

## ‘Specially designed?’ – an EU/German perspective on supplying components to defence companies



Supplying to foreign customers who manufacture both civil and military goods entails special export control risks – in particular, where components are involved which can be installed into military goods. Philip Haellmigk considers the issues arising out of EU regulation and examines the German experience.

To decide whether a (fully manufactured) product is a military item that is listed in the national military list can be difficult enough. However, the classification of a *component* as a military item is even more challenging. In particular, this is the case if the exporting company generally produces the components for civil applications, too, and if the foreign customer operates both in the military and civil sector. Whether a component must be categorised as a military item mainly depends on whether it has been specially designed (for military purposes). This article provides an overview of the content and scope of this requirement and shows how difficult it can be to draw the line between a military and civil component not covered by the military list.

### Military list also comprises components for military items

In the European Union, national law governs the export control of military items.<sup>1</sup> Therefore, each Member State provides national provisions for the export of military items including a national military list that covers all military items. However, the Member States are each members of the international export control regimes, such as the Wassenaar Arrangement, which provides a Munitions List covering military items. Further, the EU, based on its Common Position for defining controls for the export of military items,<sup>2</sup> provides a Common Military List (‘the Military List’) – closely aligned to the Munitions List – that acts as a reference point for the Member States’ military lists.<sup>3</sup> Therefore, the content and wording of the Member States’ military lists in the EU are very similar.

The Military List can be divided into two categories of military items: First, items that have a typical military character (referred to as ‘typical military items’). Examples of these would be bombs and weapons. Second

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are those items that do not have an originally military character, but include military features. Instead, these items show a dual-use character (referred to as ‘non-typical military

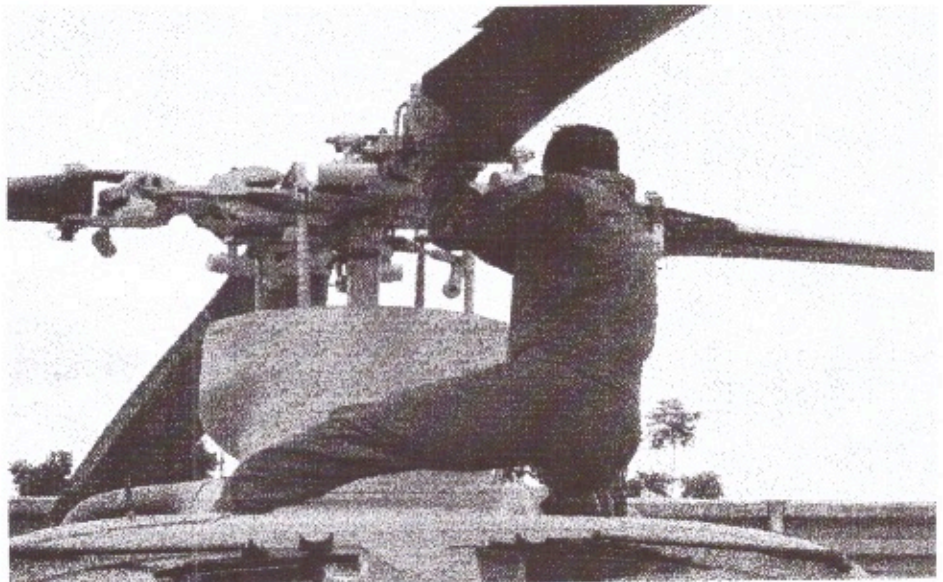
items’). Examples of these include ground vehicles, vessels and aircraft.

Both categories list military items in their entirety (main products) as well as the individual parts for these main products. In particular, the Military List frequently speaks of components.

Components (of a main product) are items that lose their ‘autonomy’ as a result of their installation into the main product; however they are essential for the functioning of the main product.

Do note that this definition allows drawing the line between components and ‘accessories’, a term that is also used in the Military List. Accessories are not essential for the functioning of a main product; they are only useful (such as screws). The Military List also covers accessories of some military items (such as for weapons, bombs).

Including components as military items significantly broadens the scope



of application of the Military List. However, it is restricted by the amendment or caveat that these components must be 'specially designed' or 'specially designed for military use'.

This limiting phrase is paramount for the (civil) export industries as it avoids a boundless widening of the term 'military item'. However, European and national export controls do not provide a legal definition as to when a component of a military item is 'specially designed (for military use)'. Therefore, it very much depends on the authorities' and courts' interpretation of this term. Against this background, the following guidelines can be established.<sup>4</sup>

#### Components for non-typical military items: specific military features are required

Concerning components for non-typical military items, the Military List states that the components must be 'specially designed for military use' – a phrase which allows for two interpretations:

First, the classification could be decided depending on whether the manufacturer pursued a military objective when producing the component. According to this approach, the manufacturer's view and motives would be decisive (subjective approach). Whether the component – after its construction – actually shows specific military features would be less important. This approach would focus (more) on the construction phase instead of the time of completion.

Second, it could be possible to classify a component as specially designed for military purposes by primarily assessing its technical specifications after it has been constructed. According to this approach, it would be necessary that the military objectives of the manufacturer be reflected by the construction itself and the individual technical elements of the component (objective approach). The relevant point of time would therefore be the completion of the development and manufacturing process.

In many cases, the manufacturer's motives and objectives during the construction phase will correspond with the component's technical specifications after its completion. Therefore, it is reasonable to consider

## The German experience

### Case law

German courts have taken diverging positions as to whether to focus on the character of the component or the purposes of the manufacturer. In one case, the courts decided that the classification should depend entirely on the manufacturer's motives. Hence, a purely civil component (with no military specifications) was considered to be a military component based on the fact that the manufacturer intended to produce a component for military use.<sup>5</sup>

However, in recent times, the courts have decided that the classification should depend on the technical features of the component. The courts require that the military design must be contained in the component itself; the military nature of the component must be recognisable when examining its specifications.<sup>6</sup>

Against the background of these decisions the courts' approach can be summarised as follows:

- If the component shows military specifications, it is a military component in the sense of the military list;
- Its intended or actual use is irrelevant for its classification as a military component;

these two phases – construction and completion – when assessing a component as specially designed for military use. If the military purposes of the manufacturer are reflected in the military specifications of the components, the subjective as well as the objective concept can be applied.

But: what happens where the motives of the manufacturer do not correspond with the features of the components designed?

It is possible that the component does not include typical military specifications, although the manufacturer intended to construct a military component, as his/her foreign customer belongs to the military industry. Further, it is possible that at the time of construction the manufacturer does not know whether the component will be used for military or civil purposes as his foreign customer operates both in the military

- It does not affect its classification if the foreign customer installs the component into a civil (main) product;
- Once the component shows military features, it is a military component regardless of its actual use.

### German authorities

Whether the authorities follow the objective approach, remains unclear to date. In a recent official publication, the authorities state that the classification of a component merely depends on its technical design features, regardless of the customer, his business activities and his intention to use the component.<sup>7</sup> However, licensing practice shows that the authorities do actually consider (sometimes primarily) whether the manufacturer has intended to produce a military item, the customer, the industry sector he belongs to and the intended use.

In order to provide companies with appropriate legal certainty for their supplies of components, the authorities should establish (and follow) a uniform practice that corresponds with their published comments.

and civil sectors (e.g., being a producer of military and civil vehicles). In these cases, it is necessary to determine whether to classify the component based on the manufacturer's motives or the component's technical specifications.

### Military nature of the component must be recognisable

The objective analysis is the correct approach – it is reasonable to focus on the character of the component. If the component does not include any military specifications, it is not a component specially designed for military use. If military features are lacking, this cannot be replaced by military purposes of the manufacturer at the time of construction. Subjective elements, such as purpose or objective of the manufacturer that are difficult to identify with absolute certainty, should not be applied to determine a provision

of the Military List. The Military List includes military items, but does not include motives of the manufacturer.

Therefore, in the light of the rationale of the Military List and the principle of legal certainty, it is sensible to follow the objective approach. Otherwise, the interpretation of the term 'specially designed for military use' would be reduced to a case-by-case evaluation of the manufacturer's thinking instead of providing general and objective criteria for the classification of a component.

Furthermore, it must be considered that, by applying the subjective approach, the distinction between export controls based on the sensitivity of the export item and the export controls based on the sensitivity of its use becomes blurred. Goods-related export controls provide licence requirements for listed goods, whereas use-related export controls provide licence requirements for non-listed goods. The assessment as to whether a component is specially designed for military purposes should take into account these different export control systems.

**Components for typical military items: Specific military features are not required**

With regard to components for typical military items, the Military List merely provides that the components must be

***Subjective elements, such as purpose or objective of the manufacturer that are difficult to identify with absolute certainty, should not be applied to determine a provision of the Military List.***

'specially designed'. It is not required that the components must be specially designed 'for military use'.

The wording clearly shows that it is not required that a component for a typical military item itself must show military features. It is sufficient that the main product the component will be

installed into is a typical military item. The component is considered a military component as it has been constructed for a typical military item. Due to its (technical) reference to such an item it is irrelevant whether the component itself includes military characteristics.

Therefore, as opposed to the components for other military items, components for typical military items do not need to show separate military features. The military character of the main product covers all components that are designed for installation into the main product.

**The design of the components must be substantial**

With respect to both categories of military items – typical and other military items – it is further required that the components are 'specially' designed.

This phrase allows us to arrive at two conclusions: First, a civil component does not become a military component simply by installing it into a military item. Second, a simple change of a civil component for military purposes does not turn the

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component into a military component. It requires a modification that is substantial.

The assessment as to whether a simple modification of a component 'crosses the line' to become a significant construction is two-fold: the modification must be substantial in terms of quality and quantity.

In terms of quality: a modification is substantial if the modification concerns essential performance features and the functionality of the component. In these cases, the modification relates to 'special' (technical) parts of the components and thus meets the requirement that the new design of the component must be 'special'.

However, if technical features are modified that do not alter the component's essential functional features, the component has not been modified substantially. This is so even if the construction works lead to a substantial modification of the main product.

In terms of quantity, it is required that the modifications of the component must involve a certain amount of construction work. This requirement draws a line at little changes and amendments of a component that are not considered to be substantial.

In many cases, the manufacturer will construct the component based on technical drawings. If the manufacturer himself has made the

technical drawings, it must be considered whether the technical drawing contains 'special' works for a military purpose. If the foreign customer has provided the technical drawing, the construction process must be militarily modified in order to become 'special'.

#### Legal definition or list of exemptions needed

Despite these criteria, it is clear that it remains difficult to define the term 'specially designed (for military use)'. In practice, it is not possible for a company to determine with absolute certainty whether a component that the company produces for installation into a military item can be considered as a civil component that is not covered by the Military List.

Given this legal uncertainty, appropriate export control compliance will require considering every

### ***A simple change of a civil component for military purposes does not turn the component into a military component. It requires a modification that is substantial.***

component that will be produced for installation into a military item as a military component in the sense of the Military List, regardless of its features and its military modifications. However, this broad definition is contrary to the wording of the Military List and is therefore clearly not intended by European and national export controls.

Against this background, the (European and) national legislator should clarify the scope of the term 'specially designed (for military use)' by providing a legal definition or – in line with US export controls<sup>8</sup> – establish a list of exemptions when a component, although produced for installation into a military item, remains a civil component and thus is not covered by the Military List.

Do note that the Military List speaks of components that are 'specially modified'. This category is not a sub-category of components whose changes

are not substantial enough to be considered as 'specially designed'. Specially modified components are components which have already been finished, but modified after their completion.

#### Conclusion

The national military lists of the Member States also include components that are produced for military items. To avoid a boundless scope of application of the Military List, it is provided that the components must be specially designed (for military use). Whether a component meets this requirement depends on the type of military item the component is produced for.

With respect to military items that have no typical military nature but rather a dual-use nature (ground vehicles, aircraft, vessels) it is required that the component itself must contain military specifications. Concerning typical military items (torpedoes, bombs, weapons) however, it is not required that the components contain separate military features. It is sufficient if they have been produced for installation into these military items. Furthermore, it is required for all components of military items that the design (for military use) is substantial. The amount of construction works as well as the content (quality) of the modifications must be significant. Despite these criteria uncertainty remains as to when to consider a component as a civil or military component. This should be clarified by a legal definition and/or a statutory list of exemptions.

#### Links and notes

1. See for Germany: Export List, Annex 1 of the Foreign Trade and Payments Regulations (*Kaüßerwirtschaftsverordnung*).
2. 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.
3. Art. 12 of the 2008/944/CFSP.
4. These guidelines are based on the approach taken by the German authorities (Office of Economics and Export Control – *Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA)*) and German criminal and administrative courts.
5. German Federal Supreme Court, judgment of 23.11.1995, case 1 StR 296/95.
6. German Federal Supreme Court, judgment of 26.3.2007, case 5 StR 225/06; German Federal Supreme Court, judgment of 26.10.2010, case 3 StR 274/09; Administrative Court of Frankfurt, judgment of 17.2.2005, case 1 E 7512/03; Higher Administrative Court of Hessen, judgment of 14.10.2009, case 6 A 2113/08; Higher Administrative Court of Hessen, judgment of 16.8.2016, case 6 A 1396/14.
7. See BAFA, Export controls for spare parts of *Airinger I* of the Dual-Use Regulation, April 2016, page 9.
8. Sec. 772 EAR.

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