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Note Verbale

The Permanent Mission of the Federal Republic of Germany to the Organization for Security and Cooperation in Europe, Vienna, presents its compliments to all Permanent Missions and Delegations to the OSCE and to the Conflict Prevention Centre and has the honour, with reference to the Decision No 20/95 of the Forum for Security Cooperation, to enclose a copy of the 2018 return submitted by the Government of the Federal Republic of Germany to the Questionnaire on Conventional Arms Transfers.

The Permanent Mission of the Federal Republic of Germany to the OSCE, Vienna, avails itself of this opportunity to renew to all Missions and Delegations of participating States to the OSCE and to the Conflict Prevention Centre the assurance of its highest consideration.



Vienna, 28 June 2019

To

- all Permanent Missions/Delegations to the OSCE
- the Conflict Prevention Centre

Vienna

Questionnaire on OSCE Participating States' Policy and/or National Practices and Procedures for the Export of Conventional Arms and Related Technology

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Question 1

Basic principles, policies and/or national practices on the export of conventional arms and related technology

Decisions in Germany on the export of war weapons and other military equipment are mainly based on the *Political Principles Governing the Export of War Weapons and Other Military Equipment* (“*Political Principles*”) of 2000 and on the relevant European and international commitments entered into by the German government, and particularly the EU Common Position defining common rules governing the control of exports of military technology and equipment. The 2000 Political Principles make a fundamental distinction between exports to NATO / EU countries and to other (“third”) countries.

Exports of war weapons and other military equipment to NATO / EU countries (and NATO equivalent countries, such as Australia, Japan, New Zealand, Switzerland) are in line with Germany’s security interests and in principle unrestricted. Exports of war weapons to third countries, in contrast, are only feasible if indicated by paramount foreign and security policy interests of Germany, bearing in mind the interests of the Alliance; employment aspects are not allowed to play a significant role.

The export of other military equipment is authorised to the extent that the provisions the *Foreign Trade and Payments Act* do not indicate otherwise; these provisions aim to protect the security of the Federal Republic of Germany, the peaceful coexistence of nations, and foreign relations.

Decisions on exports of war weapons and other military equipment are made on the basis of a thorough examination of each case. The issue of respect for human rights in the countries of destination is a key factor in deciding whether or not to grant licences. Another significant aspect is whether armed conflict is taking place or is likely between the country of destination and its neighboring states. In general, it has to be ensured that the military equipment will only be used for the purpose of defence and remain in the country of destination.

The European Council Common Position defining common rules governing control of exports of military technology and equipment adopted on December 8, 2008 – an integral part of the 2000 *Political Principles* - reflects the principles which have always formed a basis for German defence exports. The Common Position has formulated this in instructions for action which the licensing agencies must use as a basis for their decisions.

Germany’s policy on defence exports forms part of its foreign and security policy, which aims to preserve peace. It corresponds to decisions on values which have been firmly entrenched across the political spectrum since the German constitution was promulgated. There is a broad consensus in the Bundestag on the legal and political foundations of Germany’s policy on exports of military equipment and the restrictive approach taken by the government.

The principles of Germany’s export policy are reflected in the fact that military equipment accounts for only a small proportion of total German exports. For example, exports of war weapons traditionally account for significantly less than 0.3 % of all exports, and mainly go to countries which are members of NATO or the OECD. This is particularly true for major military weapons systems (*e.g.* combat tanks, combat aircraft, and combat helicopters).

Question 2

National legislation governing the export of conventional arms and related technology

- (1) German defence exports are regulated in the *Basic Law*, the *War Weapons Control Act* and the *Foreign Trade and Payments Act* in conjunction with the *Foreign Trade and Payments Ordinance*. In addition, the German government adopted “*Political Principles*” in January 2000 to provide the licensing agencies with guidelines for the scope of and limits to the discretion open to them. In general, the national legislation distinguishes between two types of defence goods - war weapons and so called “other military equipment”.
- (2) The export of “other military equipment” is subject to the rules contained in the *Foreign Trade and Payments Act* and the *Foreign Trade and Payments Ordinance*. The applicant has a right to receive an export licence unless a licence cannot be issued because one of the principles of section 4 of the *Foreign Trade and Payments Act* in conjunction with section 8f of the *Foreign Trade and Payments Ordinance* (safeguarding the security of the Federal Republic of Germany, disruption to the peaceful coexistence of nations, considerable disruption to Germany’s foreign relations) would be violated.
- (3) On 30.09.2013 Article 10 of the UN Firearms Protocol was implemented by European legislation, namely *Regulation (EU) No 258/2012 (Firearms Regulation)*. This Regulation is directly applicable and does not need to be translated into national legislation. The scope of the Firearms Regulation is defined in its Annex I, including firearms, their parts, essential components and ammunition.
The export of the goods listed in Annex I is subject to an authorization process.
The term “export” refers to an export procedure under Article 269 Regulation (EU) No 952/2013 of 9 October 2013 laying down the Union Customs Code (UCC) and to a re-export under Article 270 of the UCC. Iceland, Norway, Switzerland and the Principality of Liechtenstein are considered equivalent to EU Member States given association agreements concluded with the EU. Accordingly, exports to these countries do not require approval under the *Firearms Regulation*. However, the provisions of the *Weapons Control Act* on the transfer from Germany in any case have to be respected.
- (4) The *War Weapons Control Act* stipulates that, in general, all handling of war weapons requires prior approval; this requirement primarily refers to the manufacture, acquisition and transfer of actual control, to all types of transport (within Germany; import, export and transit), and to deals by intermediaries, even if the war weapons do not enter German territory.

For the export of war weapons, a licence must first be obtained under the *War Weapons Control Act* (“transport authorization for the purpose of export”) and then an export license pursuant to the *Foreign Trade and Payments Act and Ordinance*.

Pursuant to section 6 of the *War Weapons Control Act*, there is no legal right to receive a licence. Instead, such a license may be denied if there is a danger that the war weapons will be used in a way which disturbs the peace, that international commitments entered into by Germany will be violated, or that the applicant is not sufficiently reliable to undertake the envisaged action. Beyond this, the issuance/refusal of an export licence is subject to the political discretion of the Federal Government, and it uses its discretion in line with the principles outlined above.

Question 3

International agreements or guidelines, other than OSCE commitments, covering the export of conventional arms

Germany is a founding Participating State of the Wassenaar Arrangement and, as a member of the EU, bound to the European Council Common Position defining common rules governing control of exports of military technology and equipment adopted on December 8, 2008.

Question 4

Procedures for processing an application to export conventional arms / related technology:

- (1) **who is the issuing authority?**
- (2) **what other authorities are involved and what is their function?**
- (3) **who deals with compliance?**

(1) For war weapons the Federal Ministry of Economic Affairs and Energy is the licensing authority for commercial exports. The Federal Ministry of Defence is responsible for matters relating to the federal armed forces. The Federal Ministry of Finance and the Federal Ministry of the Interior are also responsible for certain specific areas.

Therefore, applications from companies should be submitted in general to the Federal Ministry of Economic Affairs and Energy. The Ministry decides on these projects together with the Federal Foreign Office and the Federal Ministry of Defence.

Applications for the export of “other military equipment” should be submitted to the Federal Office of Economics and Export Control (BAFA), an agency of the Federal Ministry of Economic Affairs and Energy, which is the competent authority for issuing applications in this regard. Significant projects are presented to the Federal Ministry of Economic Affairs and Energy and the Federal Foreign Office for a political assessment.

(2) The Federal Customs Administration is, inter alia, responsible for the enforcement of all transfers which means im- and export (goods entering or leaving the territory of the Federal Republic of Germany) and transit (transport of goods through the territory of the Federal Republic of Germany) of war weapons listed in the Annex of the War Weapon Control Act and for the control of im- and export and transit according to the Foreign Trade and Payments Law.

Additionally, the Federal Customs Administration is responsible for combating and preventing violations of prohibitions and restrictions contained in foreign trade and payments legislation, including breaches of embargoes. These enforcement obligations include:

- clearing import, export and transit shipments at the customs offices;
- conducting audits of the exporting companies performed by local customs authorities;
- maintaining an automatic risk management system for all customs procedures, and
- investigations (preliminary investigations and formal investigation procedures) by the Customs Investigation Service in order of the public prosecutor.

The export clearance according to the *Firearms Regulation* requires the exporter to provide evidence to the customs office of export, usually in the form of submitting the export licence, proving that all the necessary export formalities have been performed. Otherwise, clearance of the goods listed in Annex I of the *Firearms Regulation* will be rejected. In addition, the export regulations of *Foreign Trade and Payments Law* must be respected.

Export Control enforcement includes in view of the immense volume of exports from Germany (more than 1318 bn Euro in 2018¹) the examination of customs documentations and financial transactions based on risk analysis (so-called foreign trade audits). These audits are screened by auditors commissioned by the customs authorities. Foreign trade audits are initiated based on an audit planning, taking into account several factors such as company size, business activity, types of goods exported etc. Additionally, they are also performed, where any indications are at hand, that an exporter might have disobeyed applicable export regulations. However, information beyond an initial suspicion could lead to the initiation of criminal investigation.

The information may derive, besides from customs clearance procedures, from (preliminary) investigations carried out by the Customs Investigation Service as well as from centralized risk management by the Customs Criminological Office (ZKA)

The Customs Investigation Service consists of the Customs Criminological Office (ZKA) in Cologne and eight regional customs investigation offices. The customs investigation offices are local federal agencies, responsible for investigations in order of the prosecutor of the regional prosecution offices. The Customs Criminological Office (ZKA) functions as the central unit for the Customs Investigation Service; it conducts its own investigations in supra-regional cases and cases of particular importance in order of the Federal Prosecutor General, and is authorized to issue instructions, in individual cases in this field, to the Customs Investigation Service.

As auxiliary officials of the public prosecutor's office, the officers of the Customs Investigation Service have the same rights and duties as police officers.

(3) The Customs Criminological Office (ZKA) is coordinating the enforcement process to prevent major violations of Foreign Trade and Payments Law and other prohibitions and restrictions as regards im-, export and transit of goods.

This comprises the operation of a risk-based IT-clearance system covering export control, which allows analysis of export and procurement patterns of destination countries as well as obtaining essential information about the procurement structures of sensitive countries.

The activities further entails:

- the collection of information for the risk analysis purposes and evaluation of risk parameters applied to select consignment prone to irregularities,
- providing training in the field of Foreign Trade and Payments Law,
- supplying internal administrative instructions concerning the control of military equipment and technology, firearms and war weapons.

As indicated above, the Customs Criminological Office (ZKA) is responsible for criminal investigations and entitled to monitor mail and telecommunication in accordance with section 23 a Customs Investigation Service Act (Zollfahndungsdienstgesetz) preventively. Following up on indications that a serious violation of German Foreign Trade and Payments Law could arise, the Customs Criminological Office (ZKA) is empowered to monitor the telephone, fax and mail traffic of individuals and companies involved in foreign trade and payments transactions, even before a criminal offence has been committed.

¹ according to German Foreign Trade statistics 2018, Statistisches Bundesamt, Fachserie 7, Reihe 1, 2018
www.destatis.de

Question 5

List of conventional weaponry under national export controls and the basis for their control

- War Weapons List
- Part I section A of the Export List²

Where necessary, these national lists are adapted to the international control lists, particularly to the munitions list of the *Wassenaar Arrangement* and the Common Military List of equipment of the EU.

Question 6

Principles and national regulations on the destination or end-user of the equipment. Is there a complete *erga omnes* system or a published list of

- **destinations of concern?**
- **embargoed countries?**
- **differentiation between destinations (e.g. is there any preferential treatment of [groups of] countries)?**

For exports of conventional military equipment (war weapons and other military equipment), there is an *erga omnes* licensing requirement.

Question 7

Requirements for the provision of an end-user certificate in an export licence application or of nonreexportation clauses or of any other type of certification before and after delivery for conventional arms export contracts

In order to export war weapons or other military equipment, an end-user document has to be submitted in general along with the application. In case of end-user documents, a distinction is mainly made between official end-user certificates (exhibitor, government or authority of the country of destination), private end-user certificates (exhibitor, company or private individual), and International Import Certificates (IICs). Reexport clauses generally play a crucial role in end-user certificates. Details regarding the various types of end-user document can be found in the notification by the BAFA dated 01. August 2018.

Question 8

National definition of transit and transshipment (including free zones) of conventional arms, together with associated national legislation and compliance procedures

The legal definition of transit according to the *Foreign Trade and Payments Act* is met if the equipment is merely transported through German territory. “Transport” includes such reloading as it is necessary for technical transport-related reasons and – generally short – periods of storage; however, this does not apply to storage in a customs warehouse. In cases where the final destination of a delivery will change during the transporting process through Germany the legal basis for a transit will be forfeited and the shipment has to be treated furthermore as an export.

² for further information see

<http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/gueterlisten/ausfuhrliste/index.html>

(only available in German)

The transit of weapons, ammunition and armaments covered by Part 1 Section A of the Export List to arms embargo countries is prohibited under section 74 Foreign Trade and Payments Ordinance.

In case of transit/transshipment (including any interim storage) of weapons and their ammunition being subject to the *German War Weapons Control Act*, a licence pursuant to the *War Weapons Control Act* is required. Such licenses are issued upon application by the Federal Ministry of Economic Affairs and Energy. When deciding whether to issue a licence for the transit of war weapons, the Federal Government is guided by its policy on exports. For certain transports of war weapons through German territory, provided that the transport starts in an EU country and ends in another EU country of final destination of the weapons, a general licence has been issued.

Transits/ Transshipments of weapons being listed in the National Military List, Part I Section A of the Export List of the German Foreign Trade and Payments Ordinance, are prohibited, when destined for countries being subject to arms embargoes. In specific cases defined in legislation, these transits/ transshipments are subject to licence requirements. In any case the licence has to be issued before the transit is initiated. In all other cases there are no licensing requirements for the transit or transshipment of military equipment and technology.

According to the *Weapons Act*, a licence is required for the transit through Germany – including reloading – of firearms subject to section 29 (1) of the *Weapons Act* (inter alia hunting and sports weapons, pistols and revolvers) and suitable ammunition (sections 30 and 33 of the *Weapons Act*). Licence and conditions for issuing are the same as for temporary (section 33 of the *Weapons Act*) as well as for final import (section 29 of the *Weapons Act*).

Question 9

Procedures governing companies wishing to export arms. Are companies obliged to seek official governmental authority to enter into contract negotiations or to sign contracts with foreign customers?

Apart from the specific licensing requirements applying to all handling of war weapons (*cf.* answer [2] to question 2 *supra*), Germany has no special licensing system for firms wishing to export military equipment. When an application is submitted, an examination takes place incidentally to ascertain whether the firm is reliable and has taken the necessary security measures to handle military equipment.

There is no special licensing requirement for entering into contract negotiations and/or the conclusion of contracts. Instead, a licence needs to be issued before the military equipment in question is actually exported (in case of war weapons, a licence is required prior to that, for the manufacture and/or the acquisition of actual control over the war weapon to be exported).

According to section 4a of the *War Weapons Control Act* and section 46 of the *Foreign Trade and Payments Regulation*, a special licence is required for deals by intermediaries regarding the procurement of war weapons or “other military equipment” which are located abroad and are to be delivered to the foreign customer without encountering German territory (arms brokerage).

Question 10

Policy on the revocation of export licences once they have been approved; please list any published regulations

Export licences can only be revoked under certain narrow legal preconditions; these cases occur very rarely in practice.

Question 11

Penal and administrative implications for any exporter failing to comply with national controls

Violations of foreign trade and payments provisions are punishable by criminal courts by long terms of imprisonment, e.g. if they—

- (1) refer to equipment listed in Part I of the Export List, e.g. weapons, ammunition, defence materials, chemicals, (parts of) equipment, etc., or even war weapons (according to section 18 (2) of the *Foreign Trade and Payments Act* or
- (2) infringe the provisions made by economic sanctions adopted by the Security Council of the United Nations or the Council of the EU in the framework of the CSFP (section 17 (1) of the *Foreign Trade and Payments Act*).

Apart from this, other violations can be punished by fines of up to Euro 500,000.

As far as administrative implications are concerned, the exporter faces the following consequences:

- (1) Without any changes of the company's internal organization, no more export licences will be granted.
- (2) The company will be subject to "reliability checks".
- (3) The company could be asked to replace the "person responsible for exports" (Member of the Board of Director)
- (4) Violations of law will increase the risk assessment of company's exports with influence on future customs clearance processes.
- (5) The company's reliability could decrease and possibly have negative effects on authorizations of simplified procedures or the AEO-Certificate or even cause their revoke.

Question 12

Any circumstances in which the export of arms does not require an export license

Concerning war weapons, Section 5 of the *War Weapons Control Act*, stipulates exemptions from the licensing requirement in specific constellations, e.g. in the case that anyone who under the supervision or as an employee of another person.³ Furthermore, the licensing requirements do not apply to the German Federal Armed Forces, Federal police, customers' frontier service (according to section 15 (1) *War Weapons Control Act*).

Hunting weapons, with a smoothbore barrel, which are not specially constructed for military purposes and/or are not able to fire in an automatic mode or in a semi-automatic mode more than 3

³ In this case, the principal has to apply for a licence.

rounds without reloading, do generally not need an export licence Section 8 of the *Foreign Trade and Payments Regulation* in conjunction with part 1 chapter b Nr.0001 Exportlist).

Same applies for the export of rimfire weapons with a caliber less than 20 mm (not full-automatic) and rimfire ammunition with the caliber 22 L.R. and not specially constructed for military purposes, there is generally no export license required (Section 5 of the *Foreign Trade and Payments Regulation* in conjunction with part 1 chapter a Nr.0001 Ausfuhrliste)

Question 13

Licences for temporary export (e.g., demonstrations or testing), the period allowed and any special conditions attached to the licence, including verification of return procedures

Licences for temporary export (e.g. for trade fairs or demonstration purposes) are issued under the condition that the equipment is returned to Germany before the licence expires. If this deadline is not adhered to, a corresponding application for an extension must be submitted in sufficient time.

Customs will verify the return of the goods to Germany on the export licence in question where the export licence entitles the holder for multiple temporary exports. Where an export licence entitles the holder to a single temporary export, proof of reimportation must be provided to the licensing authority only.

Upon request, licences can be issued for several temporary exports, under the condition that the equipment in question is returned to Germany each time.

As a rule the licences are valid for two years.

The text of the conditions is as follows:

⇒ *Subsidiary clause for repeated temporary export*

In accordance with section 14 (1) of the *Foreign Trade and Payments Act*, the export licence is issued under the condition that the equipment is returned to the Federal Republic of Germany after its temporary use abroad and before the expiry of the licence.

This export licence also entitles the holder to the repeated export of the equipment listed in field no. 4 of the licence within the period of validity of the licence. In this regard, the exporter shall have each export and import confirmed on the back of the export licence and the copy of the export licence by the relevant customs office and shall send the licence back to the BAFA for inspection within one month of the last return of the equipment. The exporter shall receive the document back.

It is expressly noted that the issue of this licence is without prejudice to subsequent applications for export licences of any type.

The same applies to any applications for licences for the final export of the equipment covered by this licence.

The return of the equipment must therefore always occur before the expiry of this licence, irrespective of whether an application for license for final export has since been submitted.

⇒ *Subsidiary clause for single temporary export*

In accordance with section 14 (1) of the *Foreign Trade and Payments Act*, the export licence is issued under the condition that the equipment is returned to the Federal Republic of Germany after its temporary use abroad and before the expiry of the licence. The exporter shall have the return of the licence confirmed by the relevant customs office and shall send the document back to the Federal Export Office for inspection within one month of the last return of the equipment. The exporter shall receive the document back.

It is expressly noted that the issue of this licence is without prejudice to subsequent applications for export licences of any type.

The same applies to any applications for licences for the final export of the equipment covered by this licence.

The return of the equipment must therefore always occur before the expiry of this licence, irrespective of whether an application for a licence for final export has since been submitted.

Question 14

Licence documents and any standard conditions attached to it

The export licence forms and relevant documents can be found on BAFA's webpage: <http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/antragstellung/index.html> (in German)
BAFA provides for licensing an electronic application (ELAN).

Question 15

Different types (e.g., individual, general, restricted, full, permanent, etc.) of licences and what they are used for

German foreign trade and payments law defines (1) individual licences, (2) collective licences, and (3) general licences.

(1) Individual licences/licences up to a maximum amount

The basic form of the export/shipment license is the individual license. It authorizes the export of one or several items to one recipient based on one application. As a special type of individual licence, a "licence up to a maximum amount" can be issued. This licence permits the export of equipment for several contracts, e.g. in the context of a framework contract with a customer, up to the maximum amount authorized (likely sales within one year).

(2) Collective export licences

Rather than applying for individual licences, it is possible to issue a collective licence to certain reliable exporters, e. g. if a high number of export licences were granted in the previous year. This licence permits the export of a group of equipment to several recipients.

(3) *General licences*

There is no need to apply for an individual licence if a General Licence can be used for the export. National General Licences are issued by the Federal Office of Economics and Export Control and are published in the Federal Gazette. The following General export licenses apply for the export of military equipment, namely:

- No. 18 for signature-reducing clothing and equipment
- No. 19 for all-terrain vehicles
- No. 20 for certain brokering activities
- No. 21 for protection equipment
- No. 22 for explosives
- No. 23 for the re-export of conventional arms
- No 24 for temporary exports
- No 25 for certain cases, e.g. export of goods in possession of foreign armed forces stationed in the Federal Republic of Germany
- No 26 for armed forces of the Member States of the European Union, Iceland or Norway
- No 27 for certified recipients established in the Member States of the European Union, Iceland or Norway

Question 16

Advice given to exporters as to licensability, such as the likelihood of approval for a possible transaction

In addition to the application procedure, there is the institution of the preliminary inquiry, in which the licensability of a planned export business is examined legally and politically. If a positive decision is reached, the company inquiring will be assured that, assuming no changes of the legal and political situation the necessary export licence is to be issued.

Frequent use is made of the institution of the preliminary inquiry in cases of projects of commercial or political significance or where the licensing situation is unclear.

Question 17

The average number of export licences issued annually and the staff engaged in export licensing procedure

In 2017, 12.215 applications for export licences of conventional arms have been processed. In comparison with 2016, the number of applications rose by 5%.⁴; the number of staff engaged in the export licensing procedure in the BAFA and in the ministries remain unchanged.

Question 18

Any other relevant information pertaining to the export of conventional arms and related technology, e.g., additional laws, reports to Parliament, special procedures for certain goods

The annual report of the Federal Government on German arms exports for 2017 was published June, 2018.

Question 19

Are all guidelines governing conventional arms transfers nationally published?

The *Political Principles Governing the Export of War Weapons and Other Military Equipment* of January 2000 were originally published in the Federal Gazette dated January 21, 2000.

These principles form the basis on which the Federal Government exerts its political discretion regarding individual cases; in other words, the existence/absence of these criteria decides whether an export license can be issued in an individual case or not.

All legal texts are published under www.gesetze-im-internet.de, and on the websites of The Federal Ministry of Economic Affairs and Energy, www.bmwi.de, and The Federal Office of Economics and Export Control, www.bafa.de .