



Why do US Export Controls Affect Non-US Companies?

Why do US export controls affect non-US companies, is perhaps the most frequently asked question at export control seminars, especially by audiences with little prior exposure to the subject.

The answer is simple but the background rather less so. The answer is that US export controls affect non-US companies as a matter of commercial reality rather than law. Many lawyers, in the field of international public law, will argue that the manner in which US export controls, both under the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR), are applied to non-US persons is not in accordance with generally established principles of international law. However, to my knowledge, this has never been tested in court. That is not to say that the view that US export controls cannot legally be applied in the current fashion is incorrect, rather that there are other, more powerful factors in play here.

If the US Government believes that a foreign party has breached, say, ITAR a draft charging letter will be sent to that party. Failure to respond to the letter may result in a finding of guilt by a US Administrative Law Judge. Such a lack of response, followed by a finding of guilt, would most likely result in the foreign party being placed on a denied persons list. The effect of such a listing is to bar the named party from dealing with the United States to the extent set out in the denial order. The ability of the US Government to place whoever it chooses on such a list is not, generally, a matter of legal dispute.

It is the fear of such a listing which tends to bring allegedly errant companies to the negotiating table in order to settle allegations of breach of US export controls. Given that, even after voluntary disclosure of breaches of US export controls, penalties can run to the tens of millions of dollars, the powerful position in which the availability of denial orders places the US regulator is readily apparent.

Turning to penalties, these can be civil or criminal and in the case of ITAR are \$10 million per violation and in the case of EAR £250k per violation. Even a single export can amount to several violations. It may seem self-serving to say this but, typically, the cost of compliance in an organisation is a fraction of the cost of an investigation, should one take place. In fact, the legal costs of an investigation may themselves exceed the actual penalty.

Who is affected by these controls? Anyone, individual or company, who has access to goods, software, technical data or services which themselves are subject to US export controls. It should be noted that "subject to US export controls" is NOT the same as "comes from the US". US export controls are, largely, predicated on the position that the controls apply to US goods, software, technology and services anywhere in the world and, in many cases, even after these have been incorporated into non-US manufactured items. So, it is entirely possible that an item which is "subject to US export controls" could be sourced from anywhere – it is NOT sufficient simply to run a report on your ERP system for US origin.

Do you exercise due diligence in this area? Are you comfortable that, the next time you enter the US, you will not be staying for rather longer than you planned? You would not be the first UK company director to be affected. Does your Directors' and Officers' Insurance cover cases brought in or by the US authorities?.