What is the current (and past) record of ratification of the recipient country with regard to relevant international and regional human rights instruments?
- What is the degree of co-operation with international and regional human rights mechanisms (like UN treaty bodies and EU)?
- Have the competent bodies of the UN, the EU or Council of Europe established that 'serious violations' of human rights have taken place in the recipient country?
- Have international or regional bodies (UN, EU, Council of Europe) raised concerns? Are there consistent reports of concern from local or international NGOs and media?
- Can the items in question really be used as a tool of repression? Is there a record of this equipment being used for repression in the recipient state or elsewhere? If not, what is the possibility of it being used in the future?
- Has the end-user been involved in repression? Are there any relevant reports on such involvement?

If BAFA and courts were obliged to answer these questions, we assume that the result would be clear: The recipient country Kazakhstan can hardly be regarded as a typical repression country, inter alia, because only minimal or singular repression activities have been reported.[13] There were also sufficient arguments as to why the ballistic protective vests may not be regarded as repression items. They serve as a protection only against projectiles and offer no protection against beatings or stitches, so that their use in demonstrations or protests is highly unlikely, especially when taking their heavy weight into account. That they are worn underneath clothing means that their potential for intimidation is very limited.

11 *User‘ s Guide to Council Common Position*, 2008/944/CFSP defining common rule governing the control of exports of military technology and equipment, Brussels 29 April 2009, 9241/09, PESC 545, COARM25. According to its Introductory Note, it 'summaries agreed guidance for the interpretation of its criteria and implementation of its articles'.

12 Ibid., pp. 38 ff. (especially pp. 40-44).

13 Cf. BT/Drs 18/1313 of 05 May 2014 and European Parliament Resolution 2013/2600 (RSP) of 27 April 2013. There are obviously violations of freedom of speech/freedom of press, and some political imprisonment; but there is also human rights cooperation with the EU. According to the analysis of Kazakhstan by the BICC (Bonn International Center for Conversion), the 'terror level' in Kazakhstan is 3; a typical repression country would have higher terror level, namely 4 or 5. A terror level of 5 means systematic repressions.

G submitted a legal opinion to the Court, written mainly by Prof. Meng, on the legal impact of this Council Common Position[14] with the following conclusion: Because of its incorporation into German national law,[15] this Common Council Position has to be mandatorily respected and included in the legal analysis, when interpreting provisions of the German Export Control Act AWG and Export Control Order AWV. The *User's Guide* has to be seen as legally binding guidance. Both instruments are specifying German export law. Under this approach, BAFA should answer the questions regarding the export item, the end user and the recipient country posed by the *User's Guide*. Then, in our opinion, the denial of the export licence would have been revoked.

In 2015, the Administrative Court of Frankfurt (5th Chamber) reached a different conclusion:[16] A violation of the Council Common Position 2008/944 represents a serious disturbance of the foreign affairs of the Federal Republic of Germany. When evaluating whether the export business violates the Council Common Position, the Federal Government has – so says the Court – a 'comprehensive assessment prerogative', as long as factually arguable criteria are used. The Court may only review this assessment prerogative regarding the question of whether BAFA has based its decision on accurate and completely identified facts, used plausible reasoning without obviously erroneous or inherently contradictory evaluations. The Court said: This was the case here, and it continued: The *User's Guide* cannot lead to a different result, since such a guidance document may not limit the discretion of the agency. The Court added: A well-trained man may carry a protective vest of 20 kilos.

A critical review of this decision shows the following:[17] The 1st Chamber of the Administrative Court of Frankfurt has so far always required, that BAFA decisions must be comprehensive, based on concrete factual circumstances. By contrast, the 5th Chamber now follows the theory of a comprehensive assessment prerogative for the Federal Government/BAFA, without reviewing the facts in regard to their plausibility. Before using this prerogative, the Court – in our opinion – should have investigated the facts by answering the questions posed by the *User's Guide*.

14 Cf. *Meng,* Legal Opinion of 26 March 2015. In this Legal Opinion, Prof. Meng has argued that in spite of Art. 29 EU Treaty, saying that CFSP Council Common Positions are only binding on the Member States, the legal impact of this Common Position for German Law must be derived from its national implementation in Germany. According to this Legal Opinion, also Art. 3 of this Council Common Position, arguing that only minimal harmonisation should be achieved, is of no relevance for the interpretation of German export law, since the German government has never argued, that it wants to pursue a stricter regulation.

15 Especially via the Policy Principles of the Federal German Government for the Export of Weapons and other Military Equipment.

16 Administrative Court of Frankfurt, 5 K 819/14.F, Judgement of 15 June 2015.

17 Cf. *Meng*, seminar presentation of 17 September 2015.

b) Iran Cable- Case

Decisive for this Case was Art. 2 para.3 Regulation 267/2012 (former version), which stated:

> 'Annex II shall include other goods and technology which could contribute to Iran's enrichment-related, reprocessing or heavy-water-related activities, to the development of nuclear weapon delivery systems, or to the pursuit of activities related to other topics about which the International Atomic Energy Agency (IAEA) has expressed concerns or has identified as outstanding, including those determined by the UN Security Council or by the Sanctions Committee'.

According to this, there were only three possibilities to justify a ban on trade with Iran under Annex II:

- Option 1: The export concerns items which were listed by the UN themselves as prohibited items for Iran.
- Option 2: The items are directly related to Iran's enrichment activities or its nucler weapons delivery systems.
- Option 3: The items are topics about which the IAEA has expressed concerns or has identified them as outstanding.

In this case, we found evidence that these three options, that are also named in Secury Council Res. SR 1737(2006), were not applicable here. That means, that the mandate of the EU Iran embargo was exceeded here.

For the following two reasons, the exporter G should have been successful:

- Firstly, no concrete danger:

There was no concrete danger that the items could be used in a sensitive nuclear or military manner (as proven by the technical expert opinion submitted to the Court). In our view, only a concrete danger for the public welfare goods may justify the denial of an export licence.[18] A merely abstract danger is not a valid justification to deny an export licence.

- Secondly, narrow interpretation of the Iran list position:

In our opinion, the wording of the quoted Iran list position has to be teleologically reduced in its meaning. The need for this narrow interpretation follows from the fact, that the agency's reasoning appeared to be conflicting with international law. Because the measure taken was not justified in the sense of Art. XXI (c) GATT, since the UN mandate was clearly exceeded, a violation of the principle of free trade of Art. XI GATT occurred.[19] And together with Prof. Meng we pointed out: These norms

18 Cf. infra, fn. 38 and text accompanying fn. 31.

19 Thus already *Hohmann*, (fn. 3), pp. 126 ff., 132 with references; cf. also *Stoll*, Freihandel und Verfassung. Einzelstaatliche Gewährleistung und die konstitutionelle Funktion der Welthandelsordnung, ZaöRV 57/1997, pp. 83 ff., 122. That Iran is currently no WTO member, but only a country with overserver status, does not matter: These central provisions of GATT/WTO Law can be regarded as global customary law or as generally recognized legal principles (cf. *Hohmann*, (fn. 3), p. 144), which is also applicable to Iran.

granted individual protection[20] (according to the *Nakajima*-decision).[21] Due to Art. 216 para.2 TFEU, these WTO norms enjoy primacy of application with regard to EU law.[22] In addition, the broad interpretation of the list position represented an intervention into the constitutionally protected freedom of exporting. This means that – in our opinion – the wording of this list position should have been interpreted in a way, that only such filaments/fibres are included in this position, that are specially designed for nuclear uses, e.g. in a gasultracentrifuge. Under this approach, it was obvious that G‘s PAN cables were not covered by the list position.

In the year 2014, the Administrative Court of Frankfurt (5th Chamber) came to a different judgment:[23] The item clearly falls within the wording of the list position. The differentiation according to the use of this cable (for textiles or for sensitive purposes) is not possible, and also a constitutional interpretation of the listing (in the sense of narrowing the list position) cannot be done because the wording is clear. In spite of the technical expert opinion submitted to the Court, it cannot – says the Court – totally be excluded, that the item may nevertheless be used for this sensitive (i. e. nuclear) purpose. The Higher Administrative Court did overrule this decision, but due to procedual reasons, the result remained more or less the same.

3. Observations by Literature on the treatment of the freedom of exporting in Courts

The thesis expressed 1989 by *Kuss*,[24] that the constitutional freedom of exporting had played no role in the practice of the courts **from the sixties to the eighties**, is – at least in parts – not valid anymore today. It shows, however, that this constitutional right

20 Cf. especially *Meng*, Gedanken zur Frage unmittelbarer Anwendung von WTO Recht in der EG, in: Festschrift Bernhard, 1995, pp. 1063 f., 1084; *Petersmann*, Constitutional Functions of International Economic Law, 1991, pp. 124 ff.; *Hohmann*, (fn. 3), p. 132; similarly pleadings by General Attorney *Tesauro*, CJEU, case C-53/96, *Hèrmes*, ECLI:EU:C:1998:292, paras 28 ff. and *Saggio*, CJEU, case C-149/96, *Portugal/Rat*, ECLI:EU:C:1999:574, paras 22 ff.; cf. also *Kuschel*, Die EG Bananenmarkt-Ordnung vor deutschen Gerichten, EuZW 1995, p. 690; *Stoll*, (fn. 19), pp. 123 f., 128; *G. Sander*, Wirkungen des Weltwirtschaftsrechts auf supranationale und nationale Rechtsordnungen am Bsp. des GATT, 2003, p. 21; *Hilf/Schorkopf*, WTO und EG: Rechtskonflikte vor dem EuGH? Zum EuGH-Urteil vom 23.11.1999, EuR 2000, pp. 74 f., 77.

21 CJEU, case 70/87, *Fediol*, ECLI:EU:C:1989:254, para. 22, and CJEU, case 69/89, *Nakajima*, ECLI:EU:C:1991:186, paras 27-32. We pointed out, that these conditions are met here, since the first Iran Embargo Regulation 423/2007 referred explicitly to SR Rs. 1737 (2006), adopted under UN Chapter VII, and the second Iran Embargo Regulation 267/2012 has an implicit reference to UN Chater and WTO Law in consideration 27 of its preamble. The argument, that the list position must be interpreted narrowly, follows then from (1) Art. XI and Art. XXI GATT, (2) Art. 2 para. 3 Iran Embargo Regulation 267/2012, and (3) Art. 12 GG and Sect. 4 para. 4 AWG.

22 Cf. *Hohmann*, (fn. 3), p. 136.

23 Administrative Court of Frankfurt, 5 K 268/14.F, Judgement of 16 July 2014.

24 *Kuss*, Gesetzestechnische Mängel und Rechtsschutzlücken im Außenwirtschaftsrecht, Die Verwaltung 22, 1989, p. 58.

had been in a state of deep sleep (like a 'Sleeping Beauty') for the administrative courts up until the nineties.[25]

The *South Africa* and *Venezuela* decisions of the Administrative Court of Frankfurt (1st Chamber) from **the nineties** are noteworthy.[26] In an argument over the issuing of an export licence for replacement parts for patrol vessels of the South African Marine under the former Sect. 5 c AWV, in 1992 the Administrative Court required a new decision. The reason was that the constitutional right to reasonable discretion had been violated because major criteria had not been taken into account. In 1996, the Administrative Court of Frankfurt ordered the defendant BAFA to issue two export licenses concerning spare parts for handguns to be delivered to Venezuela. Because there were no indicators for the concrete danger, the plaintiff had the right to an export licence, derived from the constitutional freedom of exporting.

Recently, *Prof. Hindelang* published a new analysis regarding Court case law concerning the freedom of exporting.[27] This analysis suggests that during the **years 2000 – 2010** the Administrative Court of Frankfurt (1st Chamber) held on to its view that denial decisions require a plausibility check in regard to the facts. The Court acknowledged in its *Gun*-decision of 2010 that the danger for a serious interference of foreign relations *could* arise from non-compliance with the Council Common Position 2008/944/CFSP. But the Court continued, that this would require some *factual evidence of non-compliance with this Council Position*. In the decided case, the Court held that BAFA had failed to 'make comprehensible for this export based on actual facts that such a concrete danger *really exists*'. The circumstance alone that an item has a certain objective nature does not in itself justify the assumption, that the concrete danger of an undesired transfer or sensitive use is realised.[28] The Court continued; BAFA has neglected – for example via consultation with the German Federal Foreign Office or the Secret Services – to determine and verify the facts concerning a concrete danger in this case so that it based its decision on erroneous or incomplete facts.[29] We think this illustrates the difference to the aforementioned Kazakhstan decision of 2015.

The years from 2010 on: After a reorganisation, under which the jurisdiction for export law was transferred from the 1st to the 5th Chamber of the Administrative Court of Frankfurt (ca. 2013), there are clear tendencies to minimise these approaches, as the aforementioned decisions (Kazakhstan and Iran) suggest. Still, the situation for exporters is better today than it used to be in the eigthies and nineties: While there was maybe one decision per year in regard to the freedom of exporting in the nineties,[30] it

25 *Hohmann*, (fn. 3), pp. 429 ff.

26 Administrative Court of Frankfurt, 1/3 E 623/92, Judgement of 17 September 1992, *South Afrika* and Administrative Court of Frankfurt, 1 E 1218/93, 25 January 1996, *Venezuela*.

27 *Hindelang,* Entwicklungen des gerichtlichen Rechtsschutzres im deutschen Außenwirtschaftsrecht, in: Ehlers/Terhechte/Wolffgang/Schröder (eds.), Aktuelle Entwicklungen des Rechtsschutzes und der Streitbeilegung im Außenwirtschaftsrecht, 2013, pp. 9 ff.

28 Administrative Court of Frankfurt, 1 K 536/10 F, Judgement of 27 May 2010, *Gun decision*, para. 35 (Juris).

29 Administrative Court of Frankfurt, *Gun decision*, (fn. 18), paras 35 ff. and following *Hindelang*, (fn. 27), p. 21.

30 Cf. *Kuss,* (fn. 24), p. 56 and *Hindelang*, (fn. 27), p. 9.

is estimated that nowadays there are about between 5 and up to 10 or more lawsuits per annum lodged against BAFA decisions.

At the same time, the relevant literature states clearly that the denial of a trade licence may only be justified with or based on a **concrete danger**.[31] An abstract danger (or risk prevention) is not sufficient; a present danger, however, is also not required; necessary and sufficient is therefore a concrete danger.[32] The Constitutional reason for this hypothetical of far-fetched considerations of public welfare will regularly not be regarded as 'rational welfare interests', that are able to limit the basic freedom of exporting; or such limitation would be regarded as a disproportionate intervention into this right.

The judicial practice sometimes takes the stand that, because of the far-reaching prerogative of the German government, even far-fetched or theoretical facts may be sufficient to allow an intervention into the freedom of exporting. Their argument is as follows: Only the circumstances that lead to a BAFA decision have to be clearly stated. The following test is, therefore, decisive; the decision may not be 'obviously wrong, based on erroneous facts or rely on extraneous considerations'.[33] In its decision '*demilitarised trucks'*, the Administrative Court of Cologne affirmed a concrete dan-

31 This is currently consent in export law; thus especially *von Bogdandy*, Die außenwirtschaftsrechtliche Genehmigung: Rechtsnatur und Rechtsfolgen, VerwArch 82/1992, pp. 53, 69 following *H.P.Ipsen*, Außenwirtschaftsrecht und Außenpolitik, 1967, p. 65; thus also: *Ehrlich*, Materielles Genehmigungsrecht, in: v. Bieneck (ed.), Handbuch des Außenwirtschaftsrechts, 2. Aufl. 2005, § 16, Rn. 13 (p. 403) and *Hindelang*, (fn. 27), p. 18 as well as several decisions by the Administrative Court of Frankfurt. Especially concerning the individual case intervention under Sect. 6 AWG, requiring a concrete danger, cf. *Kollmann*, in: Wolffgang/Simonsen (eds.), AWR Kommentar, § 6 AWG, Rn. 7 and *Hohmann*, in: Hohmann/John (eds.), Kommentar zum Ausfuhrrecht, 2002, § 2 AWG, paras 8 f.; cf. also *Giegerich*, Sicherheit auf See: Maßnahmen gegen die Verschiffung von Massenvernichtungswaffen an internationale Terroristen nach Völkerrecht und deutschem Recht, in: Zimmermann/Tams (eds.), Seesicherheit vor neuen Herausforderungen, 2008, pp. 5 ff., 22.
Some critical remarks were written by *Sauer*, in: Hohmann/John (eds.), (fn. 31), § 3 AWG, Rn. 10 (while quoting case law of the Administrative Court of Frankfurt in his para. 34, which has accepted the concrete danger approach) with the following reasoning: Because of unforeseeable and very complexe events and issues, it will not always be possible, that only one issue/event will be decisive for the concrete danger.

32 Cf. *Hindelang*, (fn. 27), p. 18. Of dissenting view is only *Weith,* Die exportrechtliche Ausfuhrgenehmigung unter Berücksichtigung von Gemeinschaftsverwaltungsrecht und Aspekten der Gefahrprävention, 2009, pp. 26 ff., who accepts export-related interventions based not only on concrete danger, but also on risk prevention. -An additional question may arise (and did arise during the Meng-Symposium), whether even in case of very high risks (like military or nuclear risks or high reputation shocks for Germany) a concrete danger is required: Our answer is yes. There is no dispute that BAFA is allowed to intervene into the freedom of exporting in such situations, but if this is based on abstract danger or risk prevention (and not on concrete danger), the concerned exporter is suffering a special sacrifice, and he must then be compensated. Please see the parallel discussion in environmental law under the precautionary principle (it does allow the State to intervene, but leaves open the question, whether the State must compsensate the affected person), and in privacy law, which largely prohibits storing personal data only for risk prevention, if there is no concrete danger which justifies this storage.

33 Administrative Court of Cologne, 1 K 6937/96, *demilitarised truck*, Judgement of 11 November 1999, para. 27.

ger of military use for trucks that had been demilitarised prior to being exported, so that the outward appearance clearly was not of a concrete danger. Our critical assessment of this case is that it drew very general evaluations, that the Federal Republic of Germany had come under international scrutiny for other exports, so this could have been the straw to break the camels back, are not sufficient to deny the export authorisation.[34] Instead, the facts have to be established in such a way that a military use is almost certain to occur (concrete danger). As long as the denial of an export licence interferes with the constitutional rights and freedoms of the exporter, an abstract danger (namely a sufficient probability based on general or abstract considerations) will generally not be sufficient to justify the intervention into the exporter's basic rights.[35]

The legal situation would be different if the intervention into the exporter's basic rights (e.g. the denial of the export licence) were to be compensated based on the exporter's special sacrifice to public welfare. The legal situation would also be different, if we were dealing with danger *investigation*, because such temporary measures do not require a concrete danger – here an abstract danger is sufficient.[36]This may encompass BAFA measures like on-site-investigations after issuing the export authorisation, to verify that no danger of a sensitive use exists. The denial of an export licence, however, is no measure of a danger investigation, but an intervention into the basic right of the exporter, the freedom of exporting, protected by Art. 12 and sometimes also by Art. 14 of the German Constitution (Grundgesetz).[37]

This means that in order to not violate the freedom of exporting, BAFA may deny an export licence regularly only in cases of a concrete danger. Based on a concrete danger, the German Federal Ministry of Economics may use Sect. 6 of the German Export Act (AWG) as a justification for an individual case intervention. Thus, without compensation, such interventions based on abstract dangers or on risk prevention are not justified by the Constitution.[38] In addition, BAFA may not justify intervention into the freedom of exporting with a total risk exclusion.[39] As soon as the exporter

34 Thus ibid.; cf. *Hindelang*, (fn. 27), p. 19.

35 Cf. *Schenke,* Polizeirecht, in: Steiner (ed.), Besonderes Verwaltungsrecht, 7. Aufl. 2003, ch. II, paras 46-48 (pp. 215-216).

36 Cf. Ibid., ch. II, para. 61, p. 222.

37 And corresponding EU basic rights; cf. *Epping*, (fn. 3), pp. 66 ff. and *Hohmann*, (fn. 3), pp. 421 ff.

38 This follows from the principle of proportionality and from the fact, that only welfare goods, which are protected by the Constitution, allow an intervention. And an intervention into the freedom of exporting for external relations is allowed by case law only in case of an interference of foreign affairs that makes it impossible or hardly possible for the German government to continue its interests in foreign relations vis-à-vis other countries; cf. *Epping,* (fn. 3), p. 360. This is only possible, when concrete facts are available, allowing the conclusion that the foreign relations of Germany may be heavily impaired; thus also conclusions by literature: cf. *Epping,* (fn. 3), pp. 341 and 361; *Hohmann*, (fn. 3), p. 461; *Sauer*, in: Hohmann/John, Kommentar zum Ausfuhrrecht, 2002, § 7 AWG, para. 11 and para. 17 (pp. 414 and 416). In our view, the requirement of such concrete facts means, that a concrete danger is at stake. In addition, we cannot see how an intervention into freedom of exporting based on hypothetical facts could comply with the principle of proportionality.

39 Of dissentig view is now a BAFA decision, against which a lawsuit has now been started.

has minimised the concrete danger identified by BAFA in such a way that the danger is nolonger likely with sufficient certainty, a denial of the licence would violate the basic rights of the exporter. The export licence has to be granted.[40] After doing everything possible to minimise the risk as much as possible, it seems unlawful to deny the licence – without compensation – because the risk is not completely eliminated. This is disporportionate, since no one can eliminate all reasons (including far-fetched reasons) by 100 %.

For these principles to be effective, the Courts have to insist that, as far as possible, the facts are investigated by BAFA or by the Courts themselves. Based on these facts, it must be assessed, whether an abstract or a concrete danger is at stake, since only the latter may justify an intervention into the exporter's right under the Constitution. Only after this investigation and plausibility check is done, the wide discretion or the assessment prerogative may be used; it may not be used as an excuse to not establish the significant facts or to be satisfied with general/abstract or far-fetched/theoretical findings or assumptions in order to establish a concrete danger in the case.

4. Some Current Trends regarding the freedom of exporting

Trend 1: Instead of insisting on proof of a concrete danger, BAFA and the Courts are occasionally satisfied with an abstract danger to deny a licence in recent decisions. Then far-fetched or even theoretical facts may be regarded as sufficient. This could represent a disproportionate intervention into the freedom of trade.

This becomes clear in the aforementioned Iran Cable Case. The technical expert opinion clearly had stated that no reasonable person would use the PAN fibres in order to produce sensitive high-tech carbon fibres, because much more suitable materials are widely available. Nevertheless, BAFA and the Court were satisfied with an abstract danger. If the facts had been established in the described Kazakhstan Case by using the questions in the *User's Guide*, we are convinced that it would have been clear that the protective vests were really not repression goods and that evidence for regarding Kazakhstan as a repression country is indeed rather flimsy. The Cologne decision concerning demilitarised trucks underlines this trend. If the facts had been better established, the decisions would likely have been contrary to what they are now, because a concrete danger was missing.

Trend 2: Especially given the high importance given by Courts to the assessment prerogative of the Government[41] (together with critical press) may have a negative impact on the freedom of exporting. This has facilitated a very generous interpretation of foreign affairs risks by BAFA. We see the following three consequences:

- First: It seems that the authority does not always focus on the fact that export control means only risk minimisation. As soon as the exporter proves that the con-

40 Cf. Art. 12 GG and Sect. 8 para. 1 German Export Control Act AWG.

41 Court case law has made clear, that a wide assessment prerogative can hardly be accepted under the Constitution, when significant interventions into basic rights are likely; cf. *Epping*, (fn. 3), p. 392 (with references).

crete danger is eliminated with reasonable certainty, a licence *has* to be granted because the concrete danger has turned into an abstract one. Occasionally, it may happen that BAFA decides in a different way, because it would prefer a total risk exclusion, at least if higher risks are at stake. Such risk exclusion could mean the end of rational handling of export law, where both parties are working very hard to find a balance between the foreign policy interests of the German Government on one hand and the individual rights of the exporter on the other, by trying to eliminate a concrete danger. Here the exporter is left without any measures or possibilities; no one can exclude all risks in life. Who should then help the exporter avail his freedom to export?

- Second: This could support the Courts' tendency to avoid analysing the content of BAFA's export decisions. Independent of the question of whether the facts have been sufficciently established, the Courts may sometimes tend to uphold the decisions as long as they are not 'obviously wrong, rely on erroneous facts or are based on extraneous considerations'. This *deferential rational basis test* of the Courts is not enough when evaluating the freedom of exporting, especially given the advanced knowledge of BAFA, by using intelligence information, vis-à-vis the exporter.
- Third: This may support BAFA's tendency to view indirect risks as central to denying an export licence; especially the treatment of indirect good listings and of indirect person listings has to stop due to considerations of transparency. This describes a sales/export ban or a licence requirement in regard to non-listed goods, which may be used in connection with listed goods, or in regard to non-listed persons, who are closely connected to listed persons. Transparency requires that such indirectly covered goods or persons have to be listed themselves, in order to trigger a sales/export ban or a licence requirement.[42]

The second aspect (favouring of procedual aspects over content related questions) became very clear in the appeal decision of the Iran Cable Case.

Trend 3: BAFA has an examination competence and therefore must and should examine, whether an applicable provision violates a higher-ranking law. If that is the case, this provision has to be interpreted in accordance with the Constitution.[43] Occasionally, BAFA and the Courts view this as inadmissable, arguing that this would mean a dismissing competence, i.e. a competence to dismiss a statute, which they do not possess. This view may threaten the freedom of foreign trade.

42 Cf. *Hohmann*, Mittelbare Bereitstellung im Iran Embargo: Von der mittelbaren Personenlistung zur mittelbaren Güterlistung, in: Ehlers/Wolffgang (eds.), Recht der Exportkontrolle: Bestandsaufnahme und Perspektiven, 2015, pp. 217 ff.

43 Cf. *Jarass*, in: Jarass/Pieroth (eds.), GG, 13th edition, 2014, Art. 20 GG, Rn. 32-41; *Demleitner*, Die Normverwerfungskompetenz der Verwaltung bei entgegenstehendem Gemeinschaftsrecht, NVwZ 2009, pp. 1528 ff.; *R. Hutka*, Gemeinschaftsrechtsbezogene Prüfungs- und Verwertungskompetenz der deutschen Verwaltung gegenüber Rechtsnormen nach europäischem Gemeinschaftsrecht und nach deutschem Recht, 1997.

An explicit example can be found in the Iran Cable decision, where the Court refused a teleological reduction of the wording of the provision, arguing that the wording was clear.

Trend 4: Not in every case do the Courts interpret the relevant administrative export regulations as discretion forming administrative provisions. For example, Council Common Position 2008/944/CFSP has to be considered when interpreting provisions of German export law in regard to the export of defence items, because of its incorporation into national law. In these cases, the *User's Guide* is a legally binding guidance document which may not be disregarded without good reason. Still, the Council Common Position plays a limited role, and the *User's Guide* hardly ever influences the decisions of BAFA and the Courts. This may lead to a situation where countries with minimal repression records are surprisingly regarded as repression countries, so that defence items may not be exported to them. This means, that transparency is lacking and allows for, from the exporter's point of view, arbitrary decisions concerning permissible countries for defence items. A solution needs to be found.

The Kazakhstan decision is good evidence of this.

Trend 5: It follows the same line, that Courts do not always put the same importance on established principles of administrative, Constitutional and international public law. These, however, have to be applied, in order to allow for the constitutionally required balance between public welfare goods of the State on the one hand and the individual rights of the exporter on the other. Among these principles are, *inter alia*: protection of legitimate expectation[44] etc., and the binding effect not only of basic rights but also of central principles of WTO law – the latter in cases where they may be regarded as protecting individual rights in accordance with the *Nakajima*-case law. However, BAFA and the Courts occasionally tend to view these principles as of only limited importance and, regarding international law, it is seen as more or less insignificant. This means that an important vehicle for the freedom of exporting may not be used.

This became very obvious in the Iran Cable Case.

5. Summary:

First: Concrete Danger:

For a better implementation of the freedom of exporting in BAFA and court decisions, all parties involved need to acknowledge, that a concrete danger – and not an abstract danger or risk prevention – justifies an intervention into the freedom of exporting (without compensation). Complete risk elimination is disproportionate. To ensure this in practice, the Courts have to establish the facts adequately to enable them to perform a plausibility check of whether a concrete danger is at stake. Far-fetched or theoretical risk factors are not qualified to justify such an intervention. By contrast, danger investigation can be based on risk prevention. Lately, the Courts did not always

44 Cf. *Meng*, Legal Opinion of 15 July 2013 for our law-firm.

observe this correctly. The deferential rational basis test should also be reviewed as to whether it is a correct standard for evaluating this basic right.

Second: Transparency:

Transparency is another central tool to be established, in order to prevent – in the eyes of the exporters – arbitrary decisions. For this purpose, BAFA and the Courts should apply all available legal instruments. Among them is the examining competence, which allows them to interpret applicable norms in a way complying with the Constitution, as well as generally accepted principles of Constitutional, administrative and international public law, *inter alia* the interpretation of administrative regulations as discretion forming provisions. Indirect risks should no longer play a central role.

Third: Court access and exporting freedom

For the implementation of the basic rights of court access[45] and of freedom of exporting, it would be helpful if the number of (necessary) lawsuits against denied export licences were rising constantly. Without such a separation of powers in action, the administrative power of BAFA could become larger. It is against this background that exporters are expecting that Courts are not creating unnecessary (especially procedural) restrictions for their lawsuits.

There are more real hurdles for the rights of court access and freedom of exporting. A few exporting firms could possibly shy away from openly fighting against BAFA in courts, because they do not want to endanger the good relations with the agency. Additionally, there are the long time periods for Court procedures to consider. For example, a plaintiff at the Administrative Court of Frankfurt may have to wait up to two years just to get a first Court response, due to the backlog of cases. If a case goes through all three instances of the administrative courts in Germany (Administrative Court, Higher Administrative Court and Federal Administrative Court), up to seven years or more may pass by. Nearly no exporter is willing to submit a Constituitonal complaint thereafter.[46] In addition, this results in high fees for Courts and attorneys, with the added detriment, that the disputed business deal is most likely no longer available. This seems hardly acceptable for the freedom of exporting and effective legal protection. Therefore, some changes are urgently required.

Our two urgent proposals for modifications are as follows:

- A special export chamber should be set up at the administrative courts of Germany, at least in the Administrative Court of Frankfurt, which is responsible alone for all suits brought against BAFA; this chamber should be staffed sufficiently so that long waiting periods are eliminated.

45 Art. 19 para. 4 GG.

46 This is our experience. However, such a Constitutional complaint to the German Constitutional Court could be of decisive importance, in order to encourage BAFA employees to modify their approaches.

- Appeals should be regularly admitted in cases where the Administrative Court decides against the plaintiff, to ensure that the time consuming and procedurally complex non-admission complaints are reduced to a minimum.

In addition, we have three more proposals under the assumption, that the role of exporters should be strengthened in order to minimise the need for lawsuits:

- In decisions of the German governmental export committee,[47] a representative of the BDI[48] business branch concerned (like VDMA, ZVEI)[49] could be heard, in order to better integrate interests of the concerned exporters into the decision of this committee.
- As an alternative to the usual lawsuit of an exporter, a representation suit on another's behalf could be allowed for export law,[50] so that e. g. the relevant BDI branches concerned (like VDMA, ZVEI etc.) may sue on the concerned exporter's behalf. This would help in cases, in which the exporter has concerns about suing in his own name.
- It could be useful for the better understanding between BAFA and the export business, if the BAFA employees were allowed to work in the export business for a limited time (e.g. at the end of their careers, cf. the example Japan).[51] Bureaucratic and business requirements could then be better understood.

BAFA and the Courts are important gardians of the freedom of trade. A few enhancements could improve this role.

Prof. Werner Meng supported the view, that a few issues should be modified, by better integrating accepted legal principles. This should encourage us to continue to do so.

(Version of 23 November 2018, 2 pm)

47 This is a committee represented especially by members of the following ministries of Germany: Ministry of Economics, Ministry of Foreign Affairs, and Ministry of Defense. Concerning the Bundessicherheitsrat, cf. *Augsberg*, Rechtsschutzdefizite im Außenwirtschaftsrecht? Zum Rechtsschutz gegen Entscheidungen des Bundessicherheitsrates, in: Ehlers/Terhechte/Wolffgang/Schröder (eds.), Aktuelle Entwicklungen des Rechtsschutzes und der Streitbeilegung im Außenwirschaftsrecht, 2013, p. 189 ff.

48 BDI (Bund der Deutschen Industrie) is the German Association of Industry.

49 VDMA (Verband Deutscher Maschinen- und Anlagenbau) = German Association of Machine and Installation Producers, ZVEI (Zentralverband Elektrotechnik- und Elektronik-Industrie) = German Association of Electronical and Electric Industry.

50 Each exporter would then have a choice between usual lawsuit by himself and a representation suit of this BDI branch (on his behalf).

51 Cf. *Hohmann*, (fn.3), pp. 39-49, pp. 327, 356 and 530.