

The scope of export that requires permission under the Foreign Trade Act

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1. Introduction

Under Article 19 of the Foreign Trade Act, those who wish to export strategic goods must obtain permission from the Minister of Trade, Industry and Energy. With regard to the scope of application of this article, this paper would like to discuss whether permission should be obtained even if the government's ministries export, and whether the exporter should obtain permission even if the other party of the export owns the nationality of the Republic of Korea as dual nationality holders.

In order to review these, two points must be considered. The first is the growing number of cases of intangible transfer of strategic materials-related technologies through e-mail and social networking services. The second is that requiring permission constitutes a regulation that restricts people's rights, which should be interpreted strictly.

While limiting people's rights to a minimum, the goal of preventing the spread of weapons of mass destruction should be achieved, and for this, it is necessary to regulate the scope of exports that require permission.

2. The government's obligation to obtain permission

2.1 Foreign Trade Act

Article 19 Paragraph 2 of the Foreign Trade Act requires export permits for transfers from the people of the Republic of Korea to foreigners. If so, should government ministries such as the Nuclear Safety and Security Commission get the permits to export to foreigners?

In particular, according to Article 26-3 of the State Public Officials Act, the head of each State agency may appoint foreigners to public office except in fields related to national security, safety, and secrecy. In addition, the head of each State agency may restrict the appointment of dual nationality holders (referring to persons holding both the Korean nationality and foreign nationality) to national security, etc. Therefore, should a government official get permission to submit data to a government official who is a foreigner or dual nationality holders?

In practice, if a non-government agency hires foreign students or universities accept foreign students, the export permit is deemed necessary. Thus, in this case, it seems that permission is necessary. However, we should further consider whether the government can also be seen as a Korean citizen, the subject of exports.

2. the scope of the Korean people

Administrative bodies cannot be allowed to have legal personality because they have authority, not subjective rights. In the case of a dispute over the imposition of tariffs on the director of the Seoul International Post Office, the court said, "The director of the Seoul International Post Office is only an agency in charge of the postal service and cannot be considered legally capable of paying taxes or having a liability property, so he cannot be a tax payment obligor under the customs law".[1] The same logic states that if a government ministry exports strategic goods, it does not need to obtain permission from the Minister of Trade, Industry and Energy. To be exact, government ministries are not allowed to apply for permission because they do not have legal personality.

2. 3 Building Act

According to Article 11 of the Building Act, a person who intends to construct a new building or substantially repair an existing building, shall obtain permission from the head of a Si/Gun/Gu. If so, should the government get permission even if it builds? The Building Act has special exception to buildings for public use. Article 29 of the act stipulates that When the State or a local government intends to construct a building, it shall first consult with the permitting authority having jurisdiction over the location of the building and an agreement that the State or a local government made with the permitting authority through consultation shall be deemed building permission granted under Article 11.

Considering that the purpose of the Building Act to improve the safety, function and beauty of buildings should be applied to public buildings as well as to individual buildings, the construction of public buildings requires permission, but the act has prepared a special procedure because the government agencies have problem with going through the licensing process.

4. Revision of the Foreign Trade Act

When government agencies transfer intangible technology while carrying out official duties, there is a risk of proliferation of weapons of mass destruction, so the transfer should be controlled as in the case of individual exports. However, the current foreign trade act requires permission only when an individual exports, and there is a limit that the authorizing ministries cannot sanction even if a government ministry exports without permission. Therefore, it is necessary to make a provision that imposes a legal obligation to consult with the authorized department, referring to the example of the Building Act.

3. Multiple Nationals.

3.1 Foreign Trade Act

Article 19 of the Foreign Trade Act stipulates exports as

1. Transfer from Korea to a foreign country;
2. Transfer from a national of the Republic of Korea (including a legal entity established pursuant to domestic laws) to a foreigner (including a legal entity established pursuant to foreign laws) in the Republic of Korea or a foreign country.

Then, it is necessary to consider whether the transfer to dual nationality holder constitutes exports.

3.2 Criteria for Foreigner's Discrimination

Transferring to dual nationality holder is the transfer to Koreans and also to foreigners. Considering that dual nationality holders exercise their rights as citizens in other countries where they have nationality, it is unfair to treat them exactly the same as Koreans in the export control field.

The State Public Officials Act also prohibits foreign nationals from being appointed as public servants in areas that are related to national security and confidentiality, and restricts the appointment of dual nationality holders. In light of this, it is reasonable to impose restrictions on exports of strategic goods to obtain permission.

Article 26-3 (Appointment of Foreigners and Dual Nationality Holders)

(1) The head of each State agency may appoint foreigners to public office, as prescribed by Presidential Decree, etc., except in fields related to national security, safety, and secrecy.

(2) The head of each State agency may restrict the appointment of dual nationality holders (referring to persons holding both the Korean nationality and foreign nationality; hereinafter the same shall apply) to any of the following fields of service designated by Presidential Decree, etc

1. National security that is required to maintain the existence of the State and the fundamental constitutional order;

2. Security and confidentiality fields which may cause grave injury to the national interest, if the content thereof is leaked;

3. Fields to which it is inappropriate to appoint dual nationality holders, such as policy-making and implementation thereof in relation to diplomacy and interests between countries.

3.3 The Nationality Act

Article 11-2 of the Nationality Act stipulates that A person who has both the nationality of the Republic of Korea and that of a foreign country by birth or under other conditions prescribed by this Act and who is prescribed by Presidential Decree (hereinafter referred to as "person with multiple nationalities") shall be treated only as a national of the Republic of Korea only in applying the laws and regulations of the Republic of Korea. It also says that when the head of a central administrative agency intends to enact or amend statutes, to allow a person with multiple nationalities to be treated the same as with an alien, he/she shall consult with the Minister of Justice in advance.

The nationality act seems to have focused on preventing multiple nationality holders from exercising their privileges as foreigners in Korea. However, requiring locals to obtain permission when handing over strategic materials to multiple nationals does not grant privileges or benefits to multiple nationals. Therefore, the Foreign Trade Act should be revised to treat multiple nationals the same as foreigners in consultation with the justice minister.

4. Conclusions

As with the transfer of strategic materials by government agencies, there is a proliferation risk for WMD, so it is necessary to prepare a process for mandatory consultation with authorizing agencies. In addition, it is necessary to make a special clause into the Foreign Trade Act that differs from the Nationality Act, in which multiple nationals are treated only as citizens of the Republic of Korea.

REFERENCES

- [1] Korea Supreme Court 1987.4.28, 86 누 93