

# Selling and delivering goods from the EU – the regulatory framework for the defence and security industry

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As announced in January, BLOMSTEIN is publishing a series of briefings introducing into European and German legal defence matters. In our last briefing, we shared some insight into the Bundestag's ominous requirement (and its legality) to separately approve any defence procurement with a volume above EUR 25 Mio.

Today's topic concerns export controls on the defence and arms industry. They are a critical component of national and international security efforts. They involve strict legal frameworks and regulatory mechanisms to ensure that the export of certain goods remains in line with the interests of the nations from which the goods originate. This overview provides an insight into the basic components of the legal framework established in Germany.

## **German Laws and Regulations Shaping the Export of Military Equipment**

The export of military equipment is a highly sensitive area. The cornerstone of the legal framework is laid down in the German constitution itself. Article 26(2) stipulates that weapons intended for warfare may only be manufactured, transported, and put into circulation with the permission of the Federal Government. Further details are regulated by federal laws. These federal laws include the War Weapons Control Act (Kriegswaffenkontrollgesetz, KrWaffKontrG), the Foreign Trade and Payments Act (Außenwirtschaftsgesetz, AWG) and the related Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung, AWW). Additionally, the export is further regulated at European Level by the Dual-Use Regulation (EU) 2021/821 (Dual-Use Regulation). These regulations set out clear parameters for strict controls on the export and transfer of military equipment and war weapons and outline specific criteria for the licensing process, such as end-use and end-user controls.

**War weapons** are subject to stringent restrictions, set out in the KrWaffKontrG. The term "war weapons" is defined as weapons that can cause destruction or damage to persons or objects and capable of being used as the means of inflicting force in the course of armed conflicts between states, such as weapons, ammunition, warships, and tanks. The fundamental system underpinning the KrWaffKontrG is that the export of war weapons is prohibited unless an export license is granted. A licence is required for production or transport within the German federal territory, and a second licence is required for actual delivery, which is separate from the first.

**Other military goods** that do not fall under the KrWaffKontrG are regulated by the AWG and AWV. Military goods refer to items specifically developed for military purposes. The fundamental principle of the AWG and AWV is that foreign trade is generally unrestricted. However, the legislation contains a so-called Export-List that classifies goods, for which export licenses are required. Section A of Part I of the Export List is of particular relevance to the defence industry. It enumerates controlled goods, including military equipment, vehicles, cryptographic equipment, and weapons. The list of goods includes not only physical items but also software and technology. Further, the Export List also includes components and accessories of the military goods. In general, applicants need to apply for an export licence before exporting listed military goods. However, the Federal Government may refuse to grant a licence in individual cases. In addition, Section 74 of the AWV prohibits the export of these goods if they are destined for certain countries listed therein.

In addition, the export of **dual-use items** is also regulated. Dual-use items are goods, software, and technology that can be used for both civilian and military purposes, such as chemicals, machinery, materials, and electronics. To prevent misuse or diversion of these items for military purposes, their export is subject to the Dual-Use Regulation. The export of goods listed in Annex I of the Dual-Use Regulation to non-EU countries is subject to a licence. However, under certain conditions and in the case of military use, the export of other non-listed dual-use items may also be prohibited and subject to authorisation.

## **Export Licensing for Military Equipment**

Manufacturers and sellers of the above goods who wish to export them must apply for licences through the Federal Office of Economic Affairs and Export Control (**BAFA**) or Federal Ministry for Economic Affairs and Climate Action (Bundesministerium für Wirtschaft und Klimaschutz - **BMWK**).

The licensing process involves a detailed application specifying the commodity, destination, parties involved up to the end-user and intended use. BAFA conducts a rigorous assessment, focusing on end-use and end-user verification to prevent unauthorised diversion. The assessment leads to a decision to grant or deny an export licence, often with specific conditions and restrictions, and may be followed by post-export monitoring to ensure compliance with the authorised use.

The decision-making criteria integrate the German government's "Political Principles" and the "EU Common Position of 2008", focusing on human rights, international behaviour, regional stability, and the prevention of misuse of equipment. Additionally, the existence of a sufficient company's compliance system is relevant. In Practice, political considerations are also central. In particular, past criteria are not binding for re-evaluations, which introduces an element of opacity into the procedures.

The length of the approval process can vary considerably. There is no set standard time as each application is assessed on an individual basis. As a result, it can take anywhere from a few weeks to several months. It is also known that BAFA and BMWK do, with regard to politically sensitive applications, prefer not to take a decision at all. For instance, Rheinmetall had to file an action for failure to act against BAFA, as BAFA did not respond despite an objection against the withdrawal of an export license. In its decision, the Administrative Court emphasized in that the mere fact that the German government holds foreign policy and security concerns alone is not sufficient ground for a withdrawal.

## **Consequences of Violating Export Control Regulations**

Careful classification of goods is particularly important because breaches of export control regulations can have significant legal consequences. It is important to remember that every employee of a company can be held accountable for his or her actions and is responsible for all activities within his or her area of responsibility. Consequences include potential criminal charges with imprisonment or significant fines for intentional violations. Negligent violations will be prosecuted as administrative offences and may also result in substantial fines. Violations may also result in civil liability, also for the company. Violations can also result in significant damage to a company's reputation and its ability to conduct foreign trade.

## **Who to turn to**

Determining whether a particular good falls under the applicable regulations can be challenging. In situations of uncertainty, it is therefore essential to seek guidance from competent personnel, legal assistance, or the relevant authorities. BLOMSTEIN's defense team is happy to support you in any capacity.

Stay tuned: In our next defence briefing - to be published around 8 May - we will provide some insight into multinational collaborations in defence procurements in and by the EU.