With reference to verbal note ODA/06-2015/NLDU of 24 February 2015, the Federal Republic of Germany hereby submits its reply to the United Nations Secretary-General’s request for statements with regard to United Nations General Assembly resolution 68/44 entitled “National legislation on transfer of arms, military equipment and dual-use goods and technology”. For more detailed information, the Federal Republic of Germany wishes also to refer to its National Report on the Implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects, the latest version of which is available on the dedicated website www.poa-iss.org.

1. The German export control system

Germany’s military equipment exports are governed by the Basic Law, the War Weapons Control Act\(^1\) and the Foreign Trade and Payments Act\(^2\) in conjunction with the Foreign Trade and Payments Ordinance\(^3\) as well as the Arms Trade Treaty. The “Political Principles Adopted by the Government of the Federal Republic of Germany for the Export of War Weapons and Other Military Equipment” of 19 January 2000\(^4\) (“Political Principles”) and the Council Common Position of the EU defining common rules governing control of exports of military technology and equipment of 8 December 2008\(^5\) (“EU Common Position”) provide the licensing authorities with guidelines. The export of dual-use goods is governed by COUNCIL REGULATION (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (“EC Regulation Dual-use”\(^6\)).

The Foreign Trade and Payments Act and the Foreign Trade and Payments Ordinance require the licensing of all military equipment exports. The military equipment is listed in full in Part I

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\(^3\) Foreign Trade and Payments Ordinance in the version of 2 August 2013 (Federal Law Gazette I p. 2865).

\(^4\) See Annex 1.

\(^5\) See Annex 2.

\(^6\) See Annex 3.
Section A of the Export List (EL, Annex to Foreign Trade and Payments Ordinance). They are broken down into 22 positions (No. 0001 to No. 0022) that have their own sub-divisions. As with the EU’s Common Military List, these positions are closely oriented to the corresponding list of the Wassenaar Arrangement (Munitions List), which the German Government has thereby converted into national law to meet its political commitments.

Some of the military equipment articles falling under the Export List are also war weapons as defined by Art. 26(2) of the Basic Law and the War Weapons Control Act. They are displayed in the 62 positions of the War Weapons List (Annex to the War Weapons Control Act) and provided in full in Part I Section A of the Export List. For the export of these weapons, a licence must be obtained under the War Weapons Control Act (“transport authorisation for the purpose of export”), and then an export licence pursuant to the Foreign Trade and Payments Act and Ordinance. By contrast, the export of such military items in Part I Section A of the Export List as are not war weapons (“other military equipment”) requires – merely – a licence pursuant to the Foreign Trade and Payments Act and Ordinance.

The War Weapons Control Act provides that all activities in connection with war weapons (production, acquisition and transfer of actual control, every type of transport or brokering transaction) require prior licensing by the German Government (cf. Sections 2 - 4a of the War Weapons Control Act). The Federal Ministry of Economic Affairs and Energy is the licensing agency for commercial transactions; the other ministries (Federal Ministry of Finance, Federal Ministry of the Interior, and Federal Ministry of Defence) whose portfolio includes the treatment of war weapons are themselves responsible for the respective approvals falling within their scope of competence.

Under Section 6 of the War Weapons Control Act, applicants have no legal right to the issuance of a licence for the export of war weapons. And licences must be denied where there is a danger that the war weapons will be used in connection with peace-disturbing acts, that the obligations of the Federal Republic of Germany under international law will be impaired, or where the applicant does not possess the necessary reliability for the action.

In all of the other cases, the Federal Government decides on the issuance of export licences in accordance with the discretion it must exercise under the EU Common Position (previously the

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7Further details at www.bafa.de.
EU Code of Conduct) and the above-mentioned Political Principles as well as the Arms Trade Treaty.

The export of so-called **other military equipment** is governed by the export rules in the Foreign Trade and Payments Act and Ordinance. In accordance with the principle of the freedom of external economic transactions, on which the systematic approach of the Foreign Trade and Payments Act is based, the applicant has a fundamental right to the issuance of an export licence (Section 1 of the Foreign Trade and Payments Act), unless a licence may be denied because of a violation of interests protected under Section 4 Subsection 1 of the Foreign Trade and Payments Act. Section 4 Subsection 1 (1-3) of the Foreign Trade and Payments Act reads as follows:

> (1) *In foreign trade and payments transactions, legal transactions and actions can be restricted and obligations to act can be imposed by ordinance, in order*

1. *To guarantee the essential security interests of the Federal Republic of Germany,*

2. *To prevent a disturbance of the peaceful coexistence of nations or*

3. *To prevent a substantial disturbance to the foreign relations of the Federal Republic of Germany...”*

As is also the case for war weapons, the German Government exercises its discretion in the issuance of export licences for other military equipment in keeping with the EU Common Position and the Political Principles as well as the Arms Trade Treaty.

The Federal Office for Economic Affairs and Export Control (BAFA), which is an executive agency operating under the jurisdiction of the Federal Ministry of Economic Affairs and Energy, is responsible for granting/denying export licences under the Foreign Trade and Payments Act and Ordinance. The Federal Office for Economic Affairs and Export Control submits licence applications of particular political impact to the Federal Government for its assessment from a political perspective.

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8 www.bafa.de.
The so-called advance inquiry practice has become customary in the course of the past several decades; the discussion of this within the Federal Government is part of the core area of executive government responsibility.

The idea of the advance inquiry is that potential applicants can obtain an orientation regarding the potential outcome of an intended export application even before a contract is signed. The answering of advance inquiries does not amount to a decision on the export, and is not a substitute for it. Since the circumstances in which export applications can be licensed can change, the response to the advance inquiry cannot be binding.

Advance inquiries relating to war weapons must be submitted to the Foreign Office; advance inquiries relating to other military equipment must be filed with the Federal Office for Economic Affairs and Export Control. The procedure corresponds to that of the actual licence applications. Important projects are also submitted to the Federal Government for decision.

Germany’s Federal Security Council is normally included in deliberations on export projects that stand out because of the consignee country, the military equipment involved, or the volume of the transaction. The Federal Security Council is a Cabinet committee chaired by the Federal Chancellor. Its members comprise the Head of the Federal Chancellery, the Federal Ministers of Foreign Affairs, Finance, the Interior, Justice and Consumer Protection, Defence, Economic Affairs and Energy, and Economic Cooperation and Development.

2. General Guidelines for Licensing of Exports of War Weapons and Other Military Equipment

The War Weapons Control Act and the Foreign Trade and Payments Act serve as the framework providing the Federal Government with the latitude for assessment and discretion. To guarantee the uniform exercise of the political discretion available to the Federal Government and to make transparent the politically important criteria used for arriving at decisions, “Political Principles” were defined and have been in force since 1982 (updated in January 2000); they serve as a basis for deciding the individual cases.

These Political Principles (see Annex I) contain the following main elements:
- The preservation of human rights is of particular importance for every export decision, irrespective of the envisaged recipient country. Military equipment exports are therefore fundamentally not approved where there is “sufficient suspicion” of the involved military equipment’s misuse for internal repression or other ongoing and systematic violations of human rights. The human rights situation in the consignee country plays an important role in connection with this question. The Political Principles are more restrictive than the EU Common Position, which rules out export licences only where a “clear risk” exists.

- Following the General Section, a distinction is made between EU, NATO, and NATO-equivalent countries (Australia, New Zealand, Japan, Switzerland) on the one hand, and other countries (“third countries”) on the other. For the first group of countries, licences are the rule and denials the exception; for the second group, there is a restrictive policy with respect to licence issuance.

- In this context, the following applies for the group of third countries:
The export of war weapons is approved only in exceptional cases where, as justified by the individual situation, special foreign policy or security policy interests of the Federal Republic of Germany would support the granting of a licence. For other military equipment, licences are granted only insofar as such action does not endanger the interests to be protected under foreign trade and payments statutes (Section 4 Subsection 1 of the Foreign Trade and Payments Act as cited above under 1.).

Even under this restrictive licensing practice for third countries, the legitimate security interests of such countries may therefore argue for granting an export licence in individual cases. This situation arises in particular when the respective security interests are also internationally significant. The defence against terrorist threats and the combating of international drug trafficking are conceivable examples. In connection with the export of naval equipment to third countries, important aspects may be the interest of the community of nations in secure seaways and an effective exercise of respective national sovereignty in coastal waters. Alongside the pre-eminent importance of the seaways for the functioning of world trade, the increasing threats from piracy, narcotics trafficking, the smuggling of weapons and humans, pollution, and illegal fishing all play an increasing role here.
- The Federal Government’s “special interest” in the ongoing capability for co-operation by Germany's defence industry in the EU and NATO is expressly highlighted, above all against the background of the development of a common European defence policy.

- The factors that are taken into serious consideration in deciding whether to grant licences for the export of arms to third countries include – apart from the human rights, a factor which merits particular attention - the external and internal situation, as well as the extent to which the recipient country's sustainable development might be jeopardised by disproportionate outlays on arms.

- Other factors come into play as well when assessing whether a licence can be issued for the export of military equipment: the recipient country’s conduct toward the international community concerning matters such as the fight against international terrorism and organized crime; the extent to which the recipient country meets its international obligations, particularly with respect to international human rights law, as well as in the areas of non-proliferation, military weapons, and arms control.

Germany’s control system for military equipment exports ensures the final destination of the exported military equipment in a reliable manner. The Federal Government has gathered decades of good experience with these rules. In the few isolated cases in which a diversion has come to light, the German Government vigorously follows up any such indications. If it is proven that assurances of end-use have been violated, the issuing of export licences for the relevant recipients is normally suspended until the facts have been clarified and the danger of renewed unauthorised re-exports has been removed.

The examination of the end-use prior to the issuing of the export licence adheres to the usual system in Europe. It is recognised as an effective control system and enjoys a high reputation around the world.

The ex-ante examination ensures right from the start that defence goods are not delivered to recipients if there is a danger that the goods will be diverted. If there are doubts about the recipient’s assurance of the end-use, export licence applications are rejected.

Nevertheless, the German government is reviewing the current system of end-use control with regard to possible improvements, not least against the background of corresponding discussions.
in relevant international forums. In particular, the German government is examining the extent to which post-shipment controls in the respective countries of destination can be integrated into the German export control system. Even an export control system which conducts end-use controls in order to ensure the end-use of exported military equipment is not fully protected against illegal diversions of goods. But it may enable such activities to be discovered at an earlier juncture, and permit an appropriate response.

And finally, the Federal Government agrees to submit to the Bundestag a Military Equipment Export Report on the developments of the respectively concluded calendar year\(^9\). In addition, with a view to improving transparency, since 2014 interim reports on exports of military equipment covering the first half of the respective year are submitted to the Bundestag\(^{10}\). The same purpose is served by the commitment to disclose final decisions on licences by the Federal Security Council. The Bundestag is informed about them shortly after the taking of the decision.

The **EU Common Position of 8 December 2008** (see Annex II) contains eight specific criteria for decisions on export applications (cf. Annex II, Article 2) and is an integral element of the Political Principles. In the case of each application the Federal Government conducts a very thorough examination in the light of the situation in the region and the relevant country, including the significance of the exports in question to preserve regional peace, security and stability (Criterion Four of the EU Common Position). The assessment pays particular attention to the respect for human rights in the country of end-use (Criterion Two of the EU Common Position) and the danger of abuse of specific weapons.

It is appropriate to take a differentiated view in the light of the varying political developments in the countries and regions and in line with the aforementioned principles governing the decision-making. The criteria defined in the EU Common Position are also taken into account in the assessment of exports of dual-use goods (see Annex III, Art. 12).

Germany is party to the Arms Trade Treaty (ATT) which entered into force on 24 December 2014. The Federal Government had deposited the instrument of ratification in respect of the ATT with the Secretary General of the United Nations on 2 April 2014.

\(^9\) The annual Military Equipment Export Reports can be found at [www.bmwi.de](http://www.bmwi.de). For 2013, see http://www.bmwi.de/EN/Service/publications,did=689342.html

\(^{10}\) The first such interim report is available at http://www.bmwi.de/EN/Service/publications,did=679400.html