

### Why the future German Arms Export Control Act is going in the right direction - but not far enough: commentary

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## Commentary \ Why the Future German Arms Export Control Act is Going in the Right Direction—But Not Far Enough

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On 13 October 2022, the German Ministry for Economics and Climate published draft key points for a future German Arms Export Control Act (referred to hereafter as 'the draft'). Establishing such a law is one goal that the government defined in the coalition agreement. The authors of this BICC-Commentary, Max Mutschler (BICC) / Simone Wisotzki (PRIF), explain that the draft contains several good points that can help make German arms export policy more restrictive and more closely aligned with peace, human rights and security policy goals. At the same time, they underline that the draft reveals some serious gaps that must be remedied to fully live up to this claim.

### Human Rights Criteria Strengthened

On the positive side, the draft refers to the legal anchoring and expansion of post-shipment controls, which would also apply to EU/NATO states; the possibility of a basic presumption of denial for certain third countries; the inclusion of corruption as a potential criterion of evaluation; and a compensation mechanism for victims of illegal arms exports. Furthermore, the draft refers to the eight criteria of the Common Position of the European Union on arms exports and the Political Principles of the Federal Government for the Export of War Weapons and Other Military Equipment, which are to be included in the new Arms Export Control Act. This would change their legal status from political to legally binding.

Expanding the human rights criteria to include special consideration of human rights, democracy and the rule of law, including gender- or minority-specific violence and the use of child soldiers, is also a positive step towards human rights accountability. We believe that when human rights violations are persistent and systematic, arms exports should be denied even if the requested weapons are not directly related to any human rights violations. The draft at least states that arms exports to recipient countries with a poor human rights record *can* be rejected beyond the reference to the specific armaments, while they *must* be rejected if there is a reasonable suspicion of a link between armaments and human rights violations. However, this sensible extension should also apply to the other criteria of the Common Position (e.g. threats to peace and security or the danger of illegal proliferation).

Also positive, but comparatively timid, are the government's plans regarding better transparency and justification for arms exports. For example, it is unclear why justifying licensing decisions should be limited only to the export of war weapons to third countries, which would exclude most German arms exports. For example, many parts and components of combat aircraft and tanks are not listed as war weapons, while they

are essential to making the tanks and aircraft operate. Therefore, we believe that parliament should also be put in a position to request the government to justify licensing decisions beyond war weapons.

The future Arms Export Control Act will continue the practice of differentiating between NATO- and EU-states and third-party states. The group of states who are treated like NATO members, such as Australia or Japan, will be extended—to perhaps Chile, South Korea, Singapore and Uruguay. The selection criteria for these four countries and for further countries that might be put on an equal footing with NATO and the EU remain unclear. Singapore, for example, has not acceded to most human rights agreements, which sheds serious doubts on this country being a like-minded partner committed to the international, rule-based order, as the draft claims.

#### **No Possibility of Taking Arms Export Decisions to Court**

Now, the downside. The draft lacks any approach to prevent the circumvention of German arms export control through spin-offs and/or the acquisition of shares in foreign arms companies as well as their technical support and know-how transfer. Any reference to a legal implementation of the 2015 small arms principles is still missing. The draft also does not change the distinction between war weapons and other military equipment. Accordingly, exporting military equipment not listed as war weapons will remain relatively easy. This does not do justice to the dangerous nature of these goods. Equally troubling is the fact that some technology does not appear on any dual-use list, even though it is becoming increasingly relevant as parts and components of, e.g., drone technology. This applies, for example, to German engine technology, which ended up in drones deployed by Yemenite Houthi militias against oil infrastructure in Saudi Arabia and the United Arab Emirates.

Even more problematic, however, is that the draft does not introduce a right of action for associations. Such a right would not unduly restrict the scope for political action but rather give civil society actors the opportunity—like in environmental or disability law—to have controversial arms export licensing decisions judicially reviewed for whether the federal government is complying with existing legal requirements. There is no legal or procedural reason why a special law without such a mechanism for judicial action should remain established in the field of arms exports. The right for civil society groups to take their government's decisions on arms exports to court exists in some forms, for example, in Belgium, France, Italy, the Netherlands and some other EU states. In the United Kingdom, the Campaign Against the Arms Trade (CAAT) sued the government for its licensing of arms to Saudi Arabia despite the country's involvement in the Yemen war—The court ruled that the government had to review its decision. In Italy, the company RWM Italia, a subsidiary of German Rheinmetall, is being sued because remnants of a bomb which were secured by a Yemenite NGO proved that Italy had

supplied these weapons to Saudi Arabia, which killed a whole family after being dropped on their house. Since 2016, efforts by civil society to achieve accountability for the Yemen conflict have brought about an unprecedented amount of litigation and advocacy. Germany needs a similar law to add some form of legal accountability to a future Arms Export Control Act.

### **How to Cope with European Defence Cooperation and Potential Arms Exports?**

The draft includes a de facto stipulation of the priority of European defence cooperation projects over German arms regulations, which we find problematic. The draft envisages a future EU arms export regulation and the option of majority decisions for cooperation projects. While an EU arms export regulation is much needed, there is too much variation in the interpretation of the eight criteria of the 2008 EU Common Position on arms exports by some EU member states and how these states apply existing standards. The German defence minister Christine Lambrecht just announced that German standards are too “restrictive” to increase European defence cooperation and need to be lowered. While we agree that European defence cooperation should aim at creating synergies and reducing defence procurement costs for each state, we consider the idea of coming to an agreement by simply lowering arms export standards deeply flawed. To increase interoperability and cost-efficiency, European states should not procure different systems in the same capability category. In practice, there is fierce competition between different defence cooperation projects, such as FCAS and Tempest, for the future European fighter aircraft, but also between European consortiums and national industries.

European defence cooperation should not lead to reduced arms export control standards. The continuation of European defence cooperation without restrictive standards at the European level continues to undermine German arms export control. We just saw this happen with the supply of German arms components for the Eurofighter Typhoon combat aircraft assembled in the United Kingdom and transferred to Saudi Arabia, which uses them in the Yemen war. Hence, we believe that Germany should retain a veto position for joint projects if there is no commonly agreed EU arms export regulation.

### **Conclusion**

In summary, we believe that the draft contains several positive points. But the final draft of the Act needs to go further. It needs to include the right of associations to sue the government, include the control of German arms companies’ activities abroad, small arms principles, and the veto option for exporting weapons produced through European arms cooperation. In case there is any doubt: Improving the German arms export control system in how we recommend it by no means prohibits German arms transfers to Ukraine. Such transfers are legally compliant with the current German arms export law

because of the inherent right to self-defence enshrined in Article 51 of the UN Charter. Arms exports to states like Saudi Arabia, however, would become much more difficult if there were stronger criteria and political and legal checks to government decisions, for example, through the introduction of a right of action for associations.

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This *Commentary* is also published on [PRIF Blog](#).