

## **Summary of Dutch Court ruling: Peace- and human rights organisations voiceless against arms trade licenses.**

### ***1. Introduction***

The Dutch government has awarded an arms export license to a Dutch company for military material, worth over €34 million, to be exported to the Egyptian navy. The organisations PAX, Stop Arms Trade and the NJCM (Dutch Section of the International Commission of Jurists) have initiated a legal procedure, arguing that the Netherlands has not, or insufficiently, taken into consideration human rights, and the Egyptian involvement in the Yemen war when licensing this arms export. The district court of Noord-Holland decided on this case on 25 August 2016

The main legal question in this case centres on admissibility: are the three organisations allowed to challenge an arms export licence in court?

### ***2. The preliminary proceedings***

In September 2015 the government notified the Parliament in a letter, that it had licensed the export of arms destined for the Egyptian navy. The government's letter mentions that 'severe human rights violations' are taking place in Egypt, but claims that those violations cannot be connected to the military material. The arms trade is licensed for the navy, not the army. Regardless of the question if the navy can be considered to be independent from the army, it appears the government has not, or not sufficiently, taken into account the Yemen blockade, in which the Egyptian navy is partaking, nor the media reports on the Egyptian navy opening fire on refugee boats. The marine blockade has drastically deteriorated the humanitarian situation in Yemen and it is said international war crimes have been committed.

The Netherlands is obliged to conduct a human rights and international law investigation when granting arms trade licences. According to PILP-NJCM, the government has not, or not properly, conducted this human rights investigation. PILP-NJCM also believes that the government has not, or insufficiently, taken into account the facts, especially concerning the Yemen blockade. Pax and Stop Wapenhandel think the arms trade license is harmful to peace and the situation in the Middle East.

The three organisations objected to the licence in October 2015 in an administrative procedure. According to the Dutch administrative legal system, the government body that initially decided has to consider whether to review its decision. In this case, the Ministry of Foreign Trade and the Ministry of Foreign Affairs granted the licence. In the administrative procedure, these ministries thus decided on the objection. They declared the three organisations inadmissible.

The three organisations then appealed the inadmissibility decision and have asked the court for a provisional remedy to suspend the license and to freeze the delivery of the arms until a final decision has been made on the admissibility.

### **3. The dispute in court**

#### *3.1 Admissibility*

The admissibility requirements for the appeal are found in the General Administrative Law Act (Algemene wet bestuursrecht, hereinafter: Awb). Only interested parties can appeal a decision, according to article 8:1 Awb. Article 1:2 Awb defines the interested parties, which are admissible in objections to decisions by a government body, to be those (natural or legal persons) whose interests are directly affected by a decision. Article 1:2 (3) Awb broadens this criterium to allow for legal entities whose interests are of a general and collective nature.

The three organisations argued that they are admissible and that they should be allowed to challenge the arms export licence in court. Earlier, PAX and Stop Wapenhandel were declared inadmissible in a civil procedure, because it was an issue for the administrative court. Now the government wants to close off the administrative route as well. The organisations think that it should be possible to have a legal discussion where the government is licensing arms trade, whilst human rights are at stake. To reason differently would be problematic from a legal, democratic and human rights perspective.

Furthermore, the organisations stated that they meet all the criteria in article 1:2 (3) Awb, because the general and collective interests they represent were affected by and connected to the decision to grant the license. As proof, they provided the court with their statutes which specify each organisation's goals. Also, they specified their day-to-day work connected to that goal. Broadly stated, the general interest represented by Pax and Stop Wapenhandel are peace, while the NJCM represents human rights.

The government claimed that the organisations were not affected by this licence and are therefore not-admissible.

#### *3.2 What is the legal framework?*

The court first outlined the legal framework. The court considered that the government decision to licence the arms export was covered by article 18 and 21 of the Decision of 24 June 2008, Decision on Strategic Goods (Besluit Strategische Goederen), containing rules of import, export and transit of military goods. This was news to both the State and the organisations.

### *3.3 The courts review*

The court added that the licence is governed by both Dutch and European customs law. The applicable Dutch legislation is the Dutch General Customs Act (Algemene douanewet: hereinafter Adw) and Decision on Strategic Goods of 2008 (Besluit strategische goederen: hereinafter Decision on Strategic Goods). As the material content of the licence is the approval of arms trade, the court considered the Common Position of the Council of the European Union [2008/94/GBVB](#) applicable. In this Common Position, the European states have defined common rules governing control of exports of military technology and equipment.

The court stated that under art. 1:1 (4) Adw a Common Position of the Council of the EU is considered a 'binding legal act of the EU'. The effect of this qualification is the applicability of article 1:5 Adw, which invokes the [Union Custom Code Regulation no. 952/2013](#) (hereafter: UCC).<sup>1</sup> As a consequence, arms trade licence is now governed by the UCC. Furthermore, article 8:1 Adw excludes the applicability of article 8:1 Abw. This means that the regulations on appeal for a decision on arms trade are not covered by the Awb. This also means that article 1:2 (3) Awb which allows for organisations representing broad or collective interests to qualify as an interested party does not apply.

In other words, the Dutch legislator has adopted the UCC in its national legislation and excluded her own legislation, which contains a more progressive and extensive understanding of the interested party qualifications. The disputed licence is qualified as a licence that falls under the adopted European Customs regime.

#### *3.3.1 What is the consequence of the applicability of UCC?*

As the court stated, the admissibility of the three organisations is not based on art. 1:2 (3) Awb, but the rules of EU law on the admissibility of parties as laid down in the UCC.

The rules of admissibility are defined in art. 44 (1) of the UCC and require that an organisation has to be affected directly and individually. Following this rule, the court determined, without offering any explanation or motivation for this conclusion, that the licence has no direct and individual effect on the three organisations. Now that article 1:2 Awb is not applicable and a similar broadening of the interested party requirements does not exist in the UCC, the court concluded that the organisations are not addressees of the decision, as required by the UCC.

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1 ———The Community Customs Code was changed on 1 May 2016 into the Union Customs Code (UCC). The judge stated that the relevant articles had not changed and therefore did not offer an opinion on which Code was applicable to the case.

At the hearing the organisations stated that it is possible as a third party to object to a decision governed by the UCC in the United Kingdom. This, however, did not change the court's findings. The Dutch legislator has created 1:5 Adw, which specifically calls for the application of the UCC on decisions to license arms export and excludes the Awb. The court continued and added that this adoption of European Union Law in Dutch legislation is not prohibited and that the choice to do so is that of the Dutch legislator alone. The court considered that the United Kingdom indeed made different choices, but that this does not affect the choice of the Dutch legislator in any way.

The result is that the claimants were declared not-admissible in their objection and appeal.

### *3.4 Decision*

The court considered the appeal unfounded and rejects the provisional remedy to freeze the delivery of the military material.