THE NETHERLANDS

Court of Appeal of Amsterdam: 'Modified' for military use same as 'designed' for?

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In 2016, a Dutch private limited company ('BV') saw its application for an export licence for a product rejected by the Dutch Minister of Foreign Trade and Development Cooperation ('Minister'). On previous occasions the Minister had held that an export licence for this specific product was unnecessary. Upon observing the development of this product for military application, the Minister chose to review their position, classifying the product as a 'military good' under ML5-b within the context of the EU Common Military List, thereby subjecting it to an export licence requirement. Given the nature of the good and the end-user – it was a product for detecting and locating gunfire for a command group with offensive capacities – the Minister concluded that it could not exclude the possibility of the product contributing to a worsening of regional stability and internal conflict in the country of destination of the export. It thereby negatively assessed it against the third and fourth criteria of the EU Common Position on Arms Exports and rejected the licence application.

The BV appealed the decision, arguing that although the product does meet the description of ML5-b, it was not 'specifically designed for military use' – as referred to in the EU Common Military List – and that the development of the product for military application related only to its software, whereas the licence application only concerned the hardware. It argued that in prior cases, relevant foreign authorities had considered that the product was not a military good, and that the Minister had not substantiated its present classification of the product, and that it had infringed the principle of legal certainty, by deciding that the product that did not previously require an export licence now needed one.

District Court of North Holland[1] – dissociating the hardware from the software of the product

On 3 February 2020, the District Court of North Holland published its ruling on the case. It held that the product consisted solely of the hardware, and not the software – mirroring the BV's licence application that referred only to the hardware product. Although the Minister argued that the hardware could not be separated from the software, as the latter was necessary for the functioning of the product, the first instance court disregarded the arguments provided by the Minister and held that only the product as stated in the application had to be assessed.

It held that the Minister had insufficiently substantiated the classification of the product as a military good, considering that the military use is not apparent from the objective characteristics and properties of the product. The District Court of North Holland concluded that there was no military good, no licence requirement and that the Minister's rejection of the export licence had to be set aside to allow a reassessment of the BV's objection to the rejected application.

The Minister appealed the ruling of the District Court of North Holland.

Court of Appeal of Amsterdam[2] – providing its interpretation of the EU criteria of 'specially designed for military use' by considering if the hardware and software were modified for military use

On 24 March 2021, the Court of Appeal of Amsterdam published its ruling on the case. It first observed that the BV had previously supplied parties with the product for specific military application and had stated that a military application of the product depended on the software – and this after the Minister had made known that the development of the hardware and/or software could lead to a licencing requirement.

The Court of Appeal of Amsterdam then went on to note that the criterion 'specially designed for military use' is neither defined nor explained further in the EU Common Military List. The Minister reiterated that the complete system of a product, i.e., the hardware and software together, had to be assessed in order to determine whether the product had been specially (re)designed for military use and this time around, the Court of Appeal agreed. It held that not only was the hardware product unusable without the software and vice versa, thus existing as a functional unit, but that considering otherwise would lead to the easy circumvention of laws preventing the export of military goods used for domestic repression or international aggression, and this by the export of the relevant weapon system in (sub) parts or, as in the present case, by separating the hardware from the software.

Contrary to the BV's argument, the Court of Appeal held that the fact that the EU Common Military List, for instance under ML 21, also classifies software separately as military goods, does not necessarily lead to the conclusion that the hardware and software be necessarily assessed in all cases independently of each other – if the software that was required for the military application of the hardware was not installed on that hardware at the time of export. Based on the evidence, the Court of Appeal observed that the product had been specially modified for military use – so much so, that even the hardware was classified as a military good independently of the software – thereby constituting a military good. The Court of Appeal of Amsterdam stated the Minister was correct in subjecting the export of this product to a licence obligation, and that this decision was irrespective of other Member States' views on the nature of the product.

In its consideration of whether the Minister was right to reject the BV's application for an export licence, the Court of Appeal of Amsterdam interestingly held that the case evidence and public sources including Wikipedia used by the Minister to obtain information on the end-user and end-use of the product, were sufficient to substantiate the Minister's rejection of the BV's application for an export licence. The Court of Appeal of Amsterdam overturned the judgment of the first instance court, while providing insight on its interpretation of the EU Common Military List criterium 'specially designed for military use'.

LINKS AND NOTES

1 Court North Holland 17 December 2017, ECLI:NL:RBNHO:2019:10211 (first published: 3 February 2020).

2 Court of Appeal of Amsterdam 29 September 2020, ECLI:NL:GHAMS:2020:3788 (first published: 24 March 2021).