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Armaments law: reform of the defence export and procurement regime under the impulsion of eu law

The Act no. 2011-702 dated June 22, 2011 substantially modifies French rules on the export [and import] of war materials (1.) and the legal regime for defence procurement (2.).

This reform is largely based on the implementation of two European Directives but has a broader aim insofar as it modifies the general system for the control of war material exports both within and outside the European Union.

1. A new export control system based on the grant of licenses

At present, the rules governing the export of war materials are characterised by a unique legal regime for the transfer of materials either within or outside the European Union. This regime is based on a two-stage principle of authorisation, prior approval (French acronym: "AP") and permission to export war materials (French acronym: "AEMG"), the first stage being to authorise an undertaking to negotiate a contract and then sign it, as the case may be, and the second stage being to authorise the same undertaking to proceed with the foreign export transaction.

Once the transition period is over (by December 31, 2014 at the latest), this dual-authorisation regime will be replaced, at European level, by a transfer license system and, outside the European Union, by an export license system.

It should be noted that this license regime is not completely unknown under French law since such a mechanism already exists under the regulations controlling the export of dual-use goods and technologies.

1.1. Grant of transfer licenses for the EU market

By virtue of the principle of the regulated freedom of trade and industry, the trade of defence materials within the European Union will be given a harmonised framework providing three types of transfer licenses which may be granted to manufacturers marketing war and similar materials:

General transfer license: for a list of products defined in advance by way of a regulation, eligible manufacturers may apply for such license by sending the administration a declaration of registration prior to first use of the relevant general transfer license (known as "first registration"). They shall receive a registration number within one month that must be mentioned on all materials they dispatch;

Global transfer license: in complex transactions, manufacturers may apply for this license for the transfer of specific products to identified recipients, for a fixed period but for unlimited quantities; and

Individual transfer license: shall be granted to manufacturers for specified transactions and for the most sensitive products.

Under this less restrictive system, the administration will be required to carry out tighter ex post controls of undertakings. The purpose of such controls -- unprecedented in France at this scale -- will be to ensure that in exchange for using the general transfer licenses, the license holders comply with a limitative list of obligations which will be subject to ex post verification by the Ministry of Defence, without prejudice to the powers of the Ministry in charge of Customs. For example, it will be checked that the products transferred via general transfer licenses match those registered in one of the licenses published in a regulation or that the recipients of the defence-related products are authorised to receive them (armed forces and contracting authorities of Member States or certified undertakings). The administration will check compliance with regard, inter alia, to the register of transactions that undertakings are required to keep for a minimum period of 10 years.


Moreover, undertakings wishing to receive military materials via the general transfer licenses published by other Member States will be required to comply with a mandatory certification process. The certificate issued and notified to a manufacturer by a Member State will be recognised by all other Member States. The list of each Member State's certified undertakings shall be published on the European Commission's website.

Finally, this new regime based on the principle of free movement justifies the abolition of the import authorisations for all transfers from another EU Member State as well as the transit authorisations required when goods from a Member State cross through a national territory. It has also induced the abolition of the Customs declaration and the Customs certificate at French borders for products originating from the European Union.

1.2. Grant of export licenses for third countries

The creation of export licenses is a choice made by the French Government and does not arise out of the obligations under the Directive simplifying transfers within the Community. Like the implementation of general transfer licenses, the creation of general export licenses is expected to reduce the number of individual authorisations and thus increase the





commercial response capacities of undertakings. These licenses will apply to the least sensitive transactions: for certain components or for the purpose of exhibitions or trade fairs.

The general export licenses will be subject to the same ex post control requirements as the general transfer licenses and to the same criminal penalties. They will nevertheless be quite specific in certain respects:

The general export licenses will include a list of authorised or prohibited intended uses, unlike the general transfer licenses which will be based on the principle of non-discrimination; and

They will pertain to a more limited range of materials than the general transfer licenses;

The Government is considering reserving the use of general export licenses to companies which provide guarantees as to the organisation and functioning of internal control procedures comparable to the certification requirements set forth in the Directive simplifying transfers within the Community. A "qualification" system for exports via general export licenses is also expected to be set up.

For all other specific transactions or for sensitive products / intended uses requiring an in-depth review by the administration, global and individual export licenses will be implemented according to the same principles as those laid down at Community level for transfer licenses.

2. Opening up defence procurement procedures to EU countries and closure to third countries

The bill implements Directive 2009/81/EC of 13 July 2009 known as the "Defence and Security Procurement Directive" aimed at opening up, to the greatest extent possible, public procurement procedures to candidates from other EU Member States all while preserving the specific nature of defence and security contracts. Therefore, the possibility of using the negotiated procedure with prior publication will become the norm to the detriment of the tendering procedure which was not appropriate. Also, new qualitative selection criteria have been introduced, such as the tenderer's capacity to ensure the security of the data communicated to it or the security of supply for its customers. Moreover, new prohibitions have appeared with respect to tenders related to terrorist activities and violations of professional or national defence secrets.

Furthermore, the bill introduces a clause providing for flexible Community preference (i.e., not automatic) so that defence contracts can be closed to economic operators in third countries. Only by making an exception to this principle will the contracting authorities be able to authorise these economic operators to tender, on a case-by-case basis and under certain conditions (requirements of information and supply security, protection of State defence and security interests or even "obtaining of mutual benefits").

It remains to be seen whether these reforms will be the first bricks of a "European Defence" – an issue that has been Europe's old chestnut for several decades now.

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