

Global Insight: Export Controls in the Times of COVID-19 (Coronavirus)

Overview

During the expansion of the COVID-19 virus, export restrictions have been a frequent tool adopted by governments to preserve existing stocks of medical equipment and medicines in the domestic markets. A number of the key examples of such restrictions are set out below. At the same time countries have also relaxed certain regulatory requirements and reduced import barriers for favouring the acquisition of essential goods.

Supply of Medical Products

- **European Union**

At the beginning of the outbreak in **Europe**, countries such as France, Czechia and Germany (e.g. Order BAnz AR 04.03.2020 B1) halted exports of personal protective equipment (“PPE”) including gloves, masks, shields and protective clothing. In the case of Germany, exports were only admitted under “very limited conditions”.¹ These measures contrasted with the principle of free movement of goods within the EU market as reflected in Article 35 of the Treaty of the Functioning of the European Union (“TFEU”).

The European Commission, aware that the European production of PPE was concentrated in a limited number of Member States (such as Czech Republic, France, Germany, and Poland) stepped in by mid-March. As a result, France and Germany committed removing their export restrictions (e.g. the German order was repealed on March 19). At the same time, the European Union adopted the Commission Implementing Regulation (EU) 2020/402 making the exportation of certain medical products (itemised in the regulation’s Annex 1) to third countries subject to export authorizations.² The export authorizations must be processed by competent national

¹ Reuters, Germany bans export of medical protection gear due to coronavirus, March 4, 2020. <https://www.reuters.com/article/health-coronavirus-germany-exports/germany-bans-export-of-medical-protection-gear-due-to-coronavirus-idUSL8N2AX3D9>.

² Commission Implementing Regulation (EU) 2020/402 of 14 March making exportation of certain products subject to the production of an export authorization, OJEU L77, p. 1 of March 15, 2020.

authorities within 5 working days, but under exceptional circumstances and for duly justified reasons that period can be extended by a further period of 5 working days.³

In addition to these measures, the European Union has adopted harmonized standards for medical devices to respond to urgent needs (including devices such as medical face masks, surgical curtains, gowns and suits, and washer-disinfectors for sterilisation)⁴, and has clarified conformity assessment and market surveillance procedures within the context of the COVID-19 threat.⁵

- **UK**

The United Kingdom has banned the “parallel export” of 80 crucial medicines including adrenaline, insulin, paracetamol and morphine to protect supplies during the coronavirus outbreak. The full list of medicines subject to the restrictions is available online.⁶

³ The UK has also implemented Commission Implementing Regulation (EU) 2020/402 and has issued guidance on the export control process for PPE. When assessing whether or not to grant an export license, the Department of Health and Social Care takes into consideration (1) whether the export threatens PPE supplies within the UK and the EU; (2) whether it satisfies a legitimate need for medical use in the destination country and (3) whether the export is needed to fulfil the purposes of the Regulation (including support for an EU-affiliated, WHO or international organization’s activities).

⁴ European Commission press release, Coronavirus: harmonised standards for medical devices to respond to urgent needs, March 25, 2020.
https://ec.europa.eu/commission/presscorner/detail/en/ip_20_522.

⁵ Commission Recommendation (EU) 2020/403 of 13 March 2020 on conformity assessment and market surveillance procedures within the context of the COVID-19 threat, OJ L 79I , 16.3.2020, pp. 1–5. See also: Commission’s guidance for ramping up the production of essential medical equipment and material in three areas: the production of masks and other personal protective equipment (PPE), leave-on hand cleaners and hand disinfectants and 3D printing. (March 30, 2020).
https://ec.europa.eu/commission/presscorner/detail/en/ip_20_558.

⁶ Available at
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877739/Medicines_that_cannot_be_parallel_exported_from_the_UK.csv/preview

The UK government describes parallel exporting as the purchase of medicines meant for UK patients but usually sold for a higher price in another country, potentially causing or aggravating supply problems.⁷

Breaches of the ban will be considered a breach of regulation 43(2) of the *Human Medicines Regulations 2012* and may lead to regulatory action by the Medicines and Healthcare products Regulatory Authority (against the wholesale dealer's licence. Specifically, sanctions can include an (i) an immediate suspension of the license or suspension of the supply of certain products under license, and (ii) a 28-day notice proposing to vary the license to restrict or prevent export activity.⁸

- **United States**

On April 3, the President of the United States signed an order directing his administration to prevent crucial exports of N-95 face masks and other PPE needed in the fight against the coronavirus.⁹ The order was adopted under the Defense Production Act,¹⁰ and is accompanied by a memorandum vesting the authority to restrict exports on the Department of Homeland Security, the, Federal Emergency Management Agency and the Department of Health and Human Services.¹¹

In parallel, on March 6, the United States Trade Representative (“USTR”) granted relief for Chinese imports on more than 100 medical items including face masks, sanitisation products, gloves and isolation gowns. The exclusions from tariffs apply to 27 companies, on which Section 301 (of Trade Act of 1974) tariffs of 15% were originally imposed in

⁷ UK Government press release, Crucial medicines protected for coronavirus (COVID-19) patients, March 20, 2020. <https://www.gov.uk/government/news/crucial-medicines-protected-for-coronavirus-covid-19-patients>.

⁸ UK Government guidance on Parallel export and hoarding of restricted medicines, updated on March 23, 2020. <https://www.gov.uk/guidance/parallel-export-and-hoarding-of-restricted-medicines#breaching-the-restrictions>.

⁹ Statement from the President Regarding the Defense Production Act, April 3, 2020: <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-defense-production-act-3/>.

¹⁰ Reuters, Trump invokes Defense Production Act to stop export of masks, April 3, 2020. <https://www.reuters.com/article/us-health-coronavirus-usa-memo/trump-invokes-defense-production-act-to-stop-export-of-masks-idUSKBN21M00E>.

¹¹ Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use, April 3, 2020. <https://www.whitehouse.gov/presidential-actions/memorandum-allocating-certain-scarce-threatened-health-medical-resources-domestic-use/>.

September 2019.¹² In addition, on March 30, the USTR invited interested parties to submit comments if they believe further modifications to Section 301 tariffs are necessary.¹³

- **Russia**

The Governmental Resolution No. 223 dated March 2, 2020, prohibited the export of 17 types of medical equipment, including face masks, plastic shoe covers, gloves, surgical scrubs, gas masks, protective suits, etc. The ban will remain effective until June 1, 2020.¹⁴

Basic Goods and Food Supply

An increased number of countries are imposing restrictions on food exports to ensure domestic food security. As an illustration, the Russian government has limited exports of grains between the months of April and June to a quota of 7 million tonnes. In addition to this, the customs union of Russia, Kazakhstan, Belarus, Armenia and Kyrgyzstan also decided this week to restrict exports of sunflower seeds, rye and soybeans until June 30. The decision will come into force on April 12.¹⁵

Other countries have adopted similar actions. Vietnam temporarily suspended new rice export contracts, while Serbia has stopped the flow of its sunflower oil and other goods.¹⁶ Ukraine has banned buckwheat exports until July 1 to protect local demand.

¹² WSJ, U.S. Trade Officials Grant Tariff Relief for Face Masks, Medical Equipment, March 6, 2020. <https://www.wsj.com/articles/u-s-trade-officials-grant-tariff-relief-for-facemasks-medical-equipment-11583516931>.

¹³ USTR: Response to Coronavirus Crisis, March 30, 2020. <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/march/ustr-response-coronavirus-crisis>.

¹⁴ <https://tass.com/economy/1126373>.

¹⁵ Reuters, UPDATE 3-Russia sets grain export quota, to sell bulk of stockpile amid coronavirus, April 2, 2020. <https://www.reuters.com/article/health-coronavirus-russia-grains-stockpi/update-3-russia-sets-grain-export-quota-to-sell-bulk-of-stockpile-amid-coronavirus-idUSL8N2BQ1LQ>.

¹⁶ Bloomberg, Countries Starting to Hoard Food, Threatening Global Trade, March 24, 2020. <https://www.bloomberg.com/news/articles/2020-03-24/countries-are-starting-to-hoard-food-threatening-global-trade>

Cambodia will ban rice exports to ensure local food security. Indian rice traders have stopped signing new export contracts due to labour shortages and logistics disruptions.¹⁷

Compliance with International Trade Law

Under Article I of the General Agreement on Tariffs and Trade (“GATT”), Member States cannot discriminate between their trading partners (known as the “Most-Favoured-Nation” principle or “MFN”). This means that export controls should not target a particular country destination. As long as the export restrictions do not apply in a discriminatory manner the MFN shall not be infringed.

At the same time GATT Article XI prohibits export restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures. Nonetheless, GATT Article XX(b) establishes an exemption under which Member States have the right to restrict exports when those measures are necessary to protect the health of humans. Although WTO Member States receive a high level of deference for determining the level of health protection they may deem appropriate, they still have to comply with the obligation of good faith established in the chapeau of the exception. Accordingly, export restrictions shall not constitute “means of arbitrary or unjustifiable discrimination” or a “disguised restriction on international trade”.

¹⁷ The New York Times, Trade Restrictions on Food Exports Due to the Coronavirus Pandemic, April 3, 2020, <https://www.nytimes.com/reuters/2020/04/03/world/europe/03reuters-health-coronavirus-trade-food-factbox.html>.

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