



May 13, 2019

File: 44170

To: Stephen Peel, Novalpina Capital

From: Daniel Reisner, HFN

Subject: **Access to information relating to regulated exports under
Israeli law**

A. Introduction

1. I have been requested to advise on the legal rules and limitations in Israel applicable to the sharing of information relating to regulated defence exports.
2. More specifically, I have been asked what information relating to such exports can be shared with third parties, and especially non-Israeli third parties.

B. Experience and expertise

3. My name is Daniel Reisner. I have been a lawyer and member of the Israeli bar for over 30 years.
4. Following a lengthy career as a senior government lawyer, for the last 11 years I have been a partner at the Israeli law firm of Herzog, Fox & Neeman (HFN), where I chair the firm's international law, defense national security and international trade practice groups.
5. Today, my department is widely viewed as the leading practice group in Israel in the field of export controls. Our clients include almost all of the prominent Israeli defense, homeland security and cyber companies as well as many of the leading multinationals in these fields.

C. Introduction to Israeli Defense Export Control Laws

6. Similar to most other western countries, Israel has two separate export control regimes – a defence export control regime, and a civilian export control regime.
7. The defence export control regime is administered by the Ministry of Defence's (MOD) Defence Export Control Agency (DECA) under the 2007 Defence Export Control Law (DECL)¹. This regime primarily focuses on items, services and knowhow appearing on the MOD's Combat Equipment List² (similar to the Munitions List common in many western countries). In addition, DECA is also responsible for the administration of dual-use exports (as defined in the Wassenaar Arrangement Dual-Use List), provided that either the end use or the end user of such exports are defence or security related.
8. The civilian export control regime is administered by the Ministry of Economy ("MOE"), and is primarily focused on dual use exports not intended for security or defence end users or end uses.
9. For the purposes of this memorandum, and due to the fact that all of NSO's current product line in Israel falls under the defence export control regime, I have been asked to focus solely on this regime, as administered by DECA.
10. The DECA export control regime is relatively unique in that it includes a four-stage export licensing process:
 - a. Every potential defence exporter is first required to register in the DECA administered Defence Exporters Registry;

¹ A copy of which can be found at <http://www.exportctrl.mod.gov.il/English/Pages/Defense-Export-Control-Law-.aspx>.

² Available at

<http://www.exportctrl.mod.gov.il/Documents/%D7%97%D7%95%D7%A7%20%D7%94%D7%A4%D7%99%D7%A7%D7%95%D7%97%20+%20%D7%A6%D7%95%D7%95%D7%99%D7%9D%20+%20%D7%AA%D7%A7%D7%A0%D7%95%D7%AA/tsav-pikuah-tsiyud-lehima.pdf> (Hebrew only).

- b. Once a company or an individual has been duly registered, they are then required to register with DECA all controlled products, services or knowhow which they may wish to export;
- c. Only after both the above steps have been completed, the company or individual may apply for a Marketing License, which is generally required before they may conduct any marketing activities for regulated goods, services or knowhow. A marketing license covers all marketing activities, from the initial meetings with potential customers, up to and including signing a binding contract;
- d. Finally, before any items, services or knowhow can be physically exported from Israel to another country (or to a non-Israeli in Israel), an Export License must be sought and received from DECA.

D. Confidentiality of DECA Licenses

- 11. As part of their registration process (stage 2 referred to in Section 10(b) above), all controlled products, services and knowhow are granted a security classification by the MOD³. Such classifications range from "unclassified", "confidential" and "secret", and up to the highest classification of "top secret".
- 12. DECA licenses (both marketing and export) are similarly classified, using the same classification levels. The MOD decides on the specific license classification as a function of the classification of the relevant products, services and knowhow; the sensitivity of the customer country; and the overall sensitivity of the project in question.
- 13. In the event that a license has been classified as "confidential" or higher, all of its contents would be deemed as "secret information" under Israeli law. Consequently, providing any such information to an unauthorized third party (Israeli or otherwise) would be a violation of Section 113 of the Israeli 1977 Penal Law (the Israeli equivalent to the Official Secrets Act in the UK) and could lead to criminal proceedings.

³ See DECA's explanation of this process on their website at <http://www.exportctrl.mod.gov.il/Guide/Pages/Step3.aspx> (Hebrew only).

14. However, and possibly counter-intuitively, the fact that a specific license has been deemed by DECA to be "unclassified" does not mean that its contents may be shared with third parties.
15. On the contrary, DECA constantly emphasizes to Israeli defence exporters that it is totally prohibited to share any DECA license (irrespective of classification), or any information relating to any such license, with any third party, without the express written and prior authorization of DECA.
16. This requirement is usually specifically included in the DECA licenses and product registration documents (I cannot attach an example, for the obvious reason that doing so would, in itself, be a violation of said rule).
17. In addition, DECA representatives repeatedly stress this policy requirement in training sessions provided to defence exporters. It also used to appear prominently in the FAQ section of DECA's previous website, but has yet to re-appear on the new DECA website (although we have no basis to believe that this represents a policy change in this context).
18. Additionally, we are aware of several cases (the details of which we are not at liberty to discuss) in which this DECA license confidentiality requirement was invoked in the context of international investigations and court proceedings, resultantly preventing any disclosure of information relating to defence exports, including details relating to DECA licenses.
19. We have also been involved in several other cases in which this same confidentiality requirement prevented us from divulging licensing details to Israeli banks, who required such information for the purpose of AML verifications relating to defence export transactions.
20. Rather exceptionally, in September 2018 Israeli media published a recent decision of the Tel Aviv District Court, in which it was decided to accept the MOD's position to refuse a freedom of information request to make public information relating to the security cooperation between Israel and Sri Lanka between the years 2002 and 2011.

21. The court's decision in this regard (which was originally not made public due to a temporary gag order) referred to the fact that the information sought included, *inter alia*, information relating to export transactions with this country. The court explained that publishing the information sought (in violation of the secrecy agreement between the two states) would have problematic consequences for Israel's relations with other countries⁴.
22. This case is quite unique, in that normally such proceedings would remain outside of public sight as a result of permanent gag orders issued by the courts at the request of the MOD. However, it is quite indicative of the MOD's consistent policy that any publication of details relating to Israeli defence exports is prejudicial to Israel's national security and foreign relations.
23. It should be clarified that any perceived violation by an Israeli defence exporter of this DECA licensing confidentiality requirement could result in serious consequences, ranging from temporary or permanent revocation of licenses and registration, monetary fines, or even (in extreme cases) the initiation of criminal proceedings.
24. I can further attest that the DECA leadership has recently personally reconfirmed to me, in a face to face meeting, their strict expectation of full compliance with this requirement by all registered defence exporters.
25. To exemplify the extremes to which the MOD has gone to protect what it perceives to be sensitive information relating to Israel's defence exports policies – DECA has developed a list of (currently) 101 jurisdictions, for which a marketing license will no longer be required with respect to most products (although the requirement of an export license remains intact).

⁴ See <https://jacobinmag.com/2018/11/israel-arms-sales-eitay-mack-idf>, which provides an in-depth analysis (from the perspective of a human rights activist) of the Israeli government's non disclosure policies relating to defence exports, including reference to the recent Tel Aviv District Court decision.

26. While this has been widely viewed as a step towards easing Israel's otherwise highly onerous export control requirements, the actual list of the 101 jurisdictions is not public, and is only made available to registered defence exporters, on condition that they formally undertake not to share it with third parties.
27. In other words, only companies which have been licensed by DECA can learn which jurisdictions do not require a marketing license. Once again – this is the result of the extremely high sensitivity attributed in Israel to the government's export policies.

E. Analysis and conclusions

28. I have been asked what information relating to controlled Israeli defence exports, including details concerning related licenses, can be shared with third parties, and especially non-Israeli third parties.
29. On the basis of the MOD rules and policies outlined above, as well as our extensive experience in dealing with such matters, I can state that it is strictly prohibited for any Israeli defence exporter to share information relating to any licenses received from the MOD with respect to controlled defence exports.
30. This prohibition is wide in scope, and would cover not only specific details appearing in the licenses (such as customer information; product information; value; license terms, conditions and limitations etc.) but also more general information, including the number of licenses issued (or refused) and the names of customer countries (or countries refused for licenses).
31. While generally applicable to all third parties, the above would especially apply with regard to any non-Israeli entity or individual, whether in Israel or abroad.
32. Consequently, in any instance in which there arises a need (or interest) to share information relating to DECA licenses with a non-Israeli third party, we would first need to approach DECA in this regard, and seek their guidance and permission (which would usually not be easily forthcoming). Doing otherwise could result in serious potential consequences, for involved companies and individuals alike.


Daniel Reisner

Herzog, Fox & Neeman