



Mr.  
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**Statement Regarding the Development of a new Arms Export Control Law by the German Government Containing Commentary on the Anti-Corruption Provisions Proposed in the Legislation Outline (“Eckpunkte”)**

Dear State-Secretary Giegold,

Thank you for the renewed opportunity to advise on the government’s development of a new arms export control law.

In this submission, I will primarily comment on certain aspects of the anti-corruption provisions (point 14) in the [outline paper](#) (“Eckpunkte für das Rüstungsexportkontrollgesetz”) presented by the ministry of economics and climate protection. However, I would like to make some preliminary comments on other aspects of the outline.

Initially, I believe that the absence of a way for civil society to challenge arms export decisions, the so-called *Verbandsklagerecht*, is damaging to the overall [claim](#) that this legislation aims to be founded on principles of “Verbindlichkeit, Restriktivität, Transparenz und Europa“ (“Bindingness, Restrictiveness, Transparency, and Europe”). The *Verbandsklagerecht* is the only way adherence to the criteria, including human rights criteria, can be verified in court. It is a way to make the

restrictive nature of the legislation actually binding. This is especially crucial in cases where foreign policy or interests and restrictive and ethical criteria do not align. You [state](#) that the two go in the same direction, however, recent policy decisions regarding for example European exports to Saudi Arabia, strongly suggest the opposite. Additionally, future governments may set different priorities, including of an ethically dubious nature, and there is nothing to prevent this if the adherence to this legislation is not legally enforceable. As stated previously and by various organizations, the goal of the *Verbandsklagerecht* is not to unduly restrict the executive decision-making powers of the government, but merely ensures that the adherence to existing legislation can be legally tested.

In a similar vein, the status allocated to Israel is highly concerning. As the son of a Jewish Holocaust survivor, whose mother lost 39 members of her family in concentration camps, as someone who has lectured in Auschwitz and introduced the first motion on Holocaust remembrance in the South African parliament, I am acutely aware of Germany's historical legacy. Yet, by claiming that Israel falls in a category of value partners defending "democracy and human rights", sets a dangerous precedent. The human rights abuses of the state of Israel are widespread, well-documented, and severe. The occupation of and continued settlement in the West Bank and Gaza is illegal under international law. Furthermore, Israel is not a state-party to the Arms Trade Treaty. If a serially human rights abusing state like Israel can fit within the criteria presented the credibility of the entire framework becomes questionable.

There are several other grave concerns that could be mentioned here but I wish to focus on the issue of corruption in the arms trade.

As emphasized in previous submissions, corruption is not a victimless crime, it is not a side-issue, but it is central to how the global arms trade operates. It is encouraging to see that the government is working to address the issue.

However, the anti-corruption efforts currently outlined need to be made substantially clearer to amount to more than lip-service to anti-corruption.

It appears that the current proposal contains three elements aimed specifically at addressing corruption. First, corruption is to be acknowledged as an aspect that would lead to an assessment of an exporting company as unreliable, secondly the government wants to implement the results of European-level negotiations on inclusion of corruption as an export criterion in arms export licensing legislation, and thirdly, licensing authorities are to receive access to corruption relevant information in the competition register.

Many of the questions raised below relate to the 2018 OECD Working Group on Bribery's [phase 4 report](#) on Germany's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Overall, it remains unclear whether the government is going to implement the recommendations and respond to the concerns raised by the working group.

Regarding the assessment of reliability, it is commendable that the [2001 principles for the assessment of reliability](#) are to be included in the legislation. However, it is currently not clear whether,

- a) under the current proposal, legislation would resolve the issue that, as of 2018, a legal conviction appeared to be the threshold at which any action would be taken to suspend or revoke licenses or withdraw the status as a reliable exporter from a company. The implications for reliability assessments and licensing decisions of, for example, deferred prosecution agreements, settlements, and well-founded corruption allegations, remain unclear.
- b) legislation would refer specifically to foreign-bribery instruments, which the 2001 guidelines do not.
- c) the legislation would establish formal guidelines on the conduct of due diligence in the granting of defence export licenses, including the consultation of international debarment lists and confirmation and verification of a company's corruption-related compliance programme, as recommended by the OECD working group.
- d) the definition of employees responsible for an arms export (Rüstungsvorhaben verantwortende MitarbeiterInnen) includes only the person formally responsible for the export (Ausfuhrverantwortlicher), as designated under the 2001 principles. It is also unclear whether and at what point issues at a given company would ever be treated as structural and/or systemic rather than just constituting the failing of individuals. Should only the person whose signature an arms export application bears matter, as the [explanatory document](#) on the proposal suggests, the effectiveness of this step will be severely limited or completely negligible. Bribery happens at multiple levels of arms deals. Thus, arguably, whose signature the export application ultimately bears is largely irrelevant to whether there was corruption in the sale or whether the company otherwise has structural and/or systemic issues with corruption.

Regarding the European-level negotiations, it is certainly desirable that European legislation regarding corruption be defined. I concur with the [analysis](#) submitted previously by Transparency International Germany that without European legislation the temptation remains high for companies to circumvent German legislation. This is especially relevant as the government intends to expand European joint-production. However, there is nothing in European legislation that would prevent Germany from unilaterally pioneering an anti-corruption criterion and enforcing it in joint-developments. In fact, Article 3 of the [EU Common Position on Arms Exports 2008/944/CFSP](#) explicitly states that nothing in this legislation should restrict the right of member states to operate more restrictive policies. At the same time, it remains unclear whether,

- a) the government is already advocating or intends to advocate strongly on a European level for an anti-corruption criterion for arms exports, and if so, what kind of future regulation the government envisions. Does the government, for example, endorse Green MEP Hannah Neumann's [proposal](#) for an anti-corruption criterion?
- b) the government intends to apply a looser assessment of corruption risks pending EU-legislation that may or may not materialize in the future.

- c) it is the case that, unless an entire company or export-responsible person within that company is deemed to be wholly unreliable, evidence of corruption or corruption risks remain largely irrelevant to individual licensing decisions.

Regarding the final point, access is to be granted to licensing authorities to corruption relevant information in the competition register. This raises a number of questions.

- a) On what basis will the information obtained from the register be interpreted and translated into reliability assessments or individual licensing decisions?
- b) Will not only domestic information but also international evidence, such as international debarment lists, be consulted, as recommended by the OECD?
- c) What other relevant information do licensing authorities currently not have access to? And will at least the databases and types of information licensing decisions are based on ever be made publicly transparent?

I thank the Ministry of Economics and the German government for involving me and my organization in the process of developing the new arms export control law. We remain at your disposal for any further information, recommendations, or analysis.

Sincerely,  
Andrew Feinstein  
*Executive Director*