

POST-SALE SERVICES AS UNLAWFUL ARMS EXPORTS

A LEGAL GUIDE FOR INVESTIGATORS



Authors

Dr Valentina Azarova, Manchester
International Law Centre, University of
Manchester & Legal Advisor, GLAN

Stefano Trevisan, LL.M., Attorney, Dragone &
Partners & Associate, Lighthouse Reports

Copy-edit

Megan Clement

Editors

Linde Bryk, Amsterdam Legal Clinics, University
of Amsterdam

Dr Stuart Casey-Maslen, University of Pretoria

Roy Isbister, Saferworld

Dr Ioannis Kalpouzos, Boston University &
GLAN

Dr Gearóid Ó Cuinn, GLAN

Layout and design

Studio Sugarfree

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Investigating the Legality of Post-Sale Services

When a fighter jet is purchased the sales contract extends beyond the hardware itself. Most sales contracts for military items include a range of mission-critical 'post-sale services', such as training, maintenance, components, and know-how critical to enabling the use, upkeep and upgrade of exported arms. Up to 50% of the value of an average multi-year arms contract is related to post-sale services, which are a major pillar of the arms industry. Such relations create a long-term structural dependency between the client and the arms manufacturer. This invisible link also creates an ongoing relationship between companies and situations of war (crimes) and human rights violations. Yet this crucial part of the arms industry has escaped scrutiny.

Such services, which can provide substantial and ongoing contributions to the recipient state's military capacity, have created relations of considerable dependency between Western supplying states and multinational corporations and some of the world's most repressive regimes. There are numerous examples of such links with warring parties in the particularly violative ongoing conflict in Yemen alone: Spain's Airbus and Iberia have been carrying out maintenance for the Saudi army's A330 MRTT aircrafts, used to refuel its fighter jets, for several years;¹ French defence contractor Naval Group has been overseeing the renovation and modernisation of Saudi warships, used to enforce a punishing blockade on Yemen;² and around 6,300 UK contractors are stationed at Saudi Arabia's bases, training pilots and conducting essential maintenance on planes and supervise the loading of bombs by Saudi forces.³

Despite the growing significance of such global arms deals, both the existence of such long-term structural links between defence corporations and buyer states remain largely invisible to the public eye and regularly escape legal scrutiny. National licensing systems have, in effect, allowed for the export of certain post-sale services under relaxed and fast-track licensing procedures and limited post-export monitoring and review. The provision of such services in the context of an ongoing armed conflict or internal repression without such scrutiny has resulted in mounting allegations that supplying companies and licensing states provide wrongful assistance to and are complicit in serious violations of international law.⁴ The swell of litigation and legal advocacy to challenge arms transfers to the warring parties in Yemen has, in turn, laid bare both the damaging

¹ Pol Pareja, 'Airbus e Iberia realizan en Barajas tareas de mantenimiento para aviones militares de Arabia Saudí', ElDiario, 24 November 2019

https://www.eldiario.es/politica/iberia-realiza-mantenimiento-aviones-madrid_1_1164060.html.

² Eva Thiebaud and Thomas Clerget, 'How France helps maintain Saudi navy as it blockades Yemen', Mediapart, 28 March 2019 https://www.mediapart.fr/en/journal/international/280319/how-france-helps-maintain-saudi-navy-it-blockades-yemen?_locale=en&onglet=full.

³ Arron Merat, 'The Saudis couldn't do it without us': the UK's true role in Yemen's deadly war', The Guardian, 18 June 2019 <https://www.theguardian.com/world/2019/jun/18/the-saudis-couldnt-do-it-without-us-the-uks-true-role-in-yemens-deadly-war>.

⁴ In some cases this may even render them direct participants in the hostilities and hence lawful military targets: Nathalie Weizmann, 'Are the U.S. and U.K. parties to the Saudi-led armed conflict against the Houthis in Yemen?', Just Security, 2016, <https://www.justsecurity.org/33095/u-s-u-k-parties-saudi-led-armed-conflict-houthis-yemen/>.

impacts of such transfers on individuals affected by the buyer's conduct and the barriers to domestic accountability for unlawful transfers in Western jurisdictions.

With limited information about these dealings available to experts, let alone the general public, fact-finding by investigative journalists and arms analysts is key to enabling legal and public transparency and accountability for unlawful transfers in the form of post-sale services. By exposing specific cases of violative and ongoing unlawful post-sale transfers, such investigations can also make apparent the structural shortcomings in their regulation by arms-supplying states and corporations that enable war crimes and other serious international law violations. Evidence of how such dealings contribute to serious breaches of international law can illuminate regulatory gaps and help institutions such as the EU and the ATT Conference of State Parties to issue guidance on the appropriate interpretation and implementation of the ATT and Common Position.

The purpose of this guide is to provide investigators of arms transfers with a basic understanding of the laws, regulations and legal processes that govern post-sales services. The guide explores how such activities are defined and regulated by international, European and domestic laws – including those laws that control arms exports and those pertaining to the responsibilities and liabilities of state and corporate actors. It also provides a legally grounded research methodology for designing and pursuing investigations which, in turn, are capable of supporting legal accountability efforts.

Methodology and Structure

This guide identifies the key facts that need to be collected to evidence wrongdoing by state and corporate actors, based on their existing responsibilities and obligations under applicable national, EU and international law. The present analysis represents the first concerted account of the regulation of the non-legal category of “post-sale services” in domestic and international law. It is based on a review of primary sources, including national and international law and jurisprudence, and secondary sources such as reports from think-tanks and NGOs, legal scholarship. These were complemented by a series of interviews and correspondence with 20 experts, including legal practitioners, arms trade analysts and legal academics.

An initial version of the methodology presented in this guide was prepared ahead of the investigations of post-sale services undertaken by Lighthouse Reports' #EUArms newsroom in 2020. This was part of a broader project by Lighthouse and the Global Legal Action Network (GLAN) titled 'The Invisible Link' – in reference to ongoing dependency-relations between companies providing post-sale services and abusive regimes that remain largely unknown to the public and under-regulated by domestic and international law. The project seeks to deploy the findings of these investigations in legal advocacy and strategic litigation to expose and challenge both specific instances of such relations and the broader limits and biases of international and national arms export control laws that maintain them.

The guide is structured in two parts. The first part sets out the detailed legal framework for the regulation of post-sale services and the responsibilities and obligations of states and corporations in

relation to the provision of such forms of military assistance. This framework is the basis for the guidance offered to investigators of unlawful post-sale services in the second part of the guide, which consists of: a) a definition and typology of the category of post-sale services based on the defence sector's activities and practices; b) an account of the legal bases and means for the regulation of such dealings under European, international and domestic arms export control laws; and c) an assessment of the legal consequences of certain post-sale services and the potential liabilities they attract for corporate actors and licensing states.

The second part of the guide provides guidance on the facts that investigators should seek to identify to provide evidence on relevant wrongdoing that can be used in advocacy and legal proceedings. The report offers investigators a guide to the various elements of facts that can be used to build an investigation: the conduct of the recipient of the post-sale services, and thus the likely end-use of the arms to which such services are linked; the licensing and supplying state's obligations and responsibilities to monitor and control such services; and the obligations and liabilities of the defence corporation that performs the services. It also provides investigators with guidance on how to collect and store evidence to guarantee its usability in court.

An Overview of International Arms Export Control Law

This guide analyses and applies relevant provisions of the international legal framework on arms export controls to the subcategory of post-sale services that both constitute standalone 'arms exports' and are linked with original transfers of military hardware. The following is a brief overview of the foundational and guiding principles of this multi-layered legal framework, which includes the following international, European and national laws and legal instruments:

Arms Trade Treaty

On 2 April 2013 the UN General Assembly adopted the Arms Trade Treaty as a Resolution. The Treaty regulates arms trade through an international legal regime with the object of ending human suffering, promoting international peace and security and ensuring respect for international human rights and humanitarian law. All state parties to the Treaty are required to align their national legislation and licensing practices with their obligations under the ATT or make the ATT directly applicable as part of their national law. Domestic accountability for unlawful transfers varies depending on the supplying state's national law and procedures. The stated object and purpose of the ATT is to reduce human suffering by promoting international peace and security, human rights law and humanitarian law.⁵ State practice, however, reveals the extent to which arms export control law preferences the interests of states and defence corporations over these considerations.

EU Common Position 2008/944/CFSP (consolidated version 2019)

⁵ As well as to prevent the use of the exported arms against the supplier state, known in academic literature as the "boomerang effect".

European arms exports law is a multi-layered legal regime made up of the international, EU and national laws. The EU considers the production and export of arms to be a matter of international affairs under its Common Foreign and Security Policy ‘pillar’. Therefore, the EU legal regime for arms export control consists of the EU Common Foreign Affairs and Security Policy (EU Treaty, Title V, Article 21-46) (CFSP), and the EU Common Position 2003/468/CFSP on the control of arms brokering as well as the EU Regulation 428/2009 (Consolidated Version 2017) on Dual-Use Items.

The EU Common Position 2008/944/CFSP, which defines common rules governing control of exports of military technology and equipment lacks a control mechanism that could detect and sanction cases of violation and does establish obligations for EU Member States.⁶ According to Article 29 of the Treaty on European Union (2007), EU member states are legally bound to ensure that their domestic legislation and licensing practices conform to the Common Position.

Regulation 428/2009 governs the control of exports, transfer, brokering and transit of dual-use items. Dual-use items are defined as goods, software and technology that have both civilian and military applications. The exports of such items may include post-sale services. Unlike the Common Position, Regulation 428/2009 is directly applicable in all EU member states and must be enforced in the course of national decision-making on licensing. The regulation places the burden of classifying and determining whether a particular transaction is subject to export controls on the exporting company. Some national authorities have reportedly failed to put in place the necessary controls to effectively prevent, detect or prosecute illicit exports of dual-use goods.⁷

Domestic arms export control laws and licensing procedures

National legislation on arms export control transposes the international Arms Trade Treaty (ATT) and the EU Common Position 2008/944/CFSP (COMMON POSITION) into domestic law to implement and ensure compliance. It may include additional rules that must be interpreted in conjunction with supranational law. This guide reviews relevant aspects of the domestic legislation and practice of the biggest five European arms exporters that govern the export of post-sale services in the context of arms exports. The guide’s annex provides a list of online resources on the domestic laws of the national laws of the EU’s biggest arms exporters. Whether or not the ATT and COMMON POSITION are directly applicable as part of domestic law, state parties to the ATT, including all EU states, must ensure that their domestic legislation on arms export control is compliant with global and EU standards. Domestic legal provisions are intended to be applied alongside international and EU norms. Still, inconsistencies and discrepancies in the interpretation and application of different norms persist.

Since the defence sector is an expression of sovereign power, a range of defence and economic considerations offset legal considerations in domestic decision-making on licensing. Arms export authorizations are perceived as the principal if not exclusive competence of the executive branch of government, which in some jurisdictions excludes such decisions from judicial review and scrutiny.

⁶ Case 355/04 P, Judgment of The Court (Grand Chamber), 27 February 2007, p. 52.

⁷ European Parliament, “Dual use export controls”, p. 12 <https://www.statewatch.org/news/2015/nov/ep-study-dual-use-exports.pdf>.

Part I

The Regulation of Post-Sale Services

1. Post-Sale Services as Arms ‘Exports’

Post-sale services are a subcategory of arms transfers. This section reviews the prevailing forms of post-sale services currently provided by defence sector companies and identifies the regulatory bases for arms exports. It considers the definitions and prescribed regulation of such transfers in the ATT, COMMON POSITION and the Dual-Use Regulation and reviews the regulation of such transactions under the domestic legislation of the five biggest European exporters.

1.1 A Taxonomy of Post-Sale Services

“Post-sales services” broadly refer to various activities (“processes”) aimed at ensuring the operability of a product. The non-legal term “post-sale services” encompasses different forms of assistance provided by a seller to a buyer after a good or service is sold and delivered. A post-sale service can relate to installation, maintenance, repair, replacement, renewal, upgrade, transfer of information or technology, and training.

The provision of post-sale services is governed principally by contract and consumer law. Post-sales services can be included in a contract as a “legal guarantee of conformity”, a clause under which the seller is continuously bound under the original sales contract to deliver goods and services to the buyer on an ongoing basis at any time when the buyer may be in need of such services, e.g. in the event of a defective item. Alternatively, post-sale services can also be “commercial guarantees”, i.e. undertakings by the seller to provide post-sale services if the goods do not meet requirements set out in the guarantee statement. Such post-sale services can be delivered free of charge or entail additional payment.

Post-sale services linked with arms sales contracts can be classified according to: the time of the conclusion of the contract and of its actual execution (temporal scope); the geographical locations for the execution of the contract (spatial scope); the specific content of the service (material scope); and the company or companies that realizes the post-sale services (actors involved). A brief description of each of these features follows:

1. **Temporal scope** – the time of signature of the sales contract and the time of delivery of the services. Buyer and seller can either include a clause referring to post-sales services in the original sale contract or conclude a ‘separate related service’ agreement to regulate the delivery of such services in a continuous manner after the transfer of the items. Depending on the national legislation, the license for the export of the military item to which the post-sale services are linked may either encompass the provision of post-sale services or require that the company apply for an additional license to provide such services.
2. **Spatial scope** – the geographical location of the performance of the contract. Post-sale services are typically carried out in one or more of the following locations: in a repair facility on-site, at the arms manufacturer, or at a specialized company. The applicable export licensing regime is determined by the place where the contract is to be performed. When the post-sale services are provided in the EU within the territory of the supplying state, the service is often regulated by a “temporary import license”. This type of license authorises the temporary importation of the military item from the buyer state to the EU for a specific purpose, such as the performance of maintenance. Once the supplier company has completed the service, the item is re-exported back to the buyer state. This entire set of transactions is regulated under a single license. If an arms manufacturer provides post-sale services within the territory of the buying state, the service could require a “temporary export license” or a separate “supplying of services license”. Alternatively, post-sale services can be regulated under an ordinary definitive export license when they consist of the transfer of material or intangible goods, such as spare parts or software.
3. **Material scope** – the specific content of the post-sale services. The specifics vary according to the type of military goods exported and the specific needs of the buyer. Business practice and US Department of Defence documents suggests that post-sale services may include the following:
 - a. **Maintenance** is an umbrella term that encompasses the work of keeping something in proper condition, caring or upkeeping can include taking steps to prevent something from breaking down (preventative maintenance) and bringing something back to working order (corrective maintenance).

The US Department of Defense (DOD) Dictionary of Military and Associated Terms⁸ defines maintenance as: “1) All action, including inspection, testing, servicing, classification as to serviceability, repair, rebuilding, and reclamation, taken to retain material in a serviceable condition or to restore it to serviceability. 2) All supply and repair action taken to keep a force in condition to carry out its mission. 3) The routine recurring work required to keep a facility in such condition that it may be continuously used at its original or designed capacity and efficiency for its intended purpose”.

⁸ US Department of Defense, Dictionary of Military and Associated Terms, 2020
<https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf>.

Business practice distinguishes⁹ five levels of maintenance, depending on the complexity of operations performed on the item. French law considers¹⁰ three different types of maintenance, defined as “*niveaux techniques d'intervention*” (technical level of intervention) or NTI:

- NTI 1 ensures the implementation of line and routine maintenance. The operations are carried out with limited means, by the users of the equipment themselves or by local light structures. For example, the NTI 1 of boats is carried out by the crews themselves, sometimes at sea.
- NTI 2 corresponds to preventive or curative maintenance operations, carried out by support units that can be located at the users' site. For example, operations carried out by the fleet's military workshops at naval bases.
- NTI 3 corresponds to "heavy" maintenance operations that implies industrial reparation, carried out at specialised establishments requiring truly industrial means. These operations are often an opportunity to upgrade and modernize equipment.

The US army recently implemented a new “Two-Level Maintenance”¹¹ programme (TLM), aimed to increase readiness and cut logistics costs. TLM expands “field-level maintenance” by locating the maintenance support unit with the serviced unit, whereas “sustainment-level maintenance” covers more complex operations that are performed at depots.

In the case of aircraft, business practice distinguishes between line maintenance and base maintenance.¹² Line maintenance refers to any activity carried out while the aircraft remains in the operating environment and remains fit to fly subject to specific, relatively straightforward rectification tasks. Base maintenance includes activities that require the aircraft to be taken out of service for longer periods and necessitate special equipment that is only available in a hangar.

⁹ See for the previous Four-Level program <https://www.mobility-work.com/blog/5-corrective-and-preventive-maintenance-levels-you-need-learn-about>.

¹⁰ See, e.g., French Senate, ‘Définition des niveaux techniques d'intervention’, <https://www.senat.fr/rap/r04-426/r04-4269.html>.

¹¹ Brig. Gen. David Wilson, ‘The anatomy of two-level maintenance in Multi-Domain Battle’, 2018 https://www.army.mil/article/198430/the_anatomy_of_two_level_maintenance_in_multi_domain_battle. Major William J. Ames, ‘Logistical Effectiveness of Two-Level Maintenance’, 2000, <https://apps.dtic.mil/dtic/tr/fulltext/u2/a381766.pdf>. Christopher J. Lowman, ‘Two Level Maintenance DoD Maintenance Alignment in the 21st Century: Cross Boundary Maintenance’, 2009 <https://www.sae.org/events/dod/presentations/2009/b11christopherlowman.pdf>.

¹² See for a definition of “line maintenance”: https://www.skybrary.aero/index.php/Line_Maintenance and <http://www.iberiamaintenance.com/portal/site/mantenimientov2/menuitem.b8e6756a8112e1697c8fd010d21061ca/?idioma=en#.Xs4z8mgzblU>.

- b. **Repair** services mean restoration to the former condition in case of malfunction. Repair can imply the transfer of a brand-new component or software that is installed in the defected military equipment.
 - c. **Overhaul** refers to thorough examinations or testing of military items, with repairs or replacement if necessary.
 - d. **Replacement** occurs when goods are delivered in substitution of others not conforming to the contract.
 - e. **Renewal** entails the improvement of the original military item, including its upgrading to the most recent version.
 - f. **Transfer of information or technology** includes know-how that can take a variety of forms, including orally or through transfer that are intangible (software) or material (simulators, manuals).
 - g. **Installation** is an act by which additional equipment, components, or software is put into position or made ready for the buyer's use.
 - h. **Training** is the activity of teaching the skills and knowledge needed for the use of a particular military item.
4. **Actor specific** – the company (or companies) that performs the post-sale service. A broad range of companies supply post-sale services, including:
- 1. **Original Equipment Manufacturers (OEMs)**. Business practice usually refers to “in-house maintenance”¹³. Many EU arms manufacturers, including Rheinmetall,¹⁴ Thales,¹⁵ Airbus,¹⁶ Leonardo,¹⁷ and Naval Group,¹⁸ retain post-sales departments within the group.
 - 2. **Subsidiaries**. Arms subsidiary companies are registered both in EU and non-EU countries. In the past decades, leading European defence manufactures have expanded outside Europe, creating a global network of subsidiaries, international joint ventures and other cooperative approaches.¹⁹ The delocalization of arms production and post-sales activities is further discussed in the next paragraph,

¹³ Manufacturing.net, 'The Pros & Cons Of Outsourced vs. In-House Maintenance' 2014 <https://www.manufacturing.net/home/article/13150064/the-pros-cons-of-outsourced-vs-inhouse-maintenance>.

¹⁴ Rheinmetall Defence https://www.rheinmetall-defence.com/en/rheinmetall_defence/systems_and_products/air_defence_systems/service_neu/index.php.

¹⁵ Thalesgroup <https://www.thalesgroup.com/en/career/professions/customer-service>.

¹⁶ Airbus <https://www.airbus.com/aircraft/support-services/maintenance-engineering.html>.

¹⁷ Leonardo <https://www.leonardoautomation.com/en/contact-us/after-sales-service>.

¹⁸ Naval group <https://www.naval-group.com/en/produit/maintenance-2/>.

¹⁹ Andrew T. H. Tan, *The Global Arms Trade: A Handbook* (Routledge 2010).

under the ML 18 category analysis.

3. **Subcontractors.** Outsourced contract maintenance is becoming an increasingly prevalent method. It is cost-effective for several companies to specialize in producing components and for Original Equipment Manufacturers (OEMs) to generate and sell end-to-end military items. Among these, business practice distinguishes “Tier 1” and “Tier 2” companies²⁰. Tier 1 companies are those that supply parts or systems directly to OEMs and offer the most advanced processes in the supply chain. For instance, a Tier 1 company could supply the engine of a military vehicle. Tier 2 companies are the suppliers who, although no less vital to the supply chain, are usually limited in what they can produce. These companies are often smaller and have less technical advantages than Tier 1 companies. For instance, a Tier 2 company could provide components, parts or raw material.

It is therefore crucial to identify the supply chain of the OEM. For instance, most Belgian defence companies are suppliers to Tier 1 producers in other EU countries.

1.2 Control of Post-Sale Services in the Arms Trade Treaty

The ATT sets out to regulate several categories of conventional arms and their associated activities. Article 2 describes seven categories derived from the United Nations Register of Conventional Arms (UNROCA)²¹, including small arms and light weapons. The Treaty does not include typical post-sale services such as the transfer of technical assistance, temporary imports or the transfer of licensed production. While these operations were included in the early Treaty drafts, by the time of the first negotiating conference in 2012 the terms used in the draft text refer exclusively to “*import, export, transit, transshipment and arms brokering*”.²²

Article 4 of the ATT does regulate the exports of “parts and components”. This type of service can frequently cover post-sale services such as reparation, replacement, renewal, and installation. In a weapon context, “*part*” can be considered an item that cannot work independently but is primarily used in the construction of a larger item (e.g. the armoured steel plates that will go into a battle tank chassis). “*Component*” can be understood as an item that has an independent function (such as a gas turbine engine) but that will need to be integrated into a larger item to be used. The ATT provides for the control of parts and components “*where the export is in a form that provides the capability to assemble the conventional arms covered under Art. 2(1)*”. This provision has been

²⁰ Amatech, ‘OEMs, Tier 1, 2 & 3 - The Automotive Industry Supply Chain Explained’ <https://www.amatechinc.com/resources/blog/tier-1-2-3-automotive-industry-supply-chain-explained>.

²¹ United Nations Register of Conventional Arms, <https://www.unroca.org/categories>.

²² Casey-MalsenMaslen, Clapham, Giacca, Parker, *The Arms Trade Treaty – A Commentary* (Oxford University Press 2016) p. 65.

subject to diverse interpretations; most interpretations do not cover generic parts (e.g. nuts and bolts) but do cover unique components of specific arms.²³

The range and complexity of modern weapons systems makes it virtually impossible to list every part and component for such highly technical operations. Instead of developing a comprehensive list of all such services, we survey the prevailing characteristics and requirements for different conventional arms systems that can be used to typologise the different kinds and forms of post-sale services. The following table summarizes components and parts that would be critical to the design of the conventional arms listed in the ATT and are relatively easily identifiable.²⁴

162 *Article 4. Parts and Components*

Table 4.1 Typical Parts and Components for the Conventional Arms Regulated by the ATT

Weapon System	Parts ^a	Components
I. Battle Tanks	<ul style="list-style-type: none"> ▪ Rolled Homogeneous Armour (RHA) ▪ Composite armour ▪ Weapons-grade steels ▪ Shaped-charge liners 	<ul style="list-style-type: none"> ▪ Main armament ▪ Breech ▪ Breech block ▪ Turret ring ▪ Optics ▪ Fire-control systems ▪ Track ▪ Specialist engines
II. Armoured Combat Vehicles		<ul style="list-style-type: none"> ▪ Main armament ▪ Breech ▪ Breech block
III. Large-Calibre Artillery Systems		<ul style="list-style-type: none"> ▪ As for main battle tanks, if self-propelled guns
IV. Combat Aircraft	<ul style="list-style-type: none"> ▪ Specialist composite materials 	<ul style="list-style-type: none"> ▪ High-performance jet engines ▪ Fuselages ▪ Wings and fins ▪ Fire-control systems ▪ Flight-control systems ▪ Radars ▪ Avionics
V. Attack Helicopters	<ul style="list-style-type: none"> ▪ Specialist composite materials 	<ul style="list-style-type: none"> ▪ Fuselages ▪ Rotor blades ▪ Fire-control systems ▪ Flight-control systems ▪ Radars ▪ Avionics
VI. Warships	<ul style="list-style-type: none"> ▪ Weapons-grade steels 	<ul style="list-style-type: none"> ▪ Radars ▪ Fire-control systems ▪ Specialist communication systems
VII. Missiles and Missile Launchers	<ul style="list-style-type: none"> ▪ Specialist composite materials ▪ Shaped-charge liners 	<ul style="list-style-type: none"> ▪ Fuselages ▪ Wings and fins ▪ Rocket motors ▪ Guidance systems ▪ Safe-to-arm units ▪ Fuses
VIII. Small Arms and Light Weapons (including ammunition)	<ul style="list-style-type: none"> ▪ Shaped-charge liners 	<ul style="list-style-type: none"> ▪ Frame ▪ Receiver ▪ Barrel ▪ Breech block ▪ Bolt ▪ Cylinders ▪ Recoil gas impulse mechanisms ▪ Rocket motors ▪ Safe-to-arm units ▪ Fuses

^a The term 'parts' includes specialist materials processed from raw materials to produce a highly specialist item specifically for military use. They can be classified as parts as they are individual items and not manufactured components.

²³ Ibid.

²⁴ Ibid, p. 163.

1.3 Control of Post-Sale Services in EU Law

1.3.2 Definition of 'Export'

The regulation of an arms transfer is based on the definition of an "export".²⁵ EU law defines export as the procedure applied to the exit of European goods from the EU customs territory. Once exported, EU customs treat these European goods as non-EU goods. Regulation 450/2008 lays down the Community Customs Code (CCC), which codifies the rules, arrangements and procedures applicable to goods traded between EU and non-EU countries.

The export procedure consists of two main stages:

- 1) **The export declaration:** The exporter/declarant presents the goods, an export declaration and, where necessary, an export licence to the customs authority in the exporter's country of registration or the country in which the goods are packed and loaded for export (Article 221 (2) UCC Implementing Act)
- 2) **The presentation of the goods for export:** The exporting company presents its goods to the exporting state's customs authority who have the opportunity to examine the goods based on the information received from the exporter to make sure that they correspond to those declared, and supervises their physical departure (but do not routinely do so) (Article 332 UCC IA).

Two licensing regimes are relevant to the present analysis:

- 1) **Permanent export license.** The regulation of permanent arms exports in international law encompasses²⁶ the physical movement out of a state's territory and/or the transfer of title or control over conventional arms from one state to another, or from one state or a legal person to a legal person in the jurisdiction of another state. According to the International Convention on the Simplification and Harmonization of Custom Procedure, export means *"the custom procedure applicable to goods which, being in free circulation, leave the customs territory and are intended to remain permanently outside it"* (Annex C, Ch. 1).
- 2) **Temporary import license** ("inward processing traffic", Art. 168 CCC). The regime for non-EU goods processed in the EU Custom territory do not give rise to liability for payment of custom duties if the goods are intended for re-export outside the EU customs area. Under

²⁵ The term 'transfer' in the ATT includes activities such as *"import, transit, trans-shipment and brokering"* (Art. 2(2)).

²⁶ Discussion Paper submitted by the President of the United Nations Conference on the ATT of July 2012, S. 4(B)(1). See also United Nations Panel of Governmental Technical Experts on the Register of Conventional Arms Report A/47/342, 14 August 1992, p.10: "International arms transfers involve, in addition to the physical movement of equipment into or from national territory, the transfer of title to and control over the equipment. An international arms transfer may also occur without the movement of equipment across State frontiers if a State, or its agent, is granted title and control over the equipment in the territory of the supplier State".

EU customs law, processing of goods refers to “*assembling, fitting them to other goods, the repair of goods, including restoring them and putting them in order*” (Art. 4(32) CCC).

Therefore, a temporary import license can be used to regulate post-sale services operations, as discussed in the following section.

Finally, export licenses are granted for one of two forms of export:

- 1) **Material export**, i.e. the transfer of physical items
- 2) **Intangible export**, i.e. the transmission of software or technology by electronic media, including by fax, telephone, email or any other electronic means to a destination outside the EU. This includes making available in an electronic form such software and technology to legal and natural persons and partnerships outside the EU. Export of immaterial transfer also applies to oral transmission of intangible technology. Immaterial exports are usually not subject to control by national customs authorities.²⁷

1.3.2 Controlled Categories of Post-Sale Services

According to the EU Common Position 2008/944/CFSP, each Member State is obligated to “*assess the export licence applications made to it for items on the EU Common Military List*”. The EU Common Military List is a reference point for member states’ national military technology and equipment lists, but it does not directly replace them. Member states must “*ensure that their national legislation enables them to control the export of technology and equipment on the EU Common Military List*”. The EU Common Military List is regularly reviewed taking into account, where appropriate, similar national and international lists (Preamble 16).

The EU Common Military List sets out 22 categories of items and aims to guide the classification of military equipment by Member States with a view to harmonising the EU reporting system. The EU Common Military List does not preclude member states from including additional categories but is intended as a common minimum core standard for licensing and reporting on arms exports.

While the 2019 EU Common Military List does not expressly identify a “post-sale” category, this category can be construed by combining the categories found in the Military List using definitions contained in national legislation and the practices of defence sector businesses.

The following categories of the EU Common Military List are relevant for the control of post-sale services:

²⁷ French Defence Ministry, *Recommandations à l'usage des industriels*, 2015, pag. 3: “Le suivi et la *traçabilité* des informations transmises par voie intangible est plus difficile à établir par la diversité des moyens de diffusion rencontrés: e-mail, fax, téléphone, discussion orale (dans le cadre de formation, d'assistance technique, de coopération, ...). C'est pourquoi les informations transmises par voie intangible méritent une attention particulière. De plus, aujourd'hui, ces informations ne subissent aucun contrôle par le service des Douanes”. <https://www.ixarm.com/sites/default/files/documents/NOTE%20DGA%20-Technologies%20soumises%20%C3%A0%20contr%C3%B4le.pdf>.

ML 14. Export of “specialised equipment for military training” or for simulating military scenarios, simulators specially designed for training in the use of any firearm or weapon specified by ML1 or ML2, and specially designed components and accessories therefore”.

Simulators are increasingly popular for offering the dual benefit of boosting operational effectiveness while reducing training costs. Simulators can be differentiated between “virtual simulation input hardware” or “virtual simulation output hardware” (such as stationary or mounted displays). Post-sale services arguably include the delivery of military simulators: these are “interactive manuals” that can be delivered after the shipment of the military item and through which the supplying company provides additional information, know-how, and training on the use of the specific military equipment.

ML18 Export of production equipment and components, as follows:

- a. Specially designed or modified production equipment for the production of products specified by the EU Common Military List, and especially designed components thereof;
- b. Specially designed environmental test facilities and specially designed equipment therefore, for the certification, qualification or testing of products specified by the EU Common Military List.

For the purposes of ML18, the term 'production' includes design, examination, manufacture, testing and checking.

The ML18 category is also applicable to post-sale services provided through the establishment of subsidiaries in non-EU countries. The manufacturing of equipment by subsidiaries is subject to controls and includes the production of military items or components included in the list; and the provision of post-sale operations, such as overhaul, certification and qualification.

Since the turn of the century, EU arms manufacturers have increasingly exported manufacturing equipment to non-EU countries for the production of small arms.²⁸ Leading EU defence companies, including Thales, Rheinmetall and MBDA, conduct their global operations through their subsidiaries. In 2008, Germany controversially authorized the export of production equipment for the Heckler

²⁸ A Vranckx, ‘Containing diversion: Arms end-use and post-delivery controls (GRIP 2016) <https://grip.org/containing-diversion-arms-end-use-and-post-delivery-controls/>.

and Koch G36 assault rifles to Saudi Arabia. The rifles have reportedly been used in the conflicts in Syria and Yemen.²⁹

ML21. Transfer of software, which is defined as *“a collection of one or more programs or microprograms fixed in any tangible medium of expression”*. Programs are defined as *“a sequence of instructions to carry out a process in, or convertible into, a form executable by an electronic computer”*.

ML21 covers a wide range of functions relevant to post-sale services including the design, test, assembly, manufacture, and maintenance of military equipment through programs and other operating information used by a computer. ML21 also covers software that simulates or evaluates the use of a weapon system or specific battle environments and military operations.

The category also includes Command, Communications, Control and Intelligence (C3I) and Command, Communications, Control, Computer and Intelligence (C4I), which are information systems employed to process data and communicate military orders used in air, land or naval operations.³⁰ The most important EU arms manufacturers provide C3I and C4I, including Thales, Leonardo, Indra, and Rheinmetall.

Military software provides military personnel with operational support and administrative tools. The Stockholm International Peace Research Institute (SIPRI) notes that software can be defined as ‘explicit knowledge’, which *“can be expressed in words, numbers and symbols, and stored in computers”*.³¹ As such, software can be stored using tangible means by being saved on CD-ROMs, memory sticks, computers or servers. However, it is becoming increasingly common for software and technical data to be shared and transferred through intangible means such as email attachments, server downloads and uploads, and cloud computing services.

Military software can provide for a wide range of capabilities, including:³²

- Radar technology, enemy location and vision;
- Operations support and centralization;
- Tactical communication, military messaging, handsets & other hardware;
- Armor and vehicle management and other forms of asset management;
- Aerial technology & aircraft management;
- Personnel management;

²⁹ See generally Leroy Thompson, *The G3 Battle Rifle* (Bloomsbury 2019).

³⁰ See for a general definition: <https://fas.org/man/dod-101/navy/docs/fun/part20.htm>.

³¹ Mark Bromley, Giovanna Maletta, ‘The Challenge of Software and Technology Transfers to Non-proliferation efforts’ SIPRI, 2018, p. 24 <https://www.sipri.org/publications/2018/other-publications/challenge-software-and-technology-transfers-non-proliferation-efforts-implementing-and-complying>.

³² See ‘Military and Defense Software Overview’, <https://www.trustradius.com/military-and-defense>.

- Battle management (e.g. tactical oversight of assets and personnel); and
- Battlefield management, area surveillance.

ML22. Transfer of technology, which is defined as “specific information necessary³³ for the development, production or operation, installation, maintenance (checking), repair, overhaul or refurbishing of items specified in the EU Common Military List”.

The Stockholm International Peace Research Institute (SIPRI) notes that technology and technical assistance are forms of what can be defined as ‘tacit knowledge’, that is ‘knowledge that you do not get from being taught, or from books’ but ‘from personal experience’.³⁴ As such, knowledge and technical assistance are forms of technology that are both stored and shared through intangible means and can be transferred in-person through ‘education, training and doing’. Transfers of knowledge and technical assistance can therefore involve the active movement of people across borders. This can also be carried out using online tele-conferencing platforms.

The legal controls for Immaterial Transfer of Technology are not well-defined and are therefore understood and applied differently among EU member states.³⁵ For instance, Article 2 of the EU Dual-use Regulation states that the ‘transmission of software and technology by means of electronic media, fax or telephone to destinations outside the Community should also be controlled’, but is unclear whether this covers technology shared between different branches of the same company or stored via cloud computing services.

The EU Common Military List exempts the following transfers of technology from requirements for export authorisation:

- A. When the technology exported is “*the minimum necessary for the installation, operation, maintenance (checking) or repair, of those items which are not controlled or whose export has been authorised*”. According to SIPRI, the aim of this clause is to limit controls to “key technologies”³⁶. This concept is, though, rather vague. The UK Guidelines on arms export³⁷ provides an example: “*if we look at an Information Notice describing the repair of the airframe of a Boeing 707 aircraft, it is clear that it is “technology” capable of being “required” for the “use” of a military aircraft. The Notice would however constitute the minimum technology necessary for the repair of a non-military item and so is not*

³³ The EU Common Military List specifies that “it refers to only that portion of “technology” which is peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions”, p. 33

³⁴ Mark Bromley and Giovanna Maletta, p. 26.

³⁵ Ibid, p. 22.

³⁶ Ibid, p. 24.

³⁷ Government of United Kingdom, Department for Business and Innovation, ‘Guidance on export of technology’, 2010, p. 5

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/15203/Export_of_technology_Guidance_-_URN_10-660_-_new_logo_-_2012.pdf.

controlled". According to the French Ministry of Defence³⁸, the "minimum technology" includes "technical assistance and training for the installation, initial checks on the proper functioning of the equipment, routine maintenance or repair included under the abovementioned category NTI1/NTI2, as well as the supply of the corresponding technical means. Conversely, "minimum technology" excludes any heavy maintenance operation that requires industrial means. (...) It also excludes the transfer of manufacturing documentation, including prototype or production phase drawings, production lines or drawings of specific production tools. Likewise, the exemption clause does not apply to detailed specifications of the product prior to its development, which may give important indications on its operational use or performance. It excludes training and technical assistance for operational use involving tactical know-how and operational data".

In the UK, controls on technology are not intended to interfere unduly with normal commercial or academic practices and thus technology that is "required" for the installation, operation, maintenance and repair of controlled items whose export has been previously authorised is exempt from control. Unless otherwise specified, an export licence granted for any controlled items also authorises the export of the minimum "technology" "required" for the installation, operation, maintenance and repair of the items, to the same destination and end-user as the items.³⁹

- B. When the technology exported is in "the public domain". This means that the technology has been made available without restrictions upon its further dissemination. Copyright restrictions do not remove technology from being in the public domain. In this regard, the UK Guidelines on arms export clarifies that, for example, "a product brochure taken from a publicly available website that outlines the capabilities of a piece of military equipment could include "technology" for the "use" of military equipment but, since the brochure is clearly "in the public domain", it is not controlled"⁴⁰.
- C. When the technology exported is "basic scientific research", referring to "experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts, not primarily directed towards a specific practical aim or objective or the minimum necessary information for patent applications".

³⁸ French Minister of Defence, note n. 2016- 033184

<https://www.ixarm.com/sites/default/files/documents/NOTE%20DGA-DI%202016-033184-24-03-2016%20-Technologie%20minimale%20.pdf>.

³⁹ Government of United Kingdom, p. 4.

⁴⁰ Ibid.

1.4 National Controls of Post-Sale Services in the EU's Top Five Exporters

This section considers whether and what kind of post-sale services are controlled under the domestic law and practice of the five biggest European exporters. The section is based on a review of primary source legislation and regulation, secondary sources such as government or industry reports and other materials, and interviews with legal practitioners and industry experts. For each of the five countries, we focus on five key issues:

- 1) definition of post-sale services;
- 2) licensing of the export of post-sale services;
- 3) licensing of the establishment of a subsidiary abroad; and
- 4) national reporting on the licensing of post-sale services.

The following information on the laws and practices of these EU countries is based on initial consultations with non-governmental organisations and industry experts in the various countries. The practice of some countries remains unclear. Further information on these laws and practices could be available through direct inquiry with national licensing authorities.

Belgium

Definition: Since 2003, in Belgium the control of arms export fits within the competence of the regions. In 2012, Wallonia⁴¹, Flanders⁴² and Brussels⁴³ enacted new arms export decrees and executive regulations. The regional decrees do not provide an autonomous and comprehensive definition of post-sale services, but they explicitly incorporate the EU Common Military List.

Licensing: Three Belgian regions have authority to license arms exports in line with the practice of Belgium's Federal Government, which has exclusive authority over all imports and exports by Belgium's armed forces and Federal police.⁴⁴ The reparation and maintenance of military items in

⁴¹ Décret relatif à l'importation, à l'exportation, au transit et au transfert d'armes civiles et de produits liés à la défense, 21 June 2012 <http://www.ejustice.just.fgov.be/eli/decret/2012/06/21/2012203690/justel> (French) and <http://www.ejustice.just.fgov.be/eli/decret/2012/06/21/2012203690/justel> (Dutch).

⁴² Décret concernant l'importation, l'exportation, le transit et le transfert de produits liés à la défense, d'autre matériel à usage militaire, de matériel de maintien de l'ordre, d'armes à feu civiles, de pièces et de munitions, 15 June 2012, <http://www.ejustice.just.fgov.be/eli/decret/2012/06/15/2012035751/justel> (Dutch) and <http://www.ejustice.just.fgov.be/eli/decret/2012/06/15/2012035751/justel> (French).

⁴³ Ordinance on the import, export, transit and transfer of defense-related products, other material for military use, law enforcement equipment, civilian firearms, parts, accessories and ammunition thereof (Arms ordinance), 20 June 2013 <http://www.ejustice.just.fgov.be/eli/ordonnantie/2013/06/20/2013031470/justel> (Dutch) and <http://www.ejustice.just.fgov.be/eli/ordonnance/2013/06/20/2013031470/justel> (French).

⁴⁴ Nils Duquet, 'Business as usual? Assessing the impact of the Arab Spring on European arms export control policies', Flemish Peace Institute, 2014, p. 42 http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf.

Belgium can be licensed under a temporary import license (inward processing). However, temporary licenses are also granted for other purposes, such as demonstrations and fairs. Repair and maintenance are also regulated under ordinary permanent export. This is the case, for example, of the latest annual report of the Brussels region that mentions an export of Mirage F1 to the US imported a year earlier from France for repair.⁴⁵ Experts also note that the annual reports regularly indicate the export of spare parts and components under the ordinary export licence system. However, without more information on the exported material it is not possible to relate these licences back to an earlier arms contract. Only when the pattern is specific (e.g. country of destination and country of end-user) or if an extra remark is made in the report, it may be possible to identify a post-sale operation. In other words, the reporting system does not explicitly link the original sale with the post-sale service.

Intangible post-sale services are usually licensed under the ML22 category of the EU Common Military List. However, the regions regulate these exports differently. In 2018, Walloon issued 106 export licenses for “transfert de technologie”⁴⁶. The report does not provide any details concerning these licences, while under the regular export licences no ML22 licence can be seen. In Flanders such licences only started to appear after the NGO Vredesactie filed a case against the Belgian company Barco in 2011 accusing the company of illegal military links with Israel for assembling flight simulators in Belgium for export to Israel. The case was ultimately rejected, but today Flemish reports more diligently take stock of ML22 licences. Notably, Flemish ML22 licences often have a value of €0. Reports from Brussels do not show any ML 22 license.

Subsidiary licensing: There are indications that post-sale services are frequently performed by subsidiary companies registered in the buyer state. The annual reports of Belgium arms manufacturers show several subsidiaries in the countries with which they have large contracts. However, under Belgian law there is no need for a licence when an activity is carried out through a subsidiary (apart from what should be controlled through the ML22 and perhaps ML18 licences). An estimate of the value of the post-sale services can be made through the financial reports, but only if the subsidiary engages in no or little other activity. None of the Belgian regions require a license for the transfer of production technology to another country.

National reporting: Belgian national reports on arms exports do not include any specific information on post-sale services; either those licensed under temporary import licenses, e.g., for reparation and maintenance, or ordinary licences for the export of components and spare parts.

France

Definition: French arms export law controls the items included in the EU Common Military List, which was incorporated in 2009.⁴⁷ Domestic arms export law does not provide for an autonomous

⁴⁵ Bruxelles Region Report 2018, pp. 71 and 72 <https://grip.org/wp-content/uploads/2020/06/2018BXL.pdf>.

⁴⁶ Walloon Region Report 2018, p. 20 <https://grip.org/wp-content/uploads/2020/06/2018rw.pdf>.

⁴⁷ National law Arrêté du 17 juin 2009 fixant la liste des matériels de guerre et matériels assimilés soumis à une procédure spéciale d'exportation.

definition of post-sale services. The regulation of post-sale services is limited to the controls as they relate to/are set out under ML22 “Technology” and ML21 “Software”. French Ministry for Armed Forces has published arms export guidelines that provide the clarifications on the scope of the ML22 category:

- national law⁴⁸ controls the export of technology that can be transferred through the following ways: paper documents; CD-ROMs, memory sticks, computers or servers; email and fax; online platforms; training; technical support; and meetings. Although technology can be transferred through conversations and demonstration (which is arguably technically distinct from training), they are not subject to control.
- technology transfers⁴⁹ by companies from the same corporate group established in different jurisdictions are controlled.
- design and manufacturing technology transfers⁵⁰ linked to military equipment are not subject to arms control when the Technology Readiness Level (TRL) – a maturity estimate scale – of these items is below four (4).⁵¹

The Arms Export Department of the French Custom Office provide clarifications on the meaning of the following types of post-sale activities:⁵²

- “repair” means restoration to previous condition without adding any new functions to increase performance. There is a difference between passive upgrading repair and active upgrading repair
- “non-substantial retrofitting” means an operation aimed at keeping a military at its top performance or to improve it in a minimal way. This could be through correcting an obsolescent component that does not contribute directly to the essential functions of the military item or installing military systems that do not significantly increase performance (e.g. modernization of unencrypted communications, modernization of mechanical structural or navigational components).
- “substantial retrofitting” encompasses renovation and modernization operation using new materials or equipment that add features or significantly improve the performance of the entire item. This category encompasses, for example, a structural reinforcement of the

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020764115&categorieLien=id>.

⁴⁸ French Defence Minister, Recommendations à l’usage de des industriels, 2015, p. 8

<https://www.ixarm.com/sites/default/files/documents/NOTE%20DGA%20-Technologies%20soumises%20%C3%A0%20contr%C3%B4le.pdf>.

⁴⁹ French Defence Minister, p..4

⁵⁰ Ibid.

⁵¹ Technology readiness levels are a method of estimating technology maturity of Critical Technology Elements of a program during the acquisition process. They are determined during a Technology Readiness Assessment that examines program concepts, technology requirements, and demonstrated technology capabilities. TRL are based on a scale from 1 to 9 with 9 being the most mature technology.

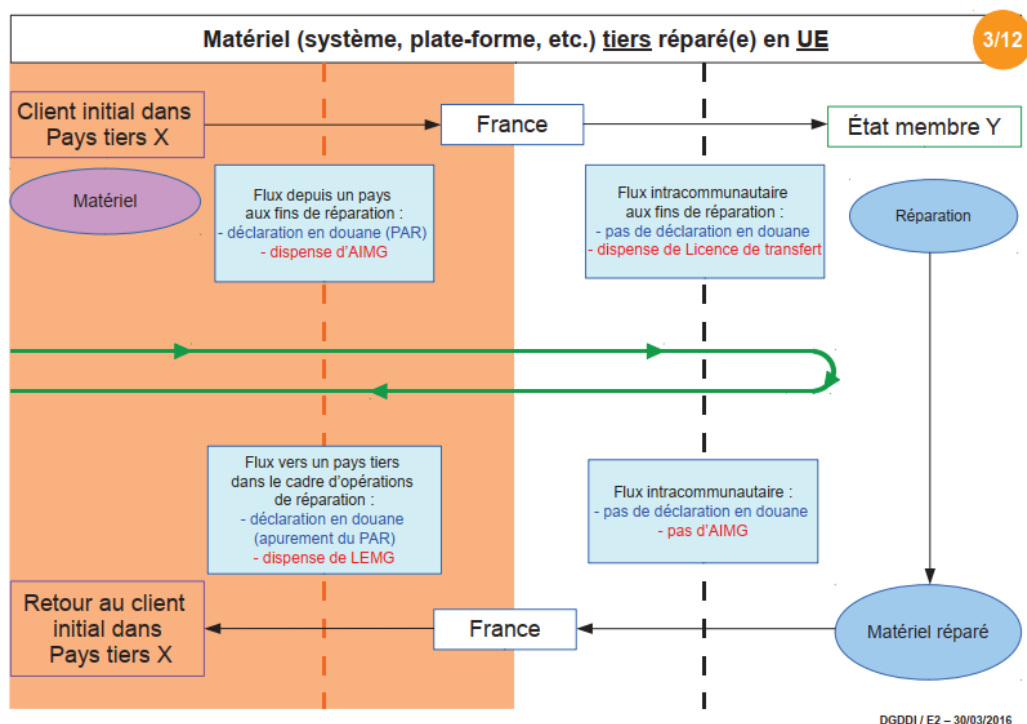
⁵² Directions Générales des Douanes et Droits Indirects, ‘Restrictions et sécurisation des échanges’, 2018: https://www.douane.gouv.fr/sites/default/files/bod/src/dana/da/Restrictions%20et%20securisation%20des%20echanges_19-029.pdf and https://www.douane.gouv.fr/sites/default/files/bod/src/dana/da_annexes/Restrictions%20et%20securisation%20des%20echanges_19-029_1.pdf.

weapons system to enhance its military functions, or the installation of a weapon system or a cryptographic system.

Licensing: Repair is not subject to French export control law. Under the Act of 8 July 2015,⁵³ the temporary import (inward processing) for the purpose of repair does not require a license (see Image 1 below). Likewise, under the Act of 2 June 2014,⁵⁴ the re-export of a military item that was temporarily imported for the purpose of repair is not subject to control, provided that it remains the property of a person established abroad and is re-exported to the original owner (see Image 2 below).

Non-substantial retrofitting requires an export license with sole regard to the additional components, spare parts or equipment that has been installed during the operation.⁵⁵ Substantial retrofitting requires an export license for the entire item.⁵⁶

Image 1: repair in the EU under French arms law



⁵³ Act of July 8, 2015,.

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030861859&dateTexte=20200527>.

⁵⁴ Act of June 2, 2014

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000029048128&dateTexte=20190429>.

⁵⁵ Direction Générale des Douanes et Droits Indirects, 'Information à destination des opérateurs : Application de la réglementation relative aux matériels de guerre matériels assimilés aux flux transfrontaliers combinés pour réparation ou rétrofit', 2016 https://www.ixarm.com/sites/default/files/documents/2016-04-07_Information_aux_opérateurs_PA-PP.pdf.

⁵⁶ Ibid.

Image 2: non-substantial retrofitting in the EU under French arms law

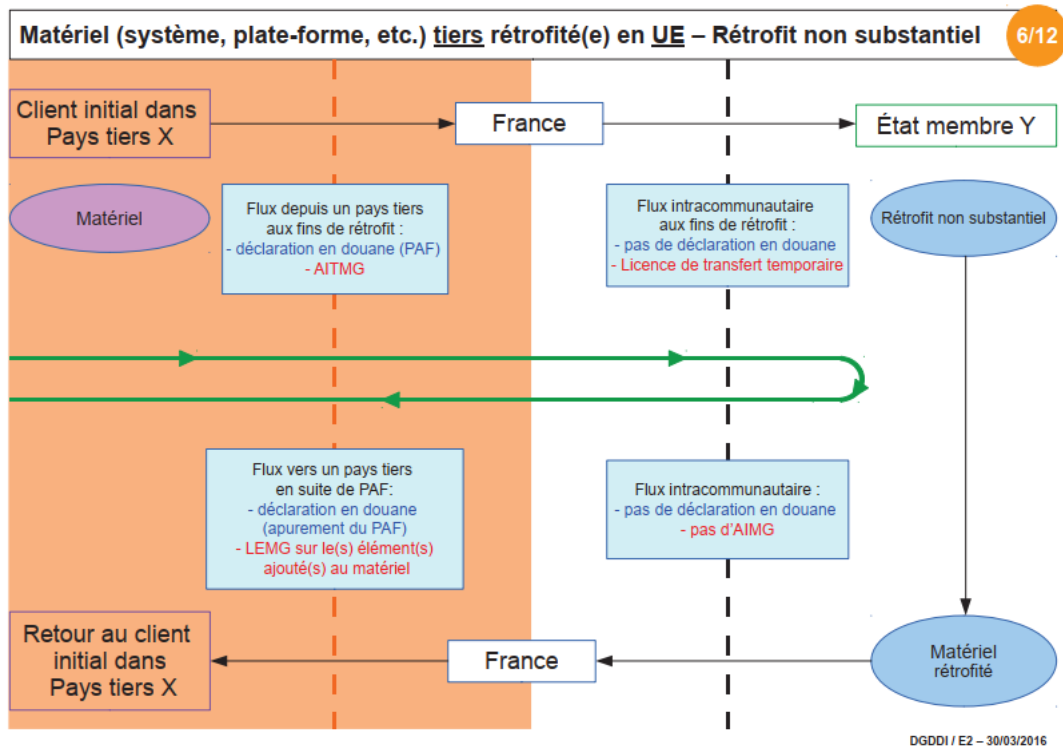
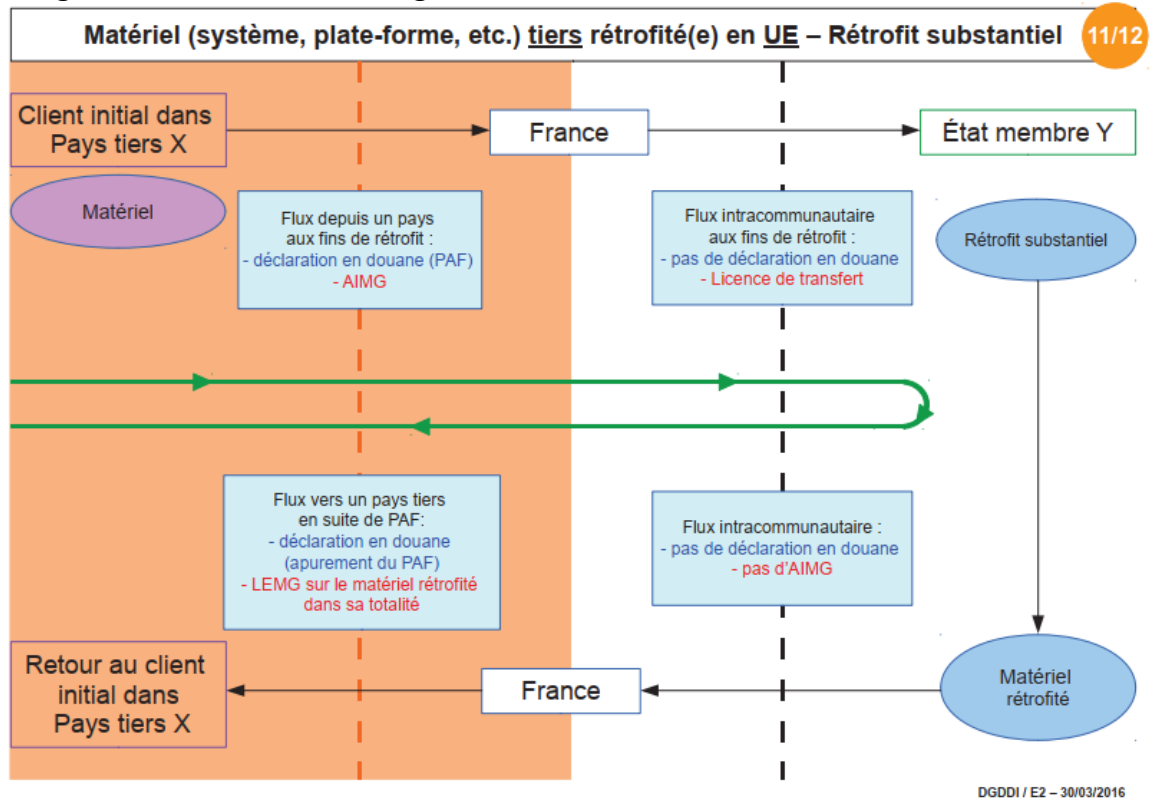


Image 3: substantial retrofitting in the EU under French arms law



Subsidiary licensing: France does not require a license to establish a subsidiary company that manufactures weapons outside the EU for the purpose of arms production or post-sale services. This operation may be regulated indirectly, when it implies the transfer of production equipment (ML 18), or intangible technologies (ML 21), or software (ML22).

National reporting: French annual reports include information about the number and amount of military technology and equipment licences granted by country and Military List; the amount of orders; and the amount of deliveries. According to the Observatory of the defense economy ('Observatoire économique de la défense') at France's ministry of armed forces, deliveries indicated in national reports do not include figures on post-sale services.⁵⁷ France has been criticised for failing to provide complete information about post-sale services.⁵⁸

Germany

Definition: Sec. 2 (16) of the Foreign Trade and Payments Act (Außenwirtschaftsgesetz - AWG)⁵⁹ defines technical support to include "all technical assistance related to the repair, the development, the manufacture, the assembly, the testing, the maintenance or any other technical service. Technical support can take the form of instruction, training, passing on of practical knowledge or skills or the form of advisory services. It also includes support provided orally, by telephone, and by electronic means".

Licensing: Under the Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung - AWV)⁶⁰, the export of technical support is subject to authorization when related to:

- chemical, biological or nuclear weapons
- a military end-use and provided to a country that is subject to arms embargo
- the construction or operation of nuclear facilities
- certain communication surveillance technology

⁵⁷ Observatoire économique de la défense, 'Comparaison des Données Internationales sur les Exportations d'Armements', 2016

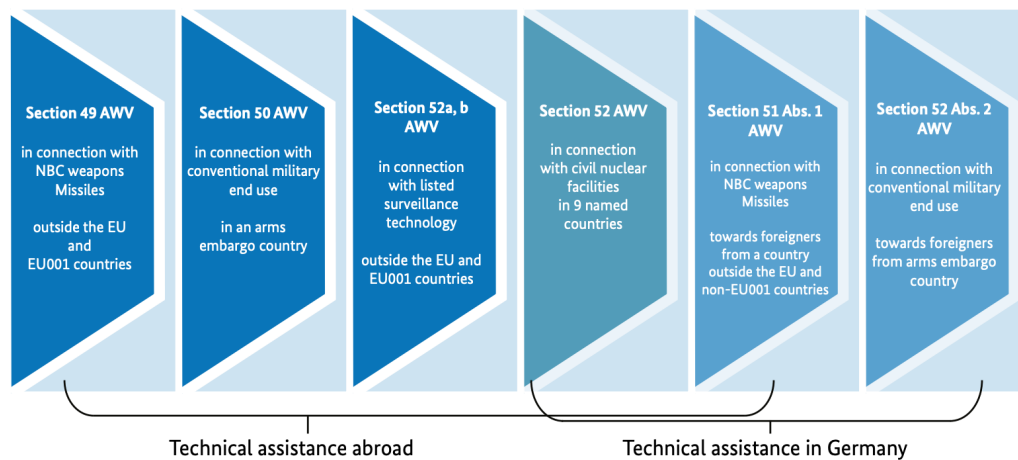
<https://www.defense.gouv.fr/fre/content/download/464404/7388334/Ecodef78.pdf>. and <https://www.defense.gouv.fr/fre/sga/le-sga-en-action/economie-et-statistiques/observatoire-economique-de-la-defense/oed>.

⁵⁸ Amnesty International, 'Egypt: How French Arms Were Used To Crush Dissent', 2018, p. 47 <https://www.amnesty.org/download/Documents/EUR2190382018ENGLISH.PDF>.

⁵⁹ Foreign Trade and Payments Act https://www.gesetze-im-internet.de/englisch_awg/englisch_awg.html#p0019.

⁶⁰ Ibid.

The following table groups relevant provisions applicable to technical assistance provided abroad as distinguished from those applicable to technical assistance undertaken in Germany:⁶¹



The Foreign Trade and Payments Act law provides for imprisonment of the company officials of up to five years in case of violation of the export regime that governs technical support (Article 18).

Pursuant to the Foreign Trade and Payments Ordinance, the export of post-sale services is not subject to the licensing regime when the technical support “represents the absolutely necessary minimum for the construction, operation, maintenance and repair of those goods for which an export licence was issued.” This exemption clause reflects the provision included in the ML 22 category of the EU Military List.

With regard to the export of components and spare parts, German law sets out the “25% rule”. Under this regime, the supplying company can apply for a license for the export of listed spare parts, which are necessary for the maintenance or the operational readiness of the main item, in a value of up to 25% of the main item, directly with the export licence for the original contract.⁶² The application for the 25% regulation can be combined with the license for the listed main good or even at a later date.⁶³

Subsidiary licensing: German law does not require an export license for the establishment of a subsidiary in a non-EU country.

National reporting: National reports on arms exports do not include specific information on post-sale services. It may be the case that post-sale services are authorised by a “collective license” for

⁶¹ Federal Office for Economic Affairs and Export Control (BAFA), "Export Control and Academia Manual", 2019, p. 36
https://www.bafa.de/SharedDocs/Downloads/EN/Foreign_Trade/ec_academia.pdf?__blob=publicationFile&v=5.

⁶² See Federal Office of Economics and Export Control “Exportkontrolle und das BAFA Grundlagen der Exportkontrolle, Antragstellung, Informationsquellen und Ansprechpartner”, 2019, p. 32
https://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk_merkblatt_exportkontrolle_bafa.html.

⁶³ Ibid.

the military item of “technology transfer for studying purpose”, which may refer to training. The export of spare parts and components are regulated under the “permanent export” regime.

Italy

Definition: Italy’s arms export law No 185/1990 defines and regulates post-sale services under different provisions. Article 2(6) states: *“the supply of training and maintenance services, to be conducted in Italy or abroad, is subject to control”*.

Licensing: According to Article 1(8)(c), a registered arms company must request a “temporary import license to overhaul the military item that was previously exported abroad”. While Article 1(h) states: “the exports of intangible military goods must be licensed”. According to Article 2(4)(b), the export of “designs, diagrams and any other type of documentation and information necessary to build, use and maintain military goods” is also subject to license. Italian arms export law also controls training to be conducted in Italy related to “military products classified as secret” (Article 21).

Overall, domestic procedures subject licenses for post-sale services to relaxed regulation. The Ministry of Defence is allowed to grant clearance (which is less cumbersome to obtain than a formal license) to a company that intends to perform post-sale services linked with previously exported arms, provided that the original license did not cover such services.

Since Italian export licenses are not limited in time (Article 14), licenses for post-sale operations can last for years, while circumstances in the buying state may change.

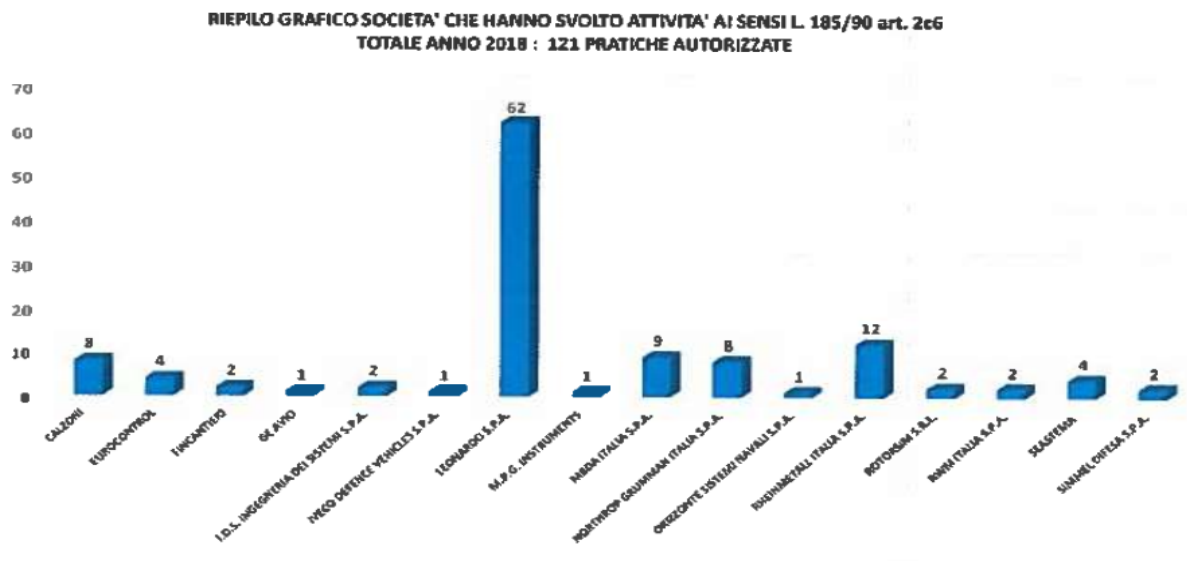
Subsidiary licensing: Italian laws regulate the relocation of arms industries outside of Italy’s territory. Pursuant to Article 13, “the offshoring of the arms production and the transfer of arms license production is subject to authorization”. The authorization must be assessed against the same grounds for denial provided for material exports (Article 1(7bis)).

National reporting: Italian Annual Arms Export Reports are relatively detailed. They provide disaggregated data on all exports that indicates the item’s identification code; specific content of the export; amount; value; country of destination; and supplier company. The 2018 National Report indicates that temporary import licenses are often used “for repair, maintenance, overhaul, testing, exhibitions and fairs, reconfiguration and retrofit, assembly”.⁶⁴ In 2018, temporary import licenses amount to more than €92 million. Ordinary permanent exports also contained reference to items that may indicate post-sale services, such as components, designs, manuals, technical data, technical assistance, and training.

⁶⁴ Italian National Report 2018, Vol. I, https://www.sipri.org/sites/default/files/2019-12/italy_volume_i_.pdf.

EUR	900.000,00			1	NUMERO	SOFTWARE PER INTEGRAZIONE SENSORI ORGANICI ABT/TBM NATO ACCS - TECNOLOGIA	01	022
				3	NUMERO	SOFTWARE PER INTEGRAZIONE SENSORI ORGANICI ABT/TBM NATO ACCS - TECNOLOGIA	01	022
				48	SETTIMANE	ASSISTENZA TECNICA PER INSTALLAZIONE, COLLAUDO, MANUTENZIONE E MESSA A PUNTO SOFTWARE PER INTEGRAZIONE SENSORI ORGANICI ABT/TBM NATO ACCS - TECNOLOGIA	03	022
				4	NUMERO	SOFTWARE PER INTEGRAZIONE SENSORI ORGANICI ABT/TBM NATO ACCS - TECNOLOGIA: DOCUMENTAZIONE TECNICA SU SUPPORTO OTTICO	02	022

In 2018 the Ministry of Defence granted 121 licenses for “the supply of training and maintenance services” worth more than €645 million.⁶⁵ As shown in the table below, Leonardo and Rheinmetall Italia s.p.a were granted 62 and 12 licenses, respectively.⁶⁶



The 2018 Annual Export Report shows controversial export authorizations of maintenance and training, including to Saudi Arabia, United Arab Emirates and Turkey.⁶⁷ Some of them are indicated below:

16	2018/0148	DIFESA	037337	09/03/2018	EMIRATI ARABI UNITI	15.000.000,00 €	08/03/2021
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96	2018/1748	DIFESA	180020	13/11/2018	EMIRATI ARABI UNITI	3.000.000,00 €	12/11/2021
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⁶⁵ Ibid, pp. 636 and 734.

⁶⁶ Ibid, p. 734.

⁶⁷ Ibid, p. 728.

51	2018/0914	DIFESA	087866	07/06/2018	ARABIA SAUDITA	300.000,00 €	06/06/2021
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119	2018/2149	DIFESA	202325	13/12/2018	ARABIA SAUDITA	500.000,00 €	12/12/2021
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97	2018/1754	DIFESA	161824	16/10/2018	TURCHIA	3.000.000,00 €	15/10/2021
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107	2018/1934	DIFESA	184385	19/11/2018	TURCHIA	1.000.000,00 €	18/11/2021
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Spain

Definition: In Spanish arms export law, post-sale operations are broadly defined as “technical assistance”, meaning “any technical support related to repair, development, manufacture, assembly, testing, maintenance or any other service technical assistance; technical assistance may take the form of instruction, training, knowledge transfer practical or consulting services. Technical assistance shall include oral forms of assistance” (Art. 3(2) Law 53/2007).

Licensing: Post-sale services – defined by Article 18(6)(c) of the Decree as “the temporary exports and imports for repairs, revisions, tests, approvals, fairs and exhibitions, as well as definitive exports and imports for replacement of defective material” – are licensed by the Secretary of State without prior consultation with the Inter-Ministerial Regulatory Board on External Trade in Defence and Dual-use Material (JIMDDU), which otherwise conducts a preliminary assessment of every export application.

Subsidiary licensing: Spain does not require a license to delocalize an arms manufacturer outside of national territory for the purpose of arms production or post-sale services.

National reporting: According to Article 19 of Royal Decree 679/2014, the Spanish National Arms Export Report must include technical assistance authorizations. However, Spanish reports to parliament follow the EU Common Military List’s categorization without mentioning specific items and their manufacturing companies. The issue with the categories is not only the lack of details about single deals, but that the categories themselves are not sufficiently precise. For instance, the sale of training equipment under category ML14 alone is not relevant but could entail actual training sessions by companies’ employees. Likewise, category ML21 software and ML22 technology might encompass post-sale services, depending on the specific operation that was delivered.

Spanish National Arms Export Reports provide additional information on exports for a value above c€100 million and above €10 million, and exports amounting to “leasing, donations, second-hand, technical assistance and licensed production”. These licenses indicate the country of destination, the value of export and the delivered item. In order to identify post-sale services, it may be useful to cross-reference the data included in the National Arms Exports Reports with national customs data, where single reports are listed.

1.5 Interim Assessment

The domestic laws and legal practice of the EU’s top exporters, surveyed above, reveal considerable variation in the control and scrutiny of post-sale services between European countries. Some European national practice is exceedingly lenient such that, in effect, it fails to fully implement international and European arms export prohibitions, for instance, as regards the post-export control of services undertaken under original sales contracts. The following table provides an overview of these differences and discrepancies, based on the laws and practices reviewed in Section 1.4 above and Section 2.2, on general export controls, below.

LEGAL ASPECTS	COUNTRIES*				
	DE	FR	ITA	ES	BE
Clear definitions of post-sale services	●	●	●	●	●
Relaxed licensing regime (eg temporary exhibition-type licenses)	●	●	●	●	●
Legal requirement to automatically suspend/revoke the license in case of violation	●	●	●	●	●
Licensing of the establishment of a subsidiary	●	●	●	●	●
National reporting on post-sale services	●	●	●	●	●

*The colour coding refers to the status of the rule or practice on a given issue, all things considered: green indicates the presence of a clear rule or practice; red indicates the absence of a rule or practice; and yellow that the law or practice is either unclear or unknown.

2. Post-Sale Services and Arms Export Controls

This section provides an overview of the various legal bases in international, EU and national law that govern certain forms of post-sale services, as well as the relevant institutions and processes involved in their enforcement. It reviews this legislation to both explicate existing legal standards and argue for special obligations commensurate with the scale and critical contribution made by certain post-sale services. It shows both the ways in which existing arms export laws control such transfers and the legal practices that have subjected such sizable forms of military assistance to relaxed regulation.

2.1 International and EU Law

Almost all ‘post-sale’ services linked with arms exports require a license as a matter of international and EU law – that is, they require the supplying state to determine whether the company can provide the recipient party with the military material by examining the legal consequences of their likely end-use. This section reviews the relevant international and EU law requirements placed on states in relation to their licensing of post-sale exports. Such requirements include provisions on monitoring compliance with arms export law throughout the execution of a contract, and clear thresholds for suspension and revocation of licenses that result in assistance to serious violations of international law.

2.1.1 Obligations to Control and License Post-Sale Services

Neither the ATT nor the Common Position provide one coherent definition of post-sale services. While there are no specific provisions that regulate post-sale services in the ATT, the list of military items controlled by the Common Position control the kinds of tangible and intangible military ‘items’ provided by post-sale services, subjecting them to the same requirements and monitoring as any other arms transfer. In practice, however, some states control these forms of ‘exports’ under temporary licenses used for trade exhibitions to circumvent stricter licenses requirements.

In the absence of specific guidance on how such services should be monitored through post-export controls, companies have entered into multi-year contracts and make substantial mission-critical contributions to the recipient state’s military capabilities even in the context of an ongoing armed conflict without necessarily being subject to any additional scrutiny.

2.1.2 Obligations to Monitor, Suspend and Revoke Licenses under the ATT

As noted, post-sale services are frequently included in a single general license granted for the original sale of the military equipment, and thus performed over a longer-term transactional relationship between the supplying company and the recipient state. The basis for the regulation of such dealings by the ATT is found in its provisions on review, revocation and suspension, generally applicable to all arms exports.

Articles 6 and 7 of the ATT define the circumstances in which transfers should be prohibited, either before the issuance of a license or throughout its execution. The state may refuse to license a transfer, including post-sale activity, in line with the prohibition of Article 6, for knowledge at the time of authorization that the arms or items would be used in any of the specific serious violations listed in Article 6(2) and (3). These include *specific* serious violations of international human rights and humanitarian law, and violations of other international agreements to which the licensing state is a party, such as the UN Charter.⁶⁸ A breach of Article 6 would include cases where a State party should reasonably have known about the illegal use of the type of arms being deployed, but failed to follow up credible suspicions by seeking further information in line with its obligation to interpret and apply treaties in good faith.⁶⁹

Even if an application for export authorisation is not initially rejected under the prohibition on transfers in Article 6, it must be subjected to a risk assessment in line with Article 7 and revoked in the event of “overriding risk” of the weapon-systems’ misuse. To trigger the requirement to prevent future transfers of the same kind of item, it suffices that a similar type of weapon as that for which authorization is being sought, is being used illegally. State Parties to the ATT are required to establish a monitoring mechanism that can effectively detect licenses that contribute to serious international law violations and review them with a view to their potential suspension. Such assessments must be “objective and non-discriminatory” and should consider “the potential” that the arms or items would be used to undermine peace and security, or commit or facilitate a serious violation of international human rights and international law or serious acts of gender-based violence or serious acts of violence against women or children.

Such review must be undertaken every time the state receives new information significant enough to merit “reassessment” (Article 7(7)), such as the outbreak of an armed conflict or a report by a UN Commission of Inquiry on violations of international humanitarian law and international human rights law during an existing armed conflict.⁷⁰

⁶⁸ Brian Wood, Daniel Turp, Eric David, Valentina Azarova, ‘Opinion on the Legality of Arms Transfers to Saudi Arabia, The United Arab Emirates and other members of the coalition militarily involved in Yemen’, Arms Trade & Security, 2019, pp. 82-84 <https://ipisresearch.be/publication/opinion-legality-arms-transfers-saudi-arabia-united-arab-emirates-members-coalition-militarily-involved-yemen/>.

⁶⁹ See, Clare da Silva and Penelope Nevill, ‘Article 6 Prohibitions’, in Clare da Silva, Brian Wood (eds.), *Weapons and International Law: The Arms Trade Treaty* (Larcier Group 2015) Chapter 6.

⁷⁰ See, on the explicit requirement to consult UN and NGO reports: EU User’s Guide, pp. 38, 41 and 56.

Article 7 permits the licensing state to consider the availability of mitigation measures “such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States”. In making a determination, under Article 7(3), as to whether there is an “overriding risk” of “any of the negative consequences in Article 1” and thus a requirement not to authorise the export, a state cannot use the mere availability of *any* mitigation measures to enable transfers if it does not effectively offset the negative consequence of contributing to serious violations.⁷¹ Proper mitigation might require inserting additional end-use restrictions into an export authorisation, carrying out follow-up inspections in the recipient state, or providing training to end-users. However, states parties are not obliged to implement any of the mitigation measures that may have been identified.⁷²

Some states have erroneously referred to steps they have taken as part of standard operating procedures for post-export control, such as the assessment and condemnation of illegal actions by the recipient state, as effective mitigation. The case of Yemen is a clear case of ‘overriding risk’ that triggers EU states’ obligation to suspend or revoke so as to avoid making a contribution to these negative consequences.⁷³ The UK Court of Appeal rebuked the government’s claims that the Saudi Arabian authorities’ “continue to seek to improve their processes and increase the professionalism of their Armed Forces and continue to be receptive to UK offers to provide training and advice” for being at odds with the likely findings of thorough assessments of the mounting allegations of serious violations by Saudi-led coalition forces.⁷⁴ But the UK government’s re-assessment of that conduct, dismissed it as ‘isolated incidents’ insufficient to establish ‘overriding risk’ thus maintaining the reliance on assurances to continue sales in these circumstances.⁷⁵

2.1.3 Obligation to Review, Suspend and Revoke Licenses under EU Law

Criterion 2 of the EU’s Common Position provides that “having assessed the recipient country’s attitude towards relevant principles established by international human rights instruments, Member States shall:

⁷¹ See, Clare da Silva, Brian Wood, ‘Article 7: Export and Export Assessment’, in Clare da Silva, Brian Wood (eds.), *Weapons and International Law The Arms Trade Treaty* (Larcier Group 2015) p. 131. See also, Amnesty International, ‘Applying the Arms Trade Treaty to Ensure the Protection of Human Rights’, 2015, <https://www.amnesty.org/download/Documents/ACT3000032015ENGLISH.PDF>.

⁷² Saferworld, *Implementing the ATT: Essential elements of an effective arms transfer control system*, ATT Expert Group Briefing No 5, July 2016, p. 11 <https://www.saferworld.org.uk/downloads/pubdocs/egai-briefing-no.5.pdf>.

⁷³ The UK Court of Appeal held that the UK government erred in failing to conduct a historic pattern assessment on the basis of past violations: “without them, how was the Secretary of State to reach a rational conclusion as to the effect of the training?”: *CAAT et al v. Secretary of State for International Trade*, [2019] EWCA Civ 1020, Judgment of 20 June 2019, paras. 138–45.

⁷⁴ *CAAT v Secretary of State for International Trade*, UK Court of Appeal, June 2019, para. 144.

⁷⁵ UK Secretary of State for International Trade, Statement, 7 July 2020, <https://questions-statements.parliament.uk/written-statements/detail/2020-07-07/HCWS339>.

- A. deny an export license if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;
- B. exercise special caution and vigilance in issuing licenses, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe; and
- C. deny an export license if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.

According to the User's Guide to the Common Position,⁷⁶ Criterion 2 requires that Member States ask certain questions in assessing the risk of serious violations of international humanitarian law, including whether the recipient country "failed to take action to prevent and suppress violations committed by its nationals or to investigate violations allegedly committed by its nationals". Critically, Criterion 5 of the COMMON POSITION states that defence and security interests "cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability".

The EU Common Position as amended in 2019 provides: "where new information becomes available, each Member State is encouraged to reassess export".

However, in some national systems, such post-export control procedures are less rigorous, and under-developed. To effectively implement this obligation for post-sale services, states need to ensure that they pay particular attention to long-term and materially substantial servicing throughout such review procedures.

Criterion 6 of the Common Position requires member states to undertake a general assessment of the country's attitude towards international law, that is the:

"Behaviour of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law. Member States shall take into account, inter alia, the record of the buyer country with regard to: ... its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions."

Such review should also consider the general conduct of the buyer state and specifically whether its laws clearly require compliance by all end-users with international law, or indeed shields state agents from accountability for serious violations of international human rights or humanitarian law, e.g. the systemic failure of the Saudi and UAE-led military-coalition in the Yemen conflict and the culture of impunity entrenched by the Saudi led coalition's own investigative mechanism known as

⁷⁶ The Common Position must be implemented and interpreted by Member States in line with the User's Guide defining common rules governing the control of exports of military technology and equipment, as endorsed by the Council on 16 September 2019; Council of the European Union, COARM 153 CFSP/PESC 683.

Joint Incidents Assessment Team (JIAT) .⁷⁷ A further example of a systemic failure to respect international law, is the disregard for Security Council sanctions, e.g., by the UAE and Egypt in relation to the UN embargo in Libya, which should result in all sales to those countries being suspended.⁷⁸

2.1.4 Obligations of Transparency and Reporting on Post-Sale Service Licenses

States are bound by general reporting and transparency obligations for all arms exports and transfers. Art. 13 of the ATT requires States to report on any new measures undertaken in order to implement the Treaty “when appropriate” and provide the ATT secretariat with an annual report on “authorized or actual exports and imports”.

Such information sharing is also necessary to implement ATT state parties’ international cooperation obligations (subject to limitations under Article 15 of the ATT) especially as regards the regulation of the activities of a company’s subsidiaries. Article 15 requires that states afford one another assistance in investigation and prosecution of illicit activities as part of their obligations to facilitate the implementation of the treaty.

EU law requires each member state to provide the European External Action Service (EEAS) with information on an annual basis on all its exports, including physical and intangible transfers, “regardless of the destination, the type of end-user and the type of licence on the basis of which the export was performed”.⁷⁹ This “commitment to transparency in the international arms trade, with a number of concrete measures that are intended to facilitate correct, coherent and timely reporting on Member States’ arms exports” was reiterated by the EU Council in its September 2019 conclusions on the review of the Common Position.⁸⁰ As part of its work to promote “uniformly strict interpretation and full implementation of the Common Position”, the European Parliament has called for “standardised and timely reporting by Member States”.⁸¹

In the broader context of EU Fundamental Rights, the right to transparency and freedom of information (Art. 41 of the EU Charter of Fundamental Rights), within certain limits, is a cornerstone of the right of EU citizens to good administration. By preventing access to information

⁷⁷ Human Rights Watch, ‘Hiding Behind the Coalition’, 2018, <https://www.hrw.org/report/2018/08/24/hiding-behind-coalition/failure-credibly-investigate-and-provide-redress-unlawful>. GLAN and Mwatana evidence submissions indicating faulty investigations and misleading responses by the Saudi led coalition: <https://www.glanlaw.org/uk-arms-licensing>.

⁷⁸ See, e.g., Kristie Pladson, ‘Germany exports millions in arms to Libya war belligerents, despite embargo’, Deutsche Welle, 17 May 2020 <https://www.dw.com/en/germany-exports-millions-in-arms-to-libya-war-belligerents-despite-embargo/a-53469291>.

⁷⁹ Article 8, Common Position and User’s guide, p. 152.

⁸⁰ Council conclusions on the review of Council Common Position 2008/944/CFSP of 8 December 2008 on the control of arms exports <https://www.consilium.europa.eu/media/40660/st12195-en19.pdf>.

⁸¹ European Parliamentary Research Service, ‘EU rules on control of arms exports’, 2018 [https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628317/EPRS_ATAG\(2018\)628317_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628317/EPRS_ATAG(2018)628317_EN.pdf).

about such significant forms of military assistance that have placed European actors in close proximity with serious violations of international law, EU citizens are deprived of their democratic rights to scrutinise EU actions and decisions relevant to its failure to effectively regulate such links.

2.2 Domestic Implementation of the ATT and EU Law by the EU's Top Five Exporters

Article 7 of the ATT provides that risk assessments are to be conducted “under its [the State party’s] jurisdiction and pursuant to its national control system”. While all EU states are bound by both the ATT and Common Position, the working procedures of relevant state authorities involved in the licensing and post-export control of transfers and review of licenses vary according to the laws and working procedures of their national systems and the resources at their disposal.

There is no indication, either in domestic legislation or from national experts consulted in the preparation of this study, that any of the national systems of Europe’s five biggest exporters apply any special assessment criteria to the review of post-sale contracts. This section sets out the general standards and procedures for review, suspension and revocation of arms transfers licenses in these national jurisdictions.

Belgium

Under Article 4 of the Law of 5 August 1991 on Import, Export, Transfer and the Fight against Trafficking of Weapons, Ammunition and Material Intended Specifically for Military Use or Law Enforcement and Corresponding Technology of 1991, the Federal government must reject an application if there is evidence that “the export or transfer will contribute to a gross violation of human rights; that there is a clear risk that the export might be used for internal repression; or when it is established that child soldiers are used in the regular army.”⁸²

Article 28 of the Arms Trade Act of 15 June 2012 sets out six more specific “Flemish” criteria that must be considered in determining an arms export under the EU Common Position: (1) the external interests of the Flemish region and Belgium; (2) the use of child soldiers in the armed forces; (3) the end-user state’s attitude to the death penalty; (4) the prevalence of firearm violence; (5) the presence of gender-related violence; and (6) the presence of peace building and reconciliation processes. The Brussels Capital Region’s Article 38 of its 2013 “Law on the import, export, transit and transfer of defence-related products, other material for military use, law enforcement

⁸² Article 4, Law of 5 August 1991 concerning the import, export, and transit and the counteracting of illegal trade in arms, munitions and materials specifically intended for military use or law enforcement and associated technology (Belgium, 1991)
http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1991080568&table_name=wet

equipment, civilian firearms, parts, accessories and ammunition” adds these six criteria to its legislation and sets out to be more protective than the Common Position.

Neither the Federal government nor any of the regional decrees require that the licensing authority in the relevant case automatically suspend an export license when there is evidence that the conditions for its issuance have ceased to exist, they merely require that such licenses be reviewed. On 9 March 2020, Belgium’s main administrative court, the *Conseil d’Etat*, suspended 17 licences (despite their effect on as much as 50% of the Belgian arms export) to Saudi Arabia pending further review through an urgent three-month-long procedure. The suspension was undertaken based on a detailed review under Criterion 2 of the risk that the exports can be used for grave violations of IHL in the Yemen conflict.⁸³

France

The EU Common Position and ATT provisions are explicitly transposed into French law, which in turn precludes the issuance of an arms export license if the arms are to be used for internal repression, in open conflicts, or if there are considerable risks of human rights violations.

Conditions or restrictions may be attached to a licence by the government to limit the risk that the arms in question are used to commit war crimes or other serious violations, and to ensure that they will not be used for ends other than those declared or re-exported without an authorisation procedure approved by the exporting state. It is unclear whether and when the French authorities treat certain conditions or restrictions as effective mitigation measures for purposes of Article 7 of the ATT. Under Article L2335-4 of the Defence Code, the French Government can at any time suspend, modify, repeal or withdraw a granted license for reasons of international obligations, national security, public order or non-respect for the requirements of the license.⁸⁴

Both prior control before an export license is granted and post-export controls are conducted by the general department of armament (DGA – Direction Générale de l’Armement), which sits under the Ministry for Armed Forces.⁸⁵ The primary objective of these post-export controls is to verify that after the issuance of the license, the operations undertaken by the company conform to the given authorisations.⁸⁶ The decision to suspend or abrogate is taken by the Prime Minister after consultation with the inter-ministerial commission for the study of war material exports, and a

⁸³ Decision No. 247.259, 9 March 2020, Conseil d’Etat.

⁸⁴ Article L2335-4, Code de la Défense.

<http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071307>.

⁸⁵ The Ministry reports to the ministerial Committee for a posteriori control is presided over by a member of the French army general control (Contrôle général des armées – CGA): Ministry of Defence, Rapport au Parlement sur les exportations d’armement de la France, 2014, p. 19 <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>.

⁸⁶ Rapport au Parlement sur les exportations d’armement de la France 2019, p. 28.

hearing of the company.⁸⁷ In urgent cases a decision to suspend a license can be made by the Prime Minister alone.

In June 2012, an amendment introduced post-shipment monitoring activities to ensure that the operations carried out match the authorisations granted or published.⁸⁸ These control measures are to be carried out by Ministry of Defence personnel and include control of the export declaration documents and contracts that companies are obliged to send to the administration; and checks carried out on the company's premises. Recent challenges of arms transfers used in the conflict in Yemen reveal considerable shortcomings in France's post-export monitoring and review procedures.⁸⁹

Germany

According to §6(3) of Germany's War Weapons Control Act, *Kriegswaffenkontrollgesetz* (KrWaffKontrG), which incorporates the Arms Trade Treaty and the EU Common Position into German law, a license must be refused where "there is the risk that the arms will be used for activities endangering international peace or when there is reason to believe that the license would infringe Germany's existing public international law obligations." Article 6 (3) of the same act states that a license must be rejected, among other reasons, if there is the danger that the weapons of war will be used for an action disturbing the peace, in particular an act of aggression. In its submission to the Arms Trade Treaty Baseline Assessment Project, Germany stated that military equipment exports are refused "where there is 'sufficient suspicion' of misuse of the military equipment for internal repression or other ongoing and systematic violations of human rights".

Section 7 of the Act provides that "A licence may be revoked at any time [...] if any of the reasons for denial specified in section 6 (3) of this Act has subsequently become evident or occurred, unless the reason is eliminated within a period of time to be determined." In 2015, Germany introduced end-use inspections, similar to the recent Spanish introduced procedures (see below). The regulation is pending review, but no public information on its scope and substance is available. Germany's licensing authority is known to have specialised staff trained to detect and assess intangible technology exports.⁹⁰

German law also requires that the supplying company conduct separate risk assessments when exporting arms. According to the Federal Office for Economic Affairs and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, short BAFA), the exporter company must notify BAFA if it becomes aware of the items' controversial use:

"awareness also exists if the exporter has sufficient information sources from which he can obtain knowledge in a reasonable manner and without any particular effort. If the use is

⁸⁷ Article 2335-15, Code de la Défense.

⁸⁸ French Defence Ministry, 2015 Report on Domestic Arms Export, p. 12.

⁸⁹ Cour Administrative d'Appel de Paris, Case N°. 19PA02929, Ordonnance du 26 Septembre 2019.

⁹⁰ Mark Bromley, Giovanna Maletta, id., Sipri prosecuting report pp 21-2.

civilian or if there is only the possibility of sensitive use, this will not be sufficient to constitute an offence. The laws do not impose any duties on the exporter to make inquiries, but it must be ensured within the context of external export control that the employees entrusted with export processing and monitoring are given all relevant information and are in a position to evaluate such. The exporter may also not deliberately ignore obvious indications.”⁹¹

While Germany’s arms export control rules are relatively restrictive, there are high thresholds for the enforcement of these rules by national courts. Claimants must be able to show that their fundamental rights were directly affected by an arms export for an administrative court to challenge a license decision.

Italy

According to Article 15 of Italy’s Law 185/1990, “Arms exports licences are subject to suspension or revocation when the conditions prescribed for their release cease to exist”. Italy’s licensing authority is entitled, but not obligated to suspend or revoke when the conditions are fulfilled.

Italian law prohibits exports to countries engaged in armed conflict, in violation of Article 51 of the United Nations Charter, or by decision of the Council of Ministers, following consultation with Parliament. Armaments exports are prohibited to Countries whose governments are responsible for serious violations of international conventions on human rights, identified by competent organisations of the United Nations, the EU or the Council of Europe. Moreover, exports are prohibited to Countries against which the United Nations, the European Union (EU) or the Organisation for Security and Cooperation in Europe (OSCE) have called a total or partial embargo on the supply of military items.

The Minister of Foreign Affairs is the competent authority for suspension and revocation. It also carries out monitoring activities and controls at the premises of the exporting company and can have access to corporate documents and registers (Article 20bis), for the purpose of verifying compliance with the legislative prohibitions and administrative regulations, as well as conditions of end-use certificates. It has only suspended a license on one occasion, in July 2019, in the case of jetfighter bombs destined to Saudi Arabia.⁹²

⁹¹ See also Section 166 German Civil Code – BGB: “If the exporter is a natural person (e. g. a scientist), he/she himself must possess the knowledge. By contrast, if the exporter is a legal person, knowledge is to be affirmed on the one hand if the relevant knowledge is available to the authorised representatives and on the other hand the knowledge of its employees is to be attributed to the legal person (see Section 166 German Civil Code – BGB)”.

⁹² This decision was adopted following a parliamentary motion: Italian Parliament, Motion No 1/00204, 24 June 2019, <https://aic.camera.it/aic/scheda.html?numero=1-00204&ramo=C&leg=18>.

Spain

Article 7 of the Royal Decree n. 679/2014⁹³ provides that the licensing authority is statutorily obliged to revoke the export license when the conditions or requirements of the license cease to exist. The grounds for suspension, denial or revocation provided for by the Decree include cases where the arms are “used for actions which could disturb the peace, stability or security on a global or regional scale, could heighten tensions or latent conflicts, could be used in such a way as to disrespect the inherent dignity of human beings, could be used for domestic repression or in situations of serious violation of international human rights law or international humanitarian law”.

It can also be suspended if it becomes known that the exporter provided false information by either omitting or misrepresenting relevant data in the application.

Royal Decree 494/2020 gives JIMDDU the option to establish a mechanism for post-shipment checks with respect to military items exported, and introduces post-shipments checks in the buyer country with the prior knowledge and cooperation of the buyer state’s government. The Spanish government claims that the decree is intended to broaden the scope of “judicial scrutiny” to make sure purchases comply with international obligations. The verification process will be overseen by the Ministry of Defence. Spanish arms export licenses usually last 12 months and can be extended upon request by an additional 24 months.

2.3 Interim Assessment

There are notable gaps between what states are required to do to fulfil their obligations under the ATT and Common Position, on the one hand, and the law and practice of national systems, on the other hand. While the ATT controls the export of spare parts and components, the EU Common Military list does include several other post-sale services, including training, maintenance, repair, overhaul or refurbishing of items. Yet there are significant shortcomings in the domestic implementation of the definitions of such transfers, the requirements for separate licensing of such services, and the monitoring and review of the underlying licenses for such services.

Such deficiencies in the implementation of international and EU arms export control law by national systems have resulted in the under-regulation of unlawful arms transfers, including post-sale services. This exposes state and corporate actors to liability under international and domestic laws for the harmful contribution (or, in the language of the ATT, ‘negative consequence’) made by such transfers, as discussed in the next section.

⁹³ Real Decreto 679/2014, Art. 7(2): “En todo caso, las autorizaciones deberán ser revocadas si se incumplieran las condiciones a las que estuvieran subordinadas y que motivaron su concesión o cuando hubiere existido omisión o falseamiento de datos por parte del solicitante”
https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-8926.

3. Post-Sale Services as Wrongful Assistance and Complicity

Parallel to the regulation of arms transfers by arms export law, the harmful effects of certain transfers may give rise to international responsibility for different forms of wrongful assistance and complicity by supplying states and defence corporations. Concurrently, it may also attract the individual criminal responsibility of corporate and state officials under international and national criminal law. These may be adjudicated in domestic courts – either under legislation transposing the Geneva Conventions or Rome Statute of the International Criminal Court into domestic law, or under domestic tort and criminal laws – or in international courts and tribunals. Such acts may also constitute violations of international human rights law, which can be addressed in regional or international judicial or quasi-judicial bodies. These legal implications are not exclusive to post-sale services and may arise with all forms of arms transfers alike.

The prohibitions on wrongful assistance and complicity in international law mirror the regulation of arms transfers by the ATT, which in effect prohibits transfers that amount to wrongful assistance through the misuse of arms. Arms deals that result in the supplying state or corporation's wrongful assistance to serious violations as a matter of the general international law rules on state responsibility, let alone transfers that trigger international criminal responsibility, would necessarily also breach either the prohibition in Article 6 of the ATT, or meet the 'overriding risk' of negative consequence under its Article 7.

The general international law prohibitions on wrongful assistance regulate the consequences of all forms of military support concurrently to the ATT. The enforcement of the various possible consequences for the harmful effects of the use of the arms for states and companies can contribute to the indirect regulation of otherwise uncontrolled post-sale activities – e.g. the electronic movement of information through cloud computing and email, especially between subsidiaries, and the movement of company personnel.⁹⁴ More regular attention to arms transfers as forms of wrongful assistance – through determinations by UN bodies, EU bodies or other states – may also enhance domestic post-export controls for existing licenses.

This section reviews the different legal bases, criteria and thresholds for establishing the responsibility and liability of state and corporate actors for wrongful assistance and complicity in the abuses of the weapons' end-user; with reference to the international and domestic fora that can adjudicate such claims. The guidance to investigators in Part II of this guide then draws on the legal criteria set out in this section to direct the identification, collection and analysis of key facts that evidence such violations of international and domestic law by arms supplying actors. Investigations of the different forms of wrongful assistance by states and companies are critical to gaining a better understanding of the infrastructure – including the use of subsidiaries, personnel

⁹⁴ Interview with Directorate-General for International Trade Policy and Economic Governance, Netherlands Ministry of Foreign Affairs, 27 October 2017.

secondments, and one-time long-term contracts – that evades domestic regulation and obfuscates responsibility for mission-critical forms of wrongful military assistance to abusive regimes.

3.1 Supplier State Complicity

In making decisions on licensing, government legal advisors are expected to assess the legality of a transfer in terms of the state's obligations under international law not to wrongfully assist violations of others. The international rules on wrongful assistance and complicity by states in the internationally wrongful acts of another state or non-state actor, are rules of customary international law codified by the UN International Law Commission in the so-called Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001. Claims of state complicity under these grounds are separate and can arise concurrently with allegations concerning the individual criminal responsibility of government officials for aiding and abetting international crimes by enabling arms transfers to certain end-users.

3.1.1 'Aiding and Abetting' Internationally Wrongful Acts

Draft Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts 2001 – which codify rules of customary international law – concerning “aid or assistance in the commission of an internationally wrongful act”, requires that the accomplice state “aids or assists another State in the commission of an internationally wrongful act ... with knowledge of the circumstances of the internationally wrongful act”. The ILC's commentary on this article states that there is “no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act”.⁹⁵ The ILC commentary also notes that the assisting state should have been aware “of the purpose for which its assistance is intended to be used by” the other state.⁹⁶

The obligation to routinely source and assess all relevant information about the conduct of the buyer state and the foreseeable use of licensed arms transfers is incumbent on all licensing states as a matter of international arms export control law. This obligation gives rise to a presumption of ‘constructive knowledge’ about the end-use of the arms by the supplying state.⁹⁷ Chatham House's expert consultation notes that the prevailing practice shows that “knowledge or virtual certainty

⁹⁵ International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, Commentary to Article 16, Report on the work of the 53rd session, 2001, UN Doc. A/56/10, Chapter 4, State Responsibility, Commentary to Article 16, p. 66.

http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

⁹⁶ Ibid.

⁹⁷ Turp et al, p. 68. See also, Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* (Chatham House November 2016).

that the recipient State will use the assistance unlawfully, is capable of satisfying the intent element under Article 16, whatever its desire or purpose.”⁹⁸

A review of a license by a national licensing authority based on new facts should include consideration of the foreseeability of wrongful actions by the recipient state. Such assessments of the likelihood that the equipment or technology transferred would make a material contribution to wrongful conduct are usually based on knowledge of the buyer state’s general and specific past conduct including as regards the use of similar weapon systems in violations.

The scope and extensiveness of the relationship between the supplying and recipient state – for example the agreement between the UK and Saudi Arabia, which governs the sale of weapons systems to Royal Saudi Air Force (RSAF) – is grounds to presume that the supplying state has privileged access to and detailed knowledge of the recipient state’s practices and activities, including the likely use of the kind of weapons systems supplied by the licensing state. Such knowledge could come from the supplying state’s agents based in the recipient state (often not limited to diplomatic representatives), as well as from the supplying defence company.⁹⁹

The number of opportunities the supplying state’s licensing authority had to find out about the nature of its contribution is also relevant to the establishment of responsibility for complicity. Governments and companies are often put on notice by external independent experts such as NGOs,¹⁰⁰ but can also be presumed to have knowledge of widespread and serious violations, particularly when these have been extensively reported and condemned by the UN or determined to be harmful and violative by international bodies.¹⁰¹

⁹⁸ Moynihan, para. 70.

⁹⁹ Lewis and Kamplar, p. 29. The UK government told the court that its privileged access and “considerable insight into the systems, processes and procedures that the KSA has in place” was sufficient to ensure that there is no clear risk of UK supplied weapons being used in IHL violations by the RSAF. Treasury Solicitors Department, Summary Grounds for Secretary of State, Claim No. CO/1306/2016 (High Court of Justice, Queens Bench Division) between The Queen on the application of Campaign Against Arms Trade, and The Secretary of State for Business, Innovation and Skills (30 March 2016), paras. 24-26; quoted in Lewis and Kamplar, p. 29.

¹⁰⁰ See, e.g., post-sale servicing of A330 MRTT aircrafts previously sold to Saudi Arabia that should not have occurred through reimport by the Spanish company, after the Spanish government was repeatedly alerted to the fact that two air-refuelling planes has been exported to Saudi Arabia and were used in presumptively unlawful airstrikes in 2015: <http://fundipau.org/wp-content/uploads/2016/05/Licencias-para-matar-FINAL.pdf> and <http://fundipau.org/informes-de-seguimiento-de-la-llei-fets-per-les-ong/>.

¹⁰¹ Complicity law-based arguments have been noted in other domestic challenges of arms exports linked to the Yemen conflict: Belgium, Canada and UK. The UK High Court deemed such arguments irrelevant to whether the court should interfere in the Secretary of State’s decision.

3.1.2 Assistance to the Maintenance and ‘Recognition as Lawful’ of ‘Serious Breaches of Peremptory Norms’

A further, separate grounds of complicity is based on the special category of aggravated responsibility for violations of international law’s peremptory norms (or *jus cogens*), such as systemic violations of the prohibition of torture, or systematic violations of the core rules of international humanitarian law. States are prohibited from aiding, assisting or recognising ‘as lawful’ a situation produced by ‘serious breaches of peremptory norms’. This customary law obligation is codified in Article 41 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA): “No state shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.” This special standard of conduct required of all third states that may come into proximity with such situations, is a form of complicity in the *maintenance* of the illegal situation – different from the higher standard of conduct required to establish a contribution that amounts to aiding and abetting the production of a specific wrongful act.

Wrongful assistance through recognition as lawful can result either from the supplying state’s failure to properly assess the end-user’s conduct and the likely end-use of the weapons system, or from the failure to implement such positions through concrete restrictive measures in the licensing process that condition the issuance of licenses for the conduct of post-sale service, in high-risk circumstances such as the Yemen conflict, on genuine and vigorously-monitored end-use standards.¹⁰²

Third states that maintain formal links with buyer states, such as through a defence cooperation agreement, must make sure that all arms supplies under such agreements conform with their international law obligations, and relevant domestic law provisions on the regulation of arms exports.

3.1.3 Failure to Regulate Corporate Nationals

Under the UN Guiding Principles on Business and Human Rights (UNGPR), which provide the blueprint for the responsibilities of companies and their home states under international human rights and humanitarian law, states are required to adopt “regulatory measures” that incentivise business to establish and operate their own due diligence systems, as well as to provide a basis for

¹⁰² See on the different forms and tests for complicity in international law: Helmut Aust, ‘Complicity and the Law of State Responsibility’, CUP, 2011; Miles Jackson, *Complicity in International Law* (Oxford University Press 2018); and Nina Jorgensen (ed), *The International Criminal Responsibility of War's Funders and Profiteers* (Cambridge University Press 2020).

the enforcement of the suspension of contracts by relevant state authorities when operating in conflict-affected contexts.¹⁰³

Given the high-risk nature of defence sector company dealings, it is expected that the law and practice of national licensing authorities is aligned with the state's responsibilities to regulate its corporate nationals' operations to ensure respect for human rights throughout their supply chains and business operations (including those of controlled subsidiaries, discussed below). The state's failure to uphold these responsibilities is a further basis for its potential complicity by way of involvement in violations of human rights by omission – i.e. for failure to regulate the conduct of its corporate nationals.

The obligations of businesses and their home-states are enshrined in a number of soft law instruments on business and human rights, including the UNGP that set out the duties of states to protect human rights, the responsibility of companies to respect human rights and the right of victims to access remedies for corporate human rights abuses in the company's home-state.¹⁰⁴ To provide access to judicial remedies for victims of businesses' wrongful conduct, home-states should enable access to information about arms dealings, permitting judicial review of licensing decisions, and publishing the criteria for risk assessments and licensing decisions.¹⁰⁵

Similar standards are found in the OECD Guidelines on Multinational Enterprises¹⁰⁶ and the OECD Due Diligence Guidance for Responsible Business Conduct, published in 2019.¹⁰⁷ These obligations exist independently from the licensing state's concurrent obligations under international arms exports control law, including the ATT and EU Common Position, and under the international prohibitions on wrongful assistance to and complicity in violations of international law.

3.1.4 Domestic Accountability in the Licensing State

Depending on the public, administrative and constitutional laws of the supplying state, licenses issued or maintained in alleged breach of the state's obligations under the ATT and EU Common Position may become the subject of domestic proceedings under the licensing state's

¹⁰³ First Amnesty International and Human Rights Watch submission in CAAT case, para. 25 <https://www.hrw.org/news/2017/02/10/human-rights-watch-amnesty-international-and-rw-uk-submissions-uk-legal-cases>.

¹⁰⁴ See on the application of these to the defense sector: Linde Bryk, Christian Schliemann, *Arms trade and corporate responsibility Liability, litigation and legislative reform* (Friedrich Ebert Stiftung 2019).

¹⁰⁵ UNGP commentary to Principle 26, https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

¹⁰⁶ OECD, OECD Guidelines for Multinational Enterprises (OECD Publishing 2011) <http://mneguidelines.oecd.org/guidelines/>.

¹⁰⁷ OECD, OECD Due Diligence Guidance for Responsible Business Conduct (OECD Publishing 2019) <https://www.oecd.org/daf/inv/mne/due-diligence-guidance-for-responsible-business-conduct.htm>.

administrative and public law. This is of course only possible if domestic courts do not consider such decisions to be political ‘acts of government’ that are thus exempt from judicial oversight.¹⁰⁸

The availability of judicial review proceedings that can effectively scrutinise government decisions that may affect foreign and security policies is variable across states. In the UK where such proceedings are broadly available, courts must be satisfied that the decision of the Secretary of State for International Trade, the public authority in charge of licensing, fell afoul of the “deliberately high threshold” of UK public law’s “rationality test” by assessing “whether a reasonable public authority could ever expect to make a decision on the future risk of a given transfer” and to this end reviewing a historic pattern of breaches of international humanitarian law.¹⁰⁹

The more restrictive grounds for administrative in German law require that suits against the state for failure to uphold constitutional law obligations to respect human rights be supported by a specific claimant that was actually injured by the state’s actions.¹¹⁰ This means that some form of causal link between the decision to provide arms and the effects of their eventual end-use needs to be established, even if based on circumstantial evidence of constructive knowledge.

While most states apply the ATT and Common Position, the material scope of domestic courts’ review of government decisions is limited to their application of domestic arms export control laws. Thus, a further critical shortcoming of such review proceedings is that they are often unaffected by the legal implications of the state’s or corporate actor’s serious breaches of international law due to its wrongful assistance to serious violations.

The true extent of these barriers to domestic accountability was laid bare by the swell of ongoing litigation to challenge military assistance to serious violations of international law in the Yemen conflict, following repeated condemnation of both the conduct of arms buyer-states and of arms supplying states including by the UN. These procedural and substantive barriers include limits on the standing of NGOs to bring such suits,¹¹¹ and lack of transparency around licensing and ongoing arms transfers, especially those delivered in the form of post-sale services.¹¹²

¹⁰⁸ In France, for instance, such decisions fall within the (political) domain of the executive and thus outside the courts’ jurisdiction: Linde Bryk, Christian Schliemann, p. 8.

¹⁰⁹ Kristine Beckerle and Dearbhla Minogue, ‘U.K. Court Nixes Saudi Arms Sales—What it Means for the US and Other EU Countries’, Just Security, 24 June 2019 <https://www.justsecurity.org/64664/u-k-court-nixes-saudi-arms-sales-what-it-means-for-the-us-and-other-eu-countries/>.

¹¹⁰ See, e.g., Faisal bin Ali Jaber and others v. the Federal Republic of Germany, North Rhine-Westphalia Higher Administrative Court, judgment from 19/3/2019 – 4 A 1361/15, wording of the oral pronouncement of the judgment: https://www.ecchr.eu/fileadmin/Juristische_Dokumente/OVG_Muenster_oral_declaration_of_judgment_19_March_2019_EN.pdf.

¹¹¹ In the Netherlands and Spain, NGOs do not have standing to challenge licenses as they are not deemed directly affected by the consequences of such decisions: Linde Bryk, Christian Schliemann, pp. 8-9.

¹¹² See the lack of access to licenses and to reasoning for licensing decisions in France and Spain: Linde Bryk, Christian Schliemann, p. 9.

3.2 Corporate Complicity and International Responsibility

This section reviews the responsibilities and potential liability of defence corporations that provide post-sale services under a license that breaches arms export control law, or that results in a contribution to serious violations of international law.

3.2.1 Corporate Criminal Liability

As a matter of international criminal law, companies and their officials can be held criminally responsible in their individual capacities for aiding and abetting international crimes (accomplice liability). Such charges can and have been brought before domestic or international courts and tribunals,¹¹³ and are not foreclosed by the licensing decisions of the supplying state.¹¹⁴

To meet the legal test for corporate complicity evidence on the company's conduct must show for a) a physical act of having a 'substantial effect' on the commission of the crime, without the need for a causal link between the transfer as a condition for the crime;¹¹⁵ and b) a mental state of knowing of the circumstances in which the weapons transferred or serviced would assist in the commission of the international crime, including as a result of publicity by the UN and others about the crimes.¹¹⁶ The criteria for establishing the conduct and the causality between the weapon and the crime, as regards the conduct (*actus reus*) element of the crime vary in different jurisdictions. In some, it suffices to show that the weapon made a *substantial contribution* to the perpetrator's ability to commit the crime. This is different from a higher threshold of proving that the crime would not have occurred but for the weapon's delivery. Further, as to the criterion of intent, some domestic prosecutors will accept knowledge whereas others may require malice aforethought, or purpose.

Domestic criminal law and procedures applied by public prosecutors, including the existence of a requirement for political clearance from the executive in invoking universal jurisdiction, vary.¹¹⁷ Domestic charges can be pursued under domestic laws implementing the Geneva Conventions' "grave breaches" regime, and the Statute of the International Criminal Court (Rome Statute). In Italy, who has not transposed the Rome Statute into its domestic law, charges brought against Italian licensing officials and R.W.M. Italia S.p.A. for selling arms to warring parties in Yemen were

¹¹³ See generally, Nina H B Jørgensen, *The International Criminal Responsibility of War's Funders and Profiteers* (Cambridge University Press, 2020).

¹¹⁴ Kai Ambos, 'Complicity in war crimes through (legal) arms supplies?', EJIL Talk, 2020, <https://www.ejiltalk.org/complicity-in-war-crimes-through-legal-arms-supplies/>.

¹¹⁵ Judgment, Prosecutor v Taylor, SCSL-03-01-T, Trial Chamber II, 18 May 2012, 5628. See also Linde Bryk, Christian Schliemann, p. 13.

¹¹⁶ ICTY Perisic, Appeals Chamber, decision 28 February 2013, paras. 25 et seq.

¹¹⁷ Linde Bryk, Christian Schliemann, pp. 15-16.

based on their complicity through gross negligence in murder and personal injury. The appeal against the prosecutor's decision to dismiss the request to open a formal investigation remains pending.¹¹⁸

Corporate officials can also be held criminally liable, and penally sanctionable, for violations of arms export control law such as the provision of false or misleading information, perhaps also concerning the situation in the supplying state's domestic legal system.¹¹⁹ In some states, such charges can also extend to companies that fail to monitor the compliance of the end-user with an end-use certificate, and inform the licensing authority of such potential risks of the license's conditions. Violations by the same type of weapon sold or serviced by a given supplying company could, for instance, corroborate the company's knowledge and failure to monitor and report on non-compliance with the license.

3.2.2 Parent Company Liability

Post-sale services performed by a subsidiary registered in a non-EU recipient state are in most cases not subject to special licensing requirements. Whether a parent company can be held liable for the involvement of its subsidiary in serious violations of international law depends on the nature of the violation, the laws of the parent company's home-state, and the specific basis for the company's liability in civil, criminal, or administrative law.

In most cases, the separate legal personality and limited liability of the parent company, also known as the corporate veil, means it is not liable for its subsidiary's wrongdoing.¹²⁰ As independently operating legal persons, the subsidiaries of parent companies are responsible for their own actions and thus a *"parent company is normally not liable for legal infractions at the level of subsidiaries of which it is a direct or indirect shareholder"*.¹²¹

Recent European case law in The Netherlands¹²², United Kingdom¹²³ and France¹²⁴ signals the emergence of a different approach to establishing parent company liability in cases of *"failure of*

¹¹⁸ Ibid, p 17.

¹¹⁹ See also, the Heckler & Koch case, where, in February 2019, Germany's the Regional Court in Stuttgart convicted two former employees of the arms manufacturer for illegally selling 5,000 G36 rifles to Mexico between 2006 and 2009, violating the German War Weapons Control Act: BBC News, Heckler & Koch fined for illegal gun sales to Mexico, 21 February 2019 <https://www.bbc.com/news/world-europe-47316445>.

¹²⁰ See UK House of Lords' decision *Salomon v. A. Salomon & Co.*, 1897.

¹²¹ B Choudhury, M Petrin, *Parent Company Liability* (Cambridge University Press 2019) p. 94.

¹²² A.G. Castermans, 'The legal liability of Dutch parent companies for subsidiaries' involvement in violations of fundamental, internationally recognised rights', 2019 <https://openaccess.leidenuniv.nl/bitstream/handle/1887/15699/ENG%20NL%20report%20on%20legal%20liabilityof%20parent%20companies%20%28transl%2031%20May%202010%29.pdf?sequence=1>.

¹²³ UK Court of Appeal, *Chandler v. Cape*, 2012. See also, England and Wales Court of Appeal, *Vedanta Resources Plc and others versus Dominic Liswaniso Lungowe and others*, 2017.

¹²⁴ *Lafarge* case, pending: <https://www.business-humanrights.org/en/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria>.

supervision". That is, if a subsidiary entity acts unlawfully, the parent company's degree of liability will be greater according to the amount of influence and control it exercised or could have exercised, through action or omission, over the policies or practices of the subsidiary.

The key question in such cases is whether the parent company acted or failed to act in a manner that caused a violation of fundamental rights by the subsidiary, not whether the company acted in a manner that caused direct injury to the victims. In a civil case against the parent company, the victim will have to prove that the alleged harm was a reasonably foreseeable consequence of the alleged breach of the supervisory power of the parent company.¹²⁵ The greater the control and influence of the parent company, the likelier it is to be held accountable for the subsidiary's wrongful acts. This is akin to the fiduciary duty that company directors maintain towards the company's affairs.

According to the above discussed case-law, the following factors are relevant to evidence a parent company's control and influence:

- i) the composition of shareholders (both in terms of voting and economic share-based rights)
- ii) the managing functions within the group, in terms of the specific individuals that hold positions in both the parent and subsidiary company and/or in terms of the corporate structure governing decision-making between the parent and subsidiary
- iii) the voluntary code of conduct (ethical codes) and commercial practices of the parent company relevant to supervision of subsidiaries, and commitments in relation to the company's supply chains and business operations.

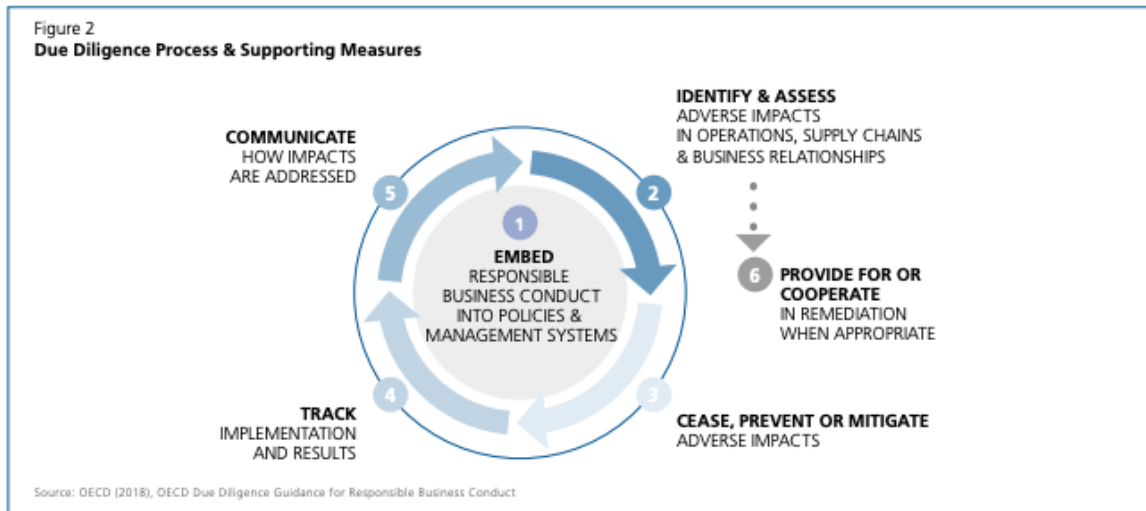
3.2.3 Business Responsibility for 'Adverse Impact' on Human Rights

International business and human rights standards (known as *soft law*) apply alongside international and national arms control law and complicity laws and are concerned with a specific form of complicity that results from a company's breach of its (customary international law) obligations to ensure against its "adverse impact" on human rights. As mentioned in Section 4.1.2, this area of law is made up of several soft law instruments and is commonly referred to as BHR standards.

In other words, the conduct of companies and the regulation of such conduct by the company's home-state should be assessed in light of the company's and state's responsibilities and duties under the UNGPs. Whether or not the company is liable under civil or criminal law, it may nevertheless be responsible for breaches of its duties as a business under the UN Guiding Principles on Business and Human Rights.

¹²⁵ See, e.g., First Instance Ontario Court, *Choc v. Hudbay Minerals Inc.*, 2013.

Principle 13 requires companies to “avoid causing or contributing to adverse human rights impacts ... and address such impacts when they occur” and “seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships”. To implement this standard, Principle 15 requires that companies adopt “(a) a policy commitment to meet their responsibility to respect human rights; (b) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”



Notwithstanding that the standalone nature of corporate human rights responsibilities,¹²⁶ many defence sector companies continue to hide behind national licensing decisions to circumvent compliance with the UNGP.¹²⁷ The UK’s OECD National Contact Point has explicitly held that such presumptive reliance is inappropriate since most national licensing systems are too under-developed and under-resourced to effectively monitor the contribution of corporate actors to serious rights abuses.¹²⁸ Good compliance procedures within defence companies that produce or have access to controlled dual-use goods and technologies are therefore an essential aspect of companies’ ability to fulfil their BHR obligations by identifying and preventing illegal transfers.¹²⁹

In all cases, due diligence measures adopted by the business should be “commensurate to the severity and likelihood of the adverse impact”. When the “likelihood and severity of an adverse impact is high, then due diligence should be more extensive”.¹³⁰ Technology-specific due diligence,

¹²⁶ OECD, Guidelines for Multinational Enterprises, p. 32 <http://mneguidelines.oecd.org/MNEguidelines/>.

¹²⁷ Amnesty International, ‘Outsourcing Responsibility: Human Rights Policies in the Defence Sector’, 2019, <https://www.amnesty.org/en/documents/act30/0893/2019/en/>.

¹²⁸ Initial Assessment by the UK National Contact Point, Complaint from an NGO against a UK company, October 2016, paras. 29 et seq <https://www.gov.uk/government/publications/uk-ncp-initial-assessment-complaint-from-an-ngo-against-a-uk-company>.

¹²⁹ Mark Bromley, Giovanna Maletta, pp. 30-1. Gallacher, D., UK Department for International Trade, Communication with the author, 8 Dec. 2017. In addition, companies must also keep track of individuals with knowledge of controlled technology, which can be even more challenging.

¹³⁰ OECD Guidelines for Multinational Enterprises, p. 17.

for instance, may extend to cloud service providers and contractual terms that restrict “the locations through which controlled software or technology may be routed; where it may be stored; how access by any unauthorized person (including system administrators) will be prevented; the right to audit the provider’s compliance; and obligations for providers to notify promptly any known or suspected breaches.”¹³¹

In sum, businesses are obliged to conduct internal monitoring of the effects of the contribution made by the services they provide and to terminate business relations that cause serious human rights harm. A company that provides post-sale services under long-term contracts should subject these to regular review, as well as consult and inform its national licensing authority of any risks or concerns it may not be in a position to address on its own. Companies should also be subject to particular scrutiny licenses issued under an existing privileged relationship, e.g. interstate agreement, between the supplying and recipient state, given that such licenses can be subject to relaxed controls and have a particularly long timespan.

These considerations around the business’ conduct may then factor in the decision-making of investors and public procurers insofar as they are based on the defence business’ compliance with basic ethical standards and its professional integrity.

¹³¹ Richard Tauwhare, ‘Cloud computing and export controls’, Tech UK, 2016. Burt Braverman and Brian Wong, ‘Cloud computing: US export controls reach for the sky’, Davis Wright Tremaine LLP, 2013; Mark Bromley, Giovanna Maletta, p. 32.

Part II

Guidance for Investigators

4. Evidencing Unlawful Post-Sale Services

This part of the guide provides guidelines to investigators by way of questions on four sets of issues pertaining to the nature of the post-sale service, the recipient state's conduct, the supplying and licensing state's responsibility, and the company's liability for wrongful assistance. The investigation of post-sale services requires, in most cases, an all-source research methodology that considers non-public government documents and non-public testimonies from those providing military services, including interviews, e.g. with former sector employees, civil servants with insight into the licensing process and army veteran organisations, and archival research, e.g. correspondence between the company and licensing authority and reports by the licensing country's diplomatic corps.

The guidance that follows is provided in the form of questions an investigator should ask themselves while looking into potential legal issues concerning post-sale services in arms dealings. The questions are based on the legal categories, thresholds and tests outlined in the following sections. The section begins by considering the significance of identifying key elements of facts needed to enable a judicial or administrative determination on the legality of an act – their various forms and their uses to evidence the responsibilities and obligations of supplying states and businesses.

4.1 Identifying Key Elements of Facts

The aim of this guide is to explain the various potential legal claims that could be made in relation to the responsibilities and liabilities of licensing governments and their supplying corporate nationals for failing to control these export activities in line with their responsibilities under arms export control law and for assisting in serious abuses of international humanitarian or human rights law. As a matter of international law, these legal claims could pertain to standards found in the ATT, in the EU Common Position or in domestic arms export control law. They could also be brought under international and domestic laws on wrongful assistance to and complicity in the abuses of others by state and corporate actors.

The usability of the evidence in substantiating and bringing legal claims before relevant domestic and international authorities will depend on the quality of the source and the weight that would be

given to the specific facts as evidence of a specific legal issue. This will depend both on the forum where the argument is being made and the mandate of that judicial or other body to make legal determinations on the responsibility of an offending state or corporate actor.

For instance, evidence of the buyer state's misconduct that makes clear that the licensing state failed to review and suspend a license, would necessarily be expected to trigger the review of said license. In a contentious judicial proceeding against a company for criminal or civil liability, for instance, the company's knowledge as to the likely effects of the transfer would need to be part of the evidence presented. Evidence indicating the potential illegality of a specific post-sale service could also be used outside of judicial proceedings either by international organisations or third states, to assess the responsibility of states and businesses concerned, or by private bodies, such as investors, procurers and other companies that may consider engaging an offending company.

Rigorous investigations can expose the structural lack of transparency in this area of regulation and the resultant barriers to public accountability for dealings that condition serious abuses. Investigators should therefore also monitor and report on the overall availability of certain kinds of information with a view to exposing the secrecy regime that applies to such dealings. The use of open source intelligence, in particular, could promote the new or under-used (open) sources of information by licensing states, and support EU institutions and international bodies in promoting the harmonisation of buyer-state conduct assessments.

4.2 Investigative Checklists

The following questions should guide investigators in identifying 'legal facts' with the ultimate purpose of gathering evidence on violations of international, EU and domestic laws by the supplying state and business in a specific case of provision of a post-sale service.

Scope and content of the post-sale services

- A. Did the supplying state formally license the export of the post-sale service?
- B. Does the information made public by the supplying state, e.g. in its national report, indicate the specific content and/or other information about the service that was provided?
- C. Was the specific post-sale service envisaged in the original contract and included in the original license for the export of the military item it is intended to service? Or was it authorized separately – and if so, under what license is the post-sale service provided e.g. “temporary import”, “supply of service”, “permanent export”?

- D. Could you obtain the contract (publicly, or, if not publicly, how?) signed by the supplier company and the recipient state?
- E. What was the nature of the company that supplied the services: original equipment manufacturer, subsidiary, or subcontractor?
- F. Which state licensed the service, e.g. is the supplying company in another member state?
- G. Where did the supplier company perform the post-sale services? Did it require the temporary re-import (and export) of a military item? Did it consist of the movement of specialised personnel?
- H. Did the service entail the transfer of material and/or intangible military items, including know-how?

Recipient state's conduct and end-use

- A. What indicators are available for the gravity of the risk in terms of the duration, extensiveness, and frequency of the recipient state's violations? What positions and responses to these violations have international authorities and other states and companies adopted? What sources are you relying on to make this assessment?
- B. Based on these indications and any legal determinations made by others on the buyer state's conduct and specific end-use of the types of weapons in question, which of the following licensing criteria appear to have been breached?
 - a. overriding risk that weapons similar to those being transferred are being used in serious violations of international humanitarian law or international human rights law;
 - b. overriding risk that the recipient state supports terrorism;
 - c. overriding risk of diversion towards an unauthorised end-user or end-use; or
 - d. breach of an arm embargo imposed by the UN or EU by the end-user.
- C. What indicators show for the 'seriousness' of the recipient state's violations of international law – how is this specific conduct reflective of or linked to general systemic failure in terms of the criminalisation, investigation and prosecution of violations as part of a structural rule of law deficit, or the lack of training, disciplinary procedures for military personnel?
- D. Was either the specific weapon or the type of weapons that had been/is being serviced used in serious violations of international humanitarian law or international human rights law either before or after being serviced?

- E. In what ways does the post-sale service contribute to the end-use of the weapons and thus potentially facilitate or enable the recipient state's violations of international law?
- F. Does the export pose a risk to regional peace, security and stability? Does the export pose a risk to national security of the supplying state and/or their friends and allies?
- G. In the case of exports by EU member states, is the military expenditure of the recipient state higher than its investments in sustainable development?

Supplier state responsibility for wrongful assistance

- A. When did the violations by the recipient state's authorities start? Was the nature of the violations by the recipient state known (or should have been known) to the supplying state when it took the decision to issue the license – or should have become known throughout the provision of the post-sale service?
- B. How many licenses did the supplying state grant to the company linked with the problematic context, since the time the supplying state can be said to have known of the violations?
- C. How long did the violations persist (are they ongoing?), and were the licenses renewed or merely maintained during this time – i.e. how many chances did the supplying state have to review and suspend the license?
- D. What standards of review does the licensing state(s) apply under domestic law – e.g. does domestic law include a statutory requirement to suspend or revoke a license in the case of serious violations by the end-user?
- E. Did the original or separate license for the post-sale service include an end-user certificate or any other restrictions that the recipient state was required to accept? If so, did the recipient state breach the conditions of the end-use certificate (i.e. export of the Caesar howitzer to Saudi Arabia from Germany)?
- F. Did the supplying state conduct post-sale export controls for the specific license? If not known in the specific case, is there an established practice of post-export controls and monitoring in the supplying state?
- G. Does the licensing/supplying state have an interstate defence cooperation agreement with the recipient state e.g. UK with Saudi Arabia? Is there a special relation between the supplying and recipient state through which the supplying state could be presumed to have privileged access to information about the recipient state's conduct?

Corporate complicity and international responsibly

- A. What is the scope and extent, material and temporal, of the post-sale services arrangement between the company and recipient state? Is the service essential for the use of the armament?
- B. How many companies were involved in the provision of services?
- C. How regular were the post-sale services provided by the company in question? What was the size of each post-sale service – e.g. in terms of how substantial its contribution was to the ability of the recipient state to use the weapon?
- D. Does the company have personnel on the ground?
- E. Does the company have a subsidiary in the recipient country? Is the establishment of a company subject to export license under the law of the supplying state? If not, did the supplying state authorize items at the time of the subsidiary's establishment?
- F. How critical/substantial is the contribution of the maintenance, or the technology to a violative action in the context of a broader military effort or law enforcement operation?
- G. Does the company have judicial records for similar misconducts (including pending cases)?
- H. In case the service was supplied by a subsidiary in a non-EU state:
 - a. Is the subsidiary registered in the chamber of commerce of the recipient state? What information does the chamber of commerce provide?
 - b. Is the subsidiary listed among the "consolidated entities" of the parent company (see parent company's annual financial report)?
 - c. What is the percentage of the parent company's share and voting rights in the subsidiary company?
 - d. Do members of the board of directors of the parent company exercise management functions in the subsidiary?
- I. Does the supplying defence company maintain its own voluntary code of conduct or 'code of ethics', or is it signed onto a multi-stakeholder initiative such as the Global Compact?
- J. What due diligence practice does the company maintain and what measures, if known, did the company adopt in the case at hand, or comparable cases? Did the non-financial declaration of the company (if publicly listed) at the time of the export (Directive 2014/95/EU) refer to its internal human rights due diligence mechanisms?

4.3 Processing, Storage and Court Usability

In all cases, the admissibility and usability of the evidence in court proceedings will depend on the way investigators process, store and analyse information obtained particularly from open-source intelligence (OSINT). After having established the fact using the above questions, it is therefore vital that evidence is identified and stored in a way that will allow it to be used in court to pursue accountability for the actors involved. This should come in six stages: identification of key sources of information; collection and preservation of relevant information; verification of OSINT, e.g. through geospatial analysis; analysis of key facts revealed by OSINT; corroboration and cross-referencing with other information; and presentation of the evidence in a database. GLAN is in the process of developing such a detailed OSINT evidence collection and preservation protocol, an initial version of which was used in Bellingcat's 'Yemen project' investigations.¹³²

¹³² Bellingcat, Yemen Project, <https://yemen.bellingcat.com/>.

Conclusion

Post-sale services in the arms industry are extremely lucrative and increasingly common forms of military assistance that often provide substantial contributions to the recipient state's overall military capacity. When such dealings persist in the highly violative circumstances such as the conflicts in Yemen and Libya, supplying states and companies may find themselves lending support to the buyer state's ongoing military operations.

While legal requirements for basic controls are found in the ATT and EU Common Position, and thus bind European national licensing systems, the significant structural shortcomings of domestic laws and regulatory practices have considerably watered down these requirements. Most European states are in the practice of either treating post-sale arms services as an integral part of the original sale, which is in turn subject to minimal post-export controls, or of facilitating the fast-track authorisation of such services, for instance, through the use of 'exhibition' permits. The limited post-export controls for arms transfers in European states have in turn failed to effectively respond to the damaging impacts of such extensive, long-term contractual relations.

The haphazard and weak regulatory environment for this substantial subset of arms transfers – critical to enabling the continued use of previously delivered weapons systems – does not mean that States and companies are at risk of incurring responsibilities and liabilities for the consequences of their military assistance to serious violations of international law. In the case of a UN arms embargo, such forms of support can amount to serious breaches of the UN Charter, that can result in sanctions and asset freezes for the company.

The purpose of the report is to lend guidance to investigators of post-sale services on the relevant facts that evidence different legal implications of arms transfers. Given the gaps in national reporting on arms deals, particularly in relation to post-sale services, achieving more transparency around such dealings is critical to enabling legal advocacy and litigation both before domestic administrative and judicial bodies, as well as international human rights and criminal justice mechanisms. Both the effectiveness of domestic regulation by national licensing authorities and the potential of the currently under-developed international enforcement practice, in the case of all unlawful arms transfers, critically depends on the quality evidence presented to support claims of illegality, either of the export itself or of its damaging impacts.

If legally grounded, such investigative work can offer potentially transformative revelations both about the substantial links between supplying states and companies with abusive regimes, and about their governance by law. The limits of the regulatory scope of domestic laws and legal practices, and the under-regulation of apparently unlawful arms transfers by international processes, in effect, enable the obfuscation and evasion of responsibility. The differences between different states' licensing practices, coupled with the discrepancies between these and international standards, have meant that large-scale post-sale servicing arrangements that use complex cross-border arrangements including subsidiaries and inter-governmental organisations (e.g. the Organisation for Joint Armament Cooperation (OCCAR)), continue to escape control.

The promotion of public and legal forms of accountability could then both serve to activate the enforcement of existing law and procedures – particularly, in states that formally implement the ATT and EU Common Position but seldom monitor and review existing licenses – and to expose the policy preferences and power relations – between defence companies and their licensing authorities, and between supplying and buyer states – that animate these minimalist forms of regulation.