

# RIETI BBL Seminar Handout

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**Speaker: Dr. Harald HOHMANN**  
(Hohmann Rechtsanwälte)

# „Export of Defense Items, the German Experience (compared with Japan): Controversial Issues“

**RA Dr. Harald Hohmann**

**Hohmann Rechtsanwälte, Büdingen (Germany)  
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Hohmann Attorneys  
Schlossgasse 2  
D-63654 Büdingen

Tel.: +49 (0) 6042 / 95 67 0  
Fax: +49 (0) 6042 / 95 67 67

[info@hohmann-rechtsanwaelte.com](mailto:info@hohmann-rechtsanwaelte.com)  
[www.hohmann-rechtsanwaelte.com](http://www.hohmann-rechtsanwaelte.com)

## Case 1: Protective Vest Case:

**G, a company in Germany, produces ballistic-resistant body armor, i. e. protective vests, which protect against being killed by shots from guns/pistols. G wants to export them to police forces in Vietnam, Thailand and Kazakhstan. The end-use is: protection of the police-officers in these countries against illegal shootings against them. However, the German export agency refuses to give the export license to G. G is surprised: What should he do?**



## Case 2: Tank Case:



**G, a company in Germany, which produces tanks, wants to export tanks to Saudi-Arabia. Is the German government allowed to give a preliminary decision\* in favor of an export license to G, even if the German government is convinced that Saudi-Arabia must be regarded as a repression State? Since Amnesty International (German branch) is frustrated about such exports, it wants to sue against such an export license. And Mr. M, member of the German parliament, wants to know from the German government whether it has decided or intends to decide in favor of this export license/preliminary decision for this?**

**What should we say to the German government, to Amnesty International and to Mr. M?**

- The preliminary decision is a binding decision, whether the export license will be given in the future, provided that the current situation of law and facts does not change.

## Background for Japan:



- Hiroshima, 6<sup>th</sup> August 1945 (Japan as a victim)
- Commitment to peace-loving nation (Article 9 Japanese Constitution), Japan has prohibited each export of weapons for long time
- Three Principles of 1967/76: It was prohibited to export arms to (1) communist bloc countries, (2) countries subject to UN arms embargoes and (3) countries involved in or likely to be involved in international conflicts
- 1983 and 1990's: a few exceptions
- 2011 Guidelines for Overseas Transfers of Defense Equipment, and April 2014: the new Three Principals: clarification of cases where transfers are prohibited, limitation to cases where transfers may contribute to peace/co-operation, limitation to cases, where appropriate controls (regarding extra-purpose use and evasions) are ensured

## Different background for Germany:



- 1945: Germany as penitent actor (Auschwitz)
- Germany became member of NATO and EU (no isolated national state)
- Art.26 para.2 German Constitution allows export of weapons under the condition that the German government has given an export license.
- 2008: EU CFSP Common Position on Arms Export: 8 principles must be taken into account, like: compliance with international commitments, compliance with human rights, taking into account national security/development issues, no delivery to conflict parties
- In Germany implemented by the German Government Principles of 2000: weapon exports to NATO/major allies is allowed, while it is restricted to other States

## Main legal principles compared:

- *Compliance with international commitments*: accepted by both countries. Japan: esp. compliance with nonproliferation agreements and UN sanctions. Germany: esp. compliance with non-proliferation and with human rights agreements and UN embargoes. Main difference: human rights: they are (explicitly) decisive for EU.
- *Taking into account peace and security*: accepted by both countries. Japan: will allow exports, which contribute to promotion of peace, international co-operation and Japan's security. EU: will not allow deliveries to conflict parties and: will take into account: impacts on security issues, foreign affairs and development issues.
- *Taking into account end-use controls*: accepted by both countries. Japanese regime is a bit stricter: Government of Japan must always give its consent before a re-export takes place, the government of Germany only in case of war weapons.

## Critics by Companies (1)

**German government: satisfied with the hardening of law 2008 (former EU Code of Conduct became Common Position),**

**but critics by companies:**

- *Ambiguous principles*: Which states are “repression States”? What do considerations of “regional peace, security and stability” mean in practice?
- *No level-playing field?* Strictest implementation of the Common Position in Germany, two consequences: “German free” equipment and: they will try to apply in a different EU Member State than Germany. If MS 1 does not give the license, MS 2 could give it, if a consultation has taken place before.



## Critics by Companies (2)

- *Possibly not hard law?* There is a feeling that the Common Position does represent “soft law”, while EU Treaty clearly says that it is “legally binding for EU Member States”. In case of open violations: lawsuits to German administrative court or the ECJ are possible. Why was the Common Position implemented by a non-legally binding act?
- *Review Procedure:* There was a hope for a total reform of the Common Position in 2013, but instead, there will be no change in the wording of this Common Position, only the User’s Guide will be updated.
- *Transparency:* more control by Parliament is required.

## Two legislative proposals 2012:

- Proposal by the Social Democratic Party: (1) arms export reports to be published earlier (twice per year), (2) the Parliament should be more integrated into decisions of the FSC (German Federal Security Council), (3) post-shipment controls of the end-use to be introduced.
- Proposal by the Green Party: (1) same (4 times per year), (2) members of Parliament should be informed before decisions by the FSC are taken, + a parliamentary committee on arms exports to be established, (3) same, (4) principles of the Common Position to become enforceable legal rights, thus allowing also a class action of concerned NGOs, (5) German Foreign Office should have responsibility.
- Proposal by the Social Democratic Party is largely implemented (still discussion on post-shipment controls), critical remarks against proposal by the Green Party.



## On the conflict between Parliament and Government:

- Each member of German parliament has the right to control the government (Art.38 GG), but the German government has the right to decide independently on arms exports (under Art.26 GG) without involvement by members of the Parliament.
- Decision of the German Constitutional Court (21 October 2014): After the FSC has finally decided on an arms export application, the German government has used its right to decide independently. After such a decision by the FSC, German government must answer to the member of Parliament whether they have given or denied the export license (except in rare security cases).



## On Case 1 (Protective Vests Case) (1)

- G should start legal redress against the denial by the German export agency BAFA, later this will be continued as lawsuit at the administrative court of Frankfurt.
- Protective vests = defense items (position 0013 d), thus an export license is required.
- Under principle 2 of the Common Position, the license must be denied “if there is a *clear* risk that the defense items *might* be used for internal repression” (cf. definition of repression: torture, arbitrary executions etc.)
- BAFA must demonstrate two points: the country of end-use is clearly a repression state, and the goods to be exported are clearly repression goods.

## On Case 1 (2)

- In principle, G should very likely be successful, because: None of these countries are clear repression countries (different would be the picture for exports to Saudi-Arabia, Libya, Philippines, UAE), and it is very unclear whether a ballistic protective vest could be regarded as a clear repression good: It does not protect sufficiently against blows, kicks etc. (different would be the anti riot protection vest, having a much lower weight), instead it is used for protection against killing by shots.
- An open question is currently, whether the BAFA has nearly unlimited discretion or whether it must at least shortly answer the legal test questions by the User Guide for the Common Position (like: Can the good really be used for repression purposes? How good are the human rights records of this country? Was the end-user involved in repression measures?). If BAFA must answer this, G will win the case. If not, G will lose the case.

## On Case 2 (Tank Case) (1)

- To the German government: From principle 2 of the Common Position follows that you are not allowed to give an export license in this case (here: country of end-use: clearly a repression state, tank: clearly a repression good); if you want to have exceptions for “regional allies”, you must publish such an exception list to the German Government Principles.
- To Amnesty International: As long as the proposed bill by the Green Party does not enter into force, there are no enforceable rights allowing a class action. And it is very unlikely that such a class action will ever be introduced (different situation to environmental law).
- To Mr. M: No, you do not have such a right to know whether the FSC has finally decided in favor of this preliminary decision, since the German Constitutional Court wrongly treats FSC decisions in favor of an export license and those in favor of preliminary decisions differently.

## Résumé (1)

- EU CFSP Common Position is a well-balanced legal document for public welfare and individual freedom interests
- Three recommendations: (1) Common Position should be implemented in Germany by a legally enforceable act, (2) more specifications of the Common Position are useful and it should be made clear that the User's Guide is a guidance which can be enforced, (3) more transparency Government-Parliament is desirable: two reports, and directly answering questions of Parliament members after FSC has finally decided, possibly also a Parliamentary/ governmental committee (cf. ECC of Sweden).
- We hope this German example is useful for Japan.

## Additional Questions (1):

- There are lots of open questions concerning dual-use goods, esp. in case of technology transfer. Some of them are the following questions:
- 1: If G has given an EUC that the weapons will be exported to the US Army as end-user, but later G finds out that they were re-exported from the USA to a repression State in South America: What must G do? Can it rely on this EUC given, even if it had reasons to assume that the EUC was wrong?
- 2: If G wants to export supervision technology to a very sensitive country: Can these new rules be enforced in nearly the same strict way as the rules for defense items?





## Additional Questions (2):



- 3: If G stores technology for using/developing weapons on a service provider or on a PC server in India: Is this already export of weapons?
- 4: G produces defense items in various countries. Now it organizes a meeting, where the international teams of researchers (from USA, Russia, Japan and China) are exchanging their knowhow. Do they need an export license from BAFA (and possibly from the US agency DDTC) for this?

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**Thank you for your attention!**

**Hohmann Rechtsanwälte  
Schlossgasse 2, D-63654 Büdingen  
Phone 06042 – 9567-0  
Fax 06042 – 9567-67**

**Mail: [info@hohmann-rechtsanwaelte.com](mailto:info@hohmann-rechtsanwaelte.com)**

**Website : [www.hohmann-rechtsanwaelte.com](http://www.hohmann-rechtsanwaelte.com)**

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