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COUNCIL OF STATE, ADMINISTRATIVE LITIGATION SECTION.

15th CHAMBER SITTING IN SUMMARY

ARR Ê T

n O 242.025 of June 29, 2018

A. 224.000/XV-3594

In cause: **1. the non-profit association "National Coordination of Action for Peace and Democracy" (CNAPD), 2. the non-profit association "League for the Rights of the man",**

having taken up residence at
M me Vincent LETELLIER, lawyer,
rue Depacqz 78-80/2
1060 Brussels,

versus :

the Walloon Region,
represented by its Government,

having taken up residence at
M me Geoffroy GENERET, avocat,
rue Capitaine Crespel 2-4
1050 Brussels.

I. Object of the request

By a request introduced on December 18, 2017, the non-profit association "Coordination Nationale d'Action pour la Paix et la Démocratie" (CNAPD), and the non-profit association "League of Human Rights", request , on the one hand, the suspension of the execution of the decision of October 18, 2017 of the Minister
President of the Walloon Region to issue to FN Herstal arms export license no. 'other weapons and automatic weapons of a caliber ÿ 12.7 mm (0.50 inch caliber) and accessories, and specially designed components therefor (ML1)' and, on the other hand, the cancellation of the

same license.

II. Procedure

Judgment No. 240.909 of March 6, 2018 reopened the proceedings and instructed the member of the auditor's office appointed by the Deputy Auditor General to continue

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investigation and to draw up an additional report on the third plea. It has been notified to the parties.

By letter dated April 6, 2018, the requesting parties request lifting the confidentiality of the administrative file.

Mr. Christian AMELYNCK, first section auditor at the Council of State, wrote an additional report.

The report was notified to the parties.

By an order of June 18, 2018, the case was fixed for the hearing of the June 27, 2018.

M me Pascale VANDERNACHT, President of the Chamber, presented her report.

M e Vincent LETELLIER, lawyer, appearing for the claimants, and M e Geoffroy GENERET, lawyer, appearing for the opposing party, were heard in their observations.

Mr. Christian AMELYNCK, first section head auditor, was heard in its assent.

The provisions relating to the use of languages, listed in Title VI, Chapter II, of the laws on the Council of State, coordinated on January 12, 1973, are applied.

III. Feedback

In its judgment no. 240.909 of March 6, 2018, the Council of State set out the facts, ruled that the present request was indeed directed against export license no. 2178/030703, which has a purpose other than that indicated in the application, that the urgency was admissible and that the first and second pleas were not serious. He reopened the proceedings for the examination of the third plea.

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IV. Confidentiality of certain documents in the administrative file

IV.1. Theses of the parties

The applicants argue that they oppose any request for confidentiality of the administrative file. They consider that such a request "would prevent an effective control of legality insofar as the opposing party hides the exact nature of the products whose export it authorizes and the recipient of the order in particular, whereas these are two determining factors in the assessment of the legality of the export with regard to the criteria of Common Position 2008/944/CFSP" of 8 December 2008 defining common rules governing the control of exports of military technologies and equipment and of the decree of the Walloon Region of 21 June 2012 relating to the import, export, transit and transfer of civilian arms and defense-related products.

They refer to various judgments rendered by the Constitutional Court, the Council of State and the Court of Justice of the European Union, relating to the examination of requests for confidentiality of documents. They recall that such requests must be examined on the basis of the right to a fair trial. They maintain that if the confidentiality of documents is granted, it must be limited to what is strictly necessary and following a concrete examination. They also point out that since they are not in a competitive position with respect to the firms concerned, no confidentiality could be opposed to them on the basis of considerations relating to commercial interests. They state that it is "[…] essential, in order to assess in particular the arguments relating to the suspension [or] the cancellation of licenses, to be able to access in particular the following information: what type of weapon is targeted specifies by these licenses, how many weapons will be sold, who are the recipients and, if possible, when the deliveries are planned". However, they admit that the sale price of the weapons concerned is not an element that interests them and that may well be covered by secrecy.

The opposing party requests that, pursuant to Article 87, § 2, of the general rules of procedure, exhibits 1 and 2 of the administrative file filed
be kept confidential. It considers that this confidentiality is justified, in this case, "taking into account the issues linked in particular to the international relations of the Walloon Region", as well as "to business secrecy". In support of her claim, she cites judgments of the Court of Justice of the European Union, a judgment of the Constitutional Court and a judgment of the Council of State. It adds that "the companies receiving licenses are bound by contractual undertakings of strict confidentiality with regard to their customers, in this case Saudi Arabia", that

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"these confidentiality commitments concern not only the products covered by the disputed licenses, but also all information and exchanges concerning the contractual relations between parties", and that "the disclosure of strategically sensitive information (final recipient, nature and quantity of the products, prices, technical characteristics, etc.) concerning the products concerned would undermine business secrecy and would seriously harm the companies concerned by jeopardizing their credibility on the market which is theirs".

It also recalls that the attack on the international relations of the Walloon Region constitutes a cause of exception to the publicity of the administration, by virtue of article 6 of the decree of March 30, 1995 relating to the publicity of the administration. It also notes that "the applicants refrained from seizing the Appeals Board against the implied decision of refusal to communicate the licenses of October 27, 2017". It considers that in the absence of the introduction of such an appeal, on the basis of the aforementioned decree of March 30, 1995, against this implicit refusal, the latter "must henceforth be considered leg

By a request of April 6, 2018 entitled "Request for access to the administrative file", the requesting parties reiterate their wish to be able to access all the documents in the administrative file as soon as the opposing party refrains from indicating in what way the information contained in certain documents which it wishes to keep confidential requires such protection. According to them, it is thus not explained how the communication of the documents would *in itself* affect international relations nor how this communication would affect business secrecy, except by invoking the existence of a contractual clause of confidentiality which could not however bind the Council of State. They also point out that the opposing party seems to consider that the opinions given by the advisory committee as well as the export licenses would automatically be "by nature" confidential. However, citing the judgment of the Constitutional Court no. 169/2013 of December 19, 2013, they recall that the latter annulled the provisions of the decree of the Walloon Region of June 21, 2012, cited above, which absolutely enshrined the confidentiality of aforementioned notices and licenses. They add that it is in any event up to the Council of State to assess the merits of this confidentiality of certain documents by striking a balance between the requirements of a fair trial and those of business secrecy or the preservation of international relations of Wallonia, with a view to submitting these documents to the contradiction of the parties or, on the contrary, with a view to removing them from it. According to them, it is indisputable that their right to a fair trial is affected in its very substance since they have no information on the contested acts, other than their registration number and their date of adoption. They are also of the opinion that there is an attack on their liberty

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of expression and their right to information under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. They thus argue that the documents whose confidentiality is claimed by the opposing party very certainly contain information of public interest to which they should be able to have access because of the role they assume in a democratic society as a "watchdog" in the meaning of the case law of the European Court of Human Rights. They still claim that the confidentiality of these documents prevents them from bringing the debate to the public square when it is a social issue and a question of general interest. Finally, they consider that it is for the Council of State to ensure that, if the opposing party's request pursues a legitimate aim, this aim is, in this case, necessary in a democratic society. However, they claim that the interference with their rights to a fair trial, to adversarial debate and to freedom of information cannot be justified by a pressing social need.

IV.2. Appreciation

In its article 87, § 2, the general rules of procedure allow a party to request from the Council of State that it order the confidential nature of the documents that it files.

In this case, such a request is made by the opposing party for certain exhibits filed (exhibits 1 and 2). It is justified by the "issues linked […] to the international relations of the Walloon Region", to "business secrecy", as well as to the "contractual commitments of confidentiality" taken with regard to Saudi Arabia by the company beneficiary of the relevant licenses.

In its judgment no. 169/2013 of 19 December 2013, the Constitutional Court heard an action for annulment brought by the second applicant party against Articles 19, § 1, first paragraph and 21 of the decree of the opposing party of 21 June 2012, cited above. In this judgment, it held in particular the following:

"As for the lack of publicity of certificates and licenses, as well as notices of the advisory committee

B.15. In its first plea, the applicant alleges a discriminatory infringement of the right to administrative transparency guaranteed by Article 32 of the Constitution, in that the arms export licenses and the opinions of the Advisory Committee are exempt from publicity organized by the Walloon decree of March 30, 1995 relating to the publicity of the administration, which has the effect of depriving the persons concerned of the control of the Commission of access to administrative documents, then of the control of the Council of State .

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In its third plea, the applicant considers that by exempting the certificates, licenses and opinions of the Advisory Commission from administrative publicity, the regional legislator infringed the jurisdiction of the Council of State and of the courts and tribunals; this infringement would thus disregard federal jurisdiction, and would also create discrimination between litigants.

The Court examines these two pleas together.

B.16.1. Article 32 of the Constitution provides:

“Everyone has the right to consult each administrative document and to have a copy given to him, except in the cases and under the conditions established by the law, the decree or the rule referred to in article 134”.

B.16.2. By declaring, in article 32 of the Constitution, that each administrative document - a concept which, according to the Constituent, must be interpreted very broadly - is in principle public, the Constituent has erected the right to publicity of administrative documents into a right fundamental.

Exceptions to the principle of the publication of administrative documents are only possible under the conditions set by law, decree or ordinance. They must be justified and are strictly interpreted *(Doc. parl.,* Senate, 1991-
1992, n° 100-49/2°, p. 9).

B.16.3. By allowing a legislator to provide in which cases and under which conditions the principle of administrative transparency may be waived, the Constituent did not exclude that access to certain documents be subject to conditions or be limited, for provided that such restrictions are reasonably justified and do not lead to disproportionate effects.

In this respect, it should be emphasized that administrative transparency contributes to the effectiveness of the exercise of the right of appeal by citizens before the Council.
State or before the courts.

B.17. The decree of the Walloon Region of March 30, 1995 relating to the publicity of the administration (hereafter: the Walloon decree of March 30, 1995) organizes in the Walloon Region the publication of administrative documents.

Under the terms of article 1, paragraph 2, 2°, of the Walloon decree of March 30, 1995, by administrative document is meant “any information, in any form whatsoever, available to an administrative authority”. Articles 4 and 5 of the Walloon decree of March 30, 1995 organize the right in principle to consult an administrative document, to obtain a copy and to receive explanations relating thereto.

Article 6, § 1, of the Walloon decree of March 30, 1995 provides for a series of exceptions to this principle of publicity, by stipulating:

"The regional or non-regional administrative authority rejects the request for consultation, explanation or communication in the form of a copy of an administrative document, if it has found that the interest of publicity does not outweigh the protection one of the following interests:
(1) public safety;
2° the freedoms and fundamental rights of citizens;
3° public order;
4° the investigation or prosecution of punishable offences;
5° the international relations of the Region;
6° an economic or financial interest of the Region”.

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Article 8 of the Walloon decree of March 30, 1995 establishes a Commission for access to administrative documents, which can issue an opinion on a request for consultation or correction of an administrative document, with the possibility of appeal to the Council of State. against the advice of this Commission.

B.18. By providing that the certificates and licenses referred to in B.9.4, as well as the opinions of the Advisory Committee, do not constitute administrative acts within the meaning and for the application of the Walloon decree of March 30, 1995, Article 21, § 1, first paragraph and § 2, as well as the words “and confidential for the sole attention of the Government” in article 19 of the Walloon decree of June 21, 2012 establish a general exception to the fundamental right guaranteed by article 32 of the Constitution.

The resulting difference in treatment between persons wishing to examine the documents referred to in the contested provisions, who are automatically excluded from this right, and persons wishing to examine other administrative documents, who benefit from the procedure established by the Walloon decree of March 30, 1995, can only withstand a review under Articles 10 and 11 of the Constitution if it is based on an objective criterion and if it is reasonably justified. The principle of equality is violated

when it is established that there is no reasonable relationship of proportionality between the means employed and the aim pursued.

Regarding certificates and licenses

B.19. Regarding the provision of the preliminary draft which has become Article 21, § 1 , first paragraph , the legislation section of the Council of State considered the following:

"The draft paragraph must be examined in the light of Article 32 of the Constitution, from which it follows that everyone has the right to consult each administrative document and to be provided with a copy thereof, except in the cases and under the conditions laid down by the decree.

In the Walloon Region, the exercise of this fundamental right is framed by the aforementioned decree of 30 March 1995.

By virtue of Article 32 of the Constitution, this decree of 30 March 1995 therefore determines, for the Walloon Region, the cases and conditions in which the recognized right of everyone to consult administrative documents and to receive a copy thereof may be limited.

In order to guarantee the citizen's fundamental right to publicity of administrative documents, the aforementioned decree of March 30, 1995 submits requests for consultation of administrative documents to a detailed procedure in which the intervention of an *ad hoc Commission is provided for.* The decisions taken within the framework of this procedure are *ultimately* subject to judicial review.

It so happens that the aforementioned decree of March 30, 1995 as it was conceived, and particularly its article 6, makes it possible to meet the concerns of the author of the preliminary draft since, on the basis of a reasoned decision , it will always be open to the regional authority to refuse the consultation of a license which contains sensitive information.

To provide that the licenses referred to in the preliminary draft would not constitute administrative documents within the meaning of the aforementioned decree of March 30, 1995 is therefore useless to ensure the protection of the interests referred to in the commentary to the articles.

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It can therefore be deduced from the foregoing that Article 24, § 1, first paragraph of the preliminary draft [now Article 21, § 1, paragraph 1, contested] cannot be legally accepted. Article 24, § 1, first paragraph , of the preliminary draft is in fact analyzed as a limitation brought to the fundamental right enshrined in article 32 of the Constitution. However, an unnecessary limitation of a fundamental right necessarily violates the principle of proportionality, with the consequence that such a limitation becomes devoid of foundation since it is the rule that any limitation made to a fundamental right is only admissible if it respects the principle of proportionality.

Article 24, § 1, first paragraph , will therefore be omitted" (Doc. *parl.,* Walloon Parliament, 2011-2012, n° 614/1, p. 25).

B.20. The Walloon legislative legislator decided not to follow the opinion of the legislation section under the following considerations:

"The question posed by the opinion of the Legislation Section is therefore not that of the competence *sensu stricto* of the Region, but that [of] knowing whether the decree of March 30, 1995 and the appeal procedure should be given priority. that it organizes, in its article 8 or if it is preferable to provide for an additional exception to those referred to in article 6 of this decree.

The draft text favors this second option.

Indeed, it is clear that it is above all, in a sensitive matter, not only in matters of competition, but also of international relations, to prevent the disclosure of information of this type.

In this regard, the fact that there is an administrative remedy and judicial review is not in itself sufficient to ensure that this information will be effectively protected and will not be disclosed.

Indeed, if, according to the Legislation Section, it will always be open to the regional authority to refuse the consultation of a license which would contain sensitive information, a citizen can always appeal to the Commission for access to documents. administrative.

However, who says Appeals Commission means that the latter will have a power of appreciation as to the exception, based on the text currently in force of the decree of March 30, 1995. Such a power of appreciation will never be subject only to marginal control by the Administrative Litigation Section of the Council of State and by reference to the notion of manifest error.

There is therefore no real guarantee that commercial or politically sensitive information will [ultimately] be made public and it is therefore inaccurate to argue that the draft text is unnecessary to ensure the protection of the interests referred to in the commentary to the articles .

Faced with this risk, the path of safety is preferred. In doing so and for the above reasons, it cannot be maintained that the draft text constitutes a disproportionate limitation of the fundamental right to administrative transparency enshrined in Article 32 of the Constitution" (Doc. *parl.,* Walloon Parliament, 2011 -2012, No. 614/1, pp. 6-7).

B.21.1. The certificates and licenses referred to in B.9.4 constitute administrative acts of individual scope. These acts fall in principle under the protection offered by Article 32 of the Constitution.

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When the Constituent adopted article 32 of the Constitution, it was underlined that the exceptions to this right call in principle for a case-by-case examination of the various interests present: "the interest of the publication must each time concretely counterbalance the interest which is protected by a ground of exception" *(Doc. parl.,* Chambre, 1992-1993, n° 839/1, p. 5).

B.21.2. The Walloon Government justifies the confidentiality regime established by the concern for security, and by the fact that these documents contain sensitive information in terms of economic competition or international relations.

Assuming that these documents may, in certain cases, contain sensitive information, the Walloon Government has failed to demonstrate that the exceptions and the procedure established by the Walloon decree of 30 March 1995 would be insufficient to guarantee the confidentiality of such information, when they are contained in the certificates and licenses referred to in B.9.4.

Indeed, as indicated in B.17, Article 6 of the Walloon decree of 30 March 1995 provides for several exceptions to the right of access, in particular in consideration of the Region's international relations (5°) or of an interest economic or financial of the Region (6°); the application of these “grounds for exception” requires a concrete assessment of the request, the Commission for access to administrative documents ensuring compliance with these exceptions, under the possible control of the Council of State; finally, the administrative documents obtained pursuant to the Walloon decree of March 30, 1995 "may not be distributed or used for commercial purposes", in accordance with Article 10 of the Walloon decree of March 30, 1995, so that any person who disregards this prohibition would risk incurring its liability. The security objective pursued could therefore be achieved by resorting to the procedure organized by the Walloon decree of March 30, 1995.

B.21.3. By establishing a general and absolute exception to the right to administrative transparency for all the certificates and licenses referred to in B.9.4, the legislative legislator has taken a measure that is not proportionate to the objective pursued.

B.22. To that extent, the pleas are founded. Consequently, article 21, § 1 , first paragraph , of the Walloon decree of June 21, 2012 must be annulled.

With regard to the opinions of the Advisory Committee

B.23. The travaux preparatoires comment on the contested article 19 as follows:

"This article establishes an Advisory Commission for exports of products related to defense.

This Commission submits its opinions only to the competent Minister, designated as such by the order establishing the Government.

Its members exercise their functions within the Commission independently and no instructions may be given to them in the context of the preparation of the Commission's opinions, in particular by a hierarchical superior; within the framework of the exercise of their missions within the Commission, the agents from the services of the Governments are exempted from referring to and reporting to their superiors on the work carried out.

Embodying the continuity of the public service at the level of Wallonia, the Commission will bring, within the framework of a reinforced independence, the expertise required for the analysis of the most sensitive files.

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The Commission will communicate to the competent Minister an opinion after an in-depth analysis of the file from the geopolitical, ethical and economic angles, in particular in compliance with the criteria of the European Code of Conduct, European case law, the report of the head of the service ' license control, analysis of foreign policy, human rights', of the report of the High Representative of Human Rights in Geneva and bilateral issues and of all the other information at its disposal" (Doc. *parl.,* Walloon Parliament, 2011-2012, no. 614/1, pp. 5-6).

B.24. Regarding the provision of the preliminary draft which became article 19 of the decree of June 21, 2012, the legislation section of the Council of State considered:

“As consultation of this Commission is not mandatory and its opinions are not of such a nature as to bind the authority, the legislator does not have to interfere in the organization of the executive power by creating a Commission of notice. As this Commission is conceived, it is in fact up to the Government, if it deems it appropriate, to set it up.

Article 4 therefore has no reason to exist and must therefore be omitted. *(Doc. parl.,* Walloon Parliament, 2011-2012, n° 614/1, p. 21).

B.25.1. The initial text of article 24, § 2, of the preliminary draft submitted for the opinion of the legislative section of the Council of State provided:

"The opinions issued by the Commission referred to in Chapter III do not constitute administrative acts within the meaning and for the application of the decree of 30 March 1995 relating to the publicity of the administration and cannot, moreover, be communicated to another authority than the government. These notices are not communicated in the event of appeals brought against a decision of the Walloon Region relating to the granting, refusal, suspension or withdrawal of an export license and this in the context of an appeal brought before the Council of State or before a court of the judicial order” (ibid., p. 40).

B.25.2. With regard to this draft provision, the Legislation Section of the Council of State has considered:

“By virtue of its paragraph 2, the opinions delivered by the Commission instituted by the preliminary draft are withdrawn from the scope of the aforementioned decree of March 30, 1995. The objections set out in the first observation under article 24 apply *mutatis mutandis :* the limitation which is thus brought to the fundamental right to consult administrative documents is not necessary to meet the objectives pursued by the author of the project in such a way that this limitation violates the principle of proportionality; if it turns out that certain opinions given by the Commission contain information deemed to be sensitive, the regional authority will be free to refuse consultation of them on the basis of the procedure provided for by the aforementioned decree of 30 March 1995” (Parl . *doc.,* Walloon Parliament, 2011-2012, n° 614/1, p. 26).

She added:

"Paragraph 2 also states that the opinions of the Commission set up by the preliminary draft are not communicated in the file submitted to the courts of law and to the Council of State when these courts are seized of an appeal ' relating to the granting, refusal, suspension or withdrawal of an export licence.

As the Walloon Region is not competent for the organization of the procedures which take place before the courts and before the Council of State, it

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> it is not up to it to lay down rules affecting the content of cases submitted to these jurisdictions.
>
> The legislation section also observes that, following the judgments of the Court of Justice of the European Union and of the Constitutional Court which held that the parties to judicial proceedings should, despite the principle of adversarial proceedings and respect for rights of defence, being able to invoke the confidentiality of certain documents in the files submitted to the courts, the Regent's decree of 23 August 1948 'determining the procedure before the administrative litigation section of the Council of State' provides, in its article 87, replaced by the Royal Decree of 24 May 2011 'amending various decrees relating to the procedure before the administrative litigation section of the Council of State concerning the confidentiality of documents', that the parties may request that certain documents in the file not be communicated to other parties.
>
> In conclusion, paragraph 2 therefore falls outside the competences of the Walloon Region and has no raison d'être" (ibid.).

The Legislation Section of the Council of State concluded that "article 24 must be omitted in its entirety since the rules it contains cannot occur without violating the legal framework in which they are called upon to fit" (ibid. ., p. 27).

B.25.3. The Walloon legislative legislator has, in article 21, § 2, attacked, partially taken into account the observations of the Council of State, by deleting part of the draft text, but maintaining the principle of the confidentiality of the opinions of the Commission of opinion, established by article 19 attacked and by specifying that these opinions "cannot, moreover, be communicated to an authority other than the Government". It was stressed that it was "essential to impose the confidentiality of these opinions, which can only be done by decree" (CRI,
Walloon Parliament, 2011-2012, n° 19, p. 22, and *CRIC,* Walloon Parliament, 2011-2012, n° 148 (Monday 18 June 2012), p. 7).

The preparatory works explain that the opinions "cannot therefore be transmitted to Parliament" (Doc. *parl.,* Walloon Parliament, 2011-2012, n° 614/1, p. 6), while specifying:

> "This naturally in no way affects the power of the judicial authorities within the framework of their power and mission of investigation as they are organized by the Code of Criminal Investigation or by the Penal Code. This provision is explained, on the one hand, by the fact that the opinions of the Commission contain commercial and confidential information and, on the other hand, by the fact that these reports contain sensitive information and considerations, particularly in terms of geopolitical and diplomatic which require that they never risk being broadcast" (ibid.).

Judicial control "remains possible on the basis of the administrative file, which is not exempt from said control, except if it was [made] use of the faculty offered by article 87 of the decree of the Regent of August 23, 1948 determining the procedure before the Administrative Litigation Section of the Council of State" (ibid., p. 7):

> "It is moreover because of this option that the preliminary draft has been revised by removing the fact that the opinions issued by the Advisory Commission on arms export licenses should not [be] communicated in the event of appeals lodged against a decision of the Walloon Region relating to the granting, refusal, suspension or withdrawal of an export license and this both within the framework of a appeal brought before the Council of State or before a court of the judicial order" (ibid.).

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B.26.1. By exempting from the publicity organized by the Walloon decree of March 30, 1995 the opinions of the Advisory Committee, and by providing that these opinions may not be communicated to any authority other than the Walloon Government, Articles 19 and 21, § 2 , of the Walloon decree of 21 June 2012 prevent any person, or any authority other than the Walloon Government, from taking cognizance of these notices.

Although these opinions relating to the granting of arms export licenses are not as such administrative acts subject to appeal, they nevertheless constitute preparatory acts for the adoption of individual decisions relating to requests for arms export licenses; these elements not only come under the principle of the right to administrative transparency, but may also constitute information enabling the person concerned to be able to lodge an appeal with full knowledge of the facts, with regard to administrative acts of individual scope, such as decisions on applications for arms export licenses.

B.26.2. Furthermore, assuming that these opinions contain sensitive information, the Walloon Government has failed to demonstrate that the exceptions and the procedure established by the Walloon decree of 30 March 1995 would be insufficient to guarantee the confidentiality of such information, when it is contained in the opinions of the Arms Export Licensing Advisory Committee.

Indeed, as indicated in B.17, Article 6 of the Walloon decree of 30 March 1995 provides for several exceptions to the right of access, in particular in consideration of the Region's international relations (5°) or of an interest economic or financial of the Region (6°); the application of these “grounds for exception” requires a concrete assessment of the request, the Commission for access to administrative documents ensuring compliance with these exceptions, under the possible control of the Council of State; finally, the administrative documents obtained pursuant to the Walloon decree of March 30, 1995 "cannot be distributed or used for commercial purposes", in accordance with article 10 of the Walloon decree of March 30, 1995, so that any person who disregards this prohibition would risk incurring its liability. The security objective pursued could therefore be achieved by resorting to the procedure organized by the Walloon decree of March 30, 1995.

Furthermore, when examining the exceptions provided for in Article 6 of the decree of 30 March 1995, account should be taken of the confidentiality provided for by the provisions of Common Position 2008/944/CFSP of the Council of 8 December 2008 defining common rules governing the control of exports of military technology and equipment.

B.26.3. The Walloon Government also argues that the opinions of the Advisory Committee are based on classified information within the meaning of the law of 11 December 1998 relating to classification and security clearances, certificates and opinions. The classification concerns information, documents or data, equipment, materials or materials, in any form whatsoever, the inappropriate use of which may harm one of the interests listed in article 3 of the law of 11 December 1998 cited above. The degree of classification - Top Secret, Secret or Confidential (Section 4) - is determined by the content (Section 5).

If certain opinions of the Advisory Committee are based on classified documents, it may then be justified that access to these documents be refused on a case-by-case basis, according to the procedure organized by the Walloon decree of 30 March 1995, subject to control of the Commission for access to administrative documents.

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B.26.4. By establishing a general and absolute exception to the right to administrative transparency for all the opinions of the Advisory Committee, and by providing for their absolute confidentiality, without being able to be communicated to an authority other than the Walloon Government, the legislative legislator has taken a measure which is not proportionate to the objective pursued.

B.26.5. In addition, this measure also limits the possibilities of judicial appeal against individual decisions relating to arms export licenses.

Even assuming that the modification of the text of the preliminary draft authorizes that the opinions be communicated in the administrative file in the event of appeal before the Council of State or before a court of the judicial order, this circumstance does not change this conclusion, since this post-appeal communication does not make it possible to knowingly bring appropriate appeals against individual decisions relating to arms export licenses.

B.27. To that extent, the pleas are founded.

Consequently, it is necessary to cancel, in article 19, § 1, first paragraph , of the Walloon decree of June 21, 2012, the words "and confidential for the sole attention of the Government", and article 21, § 2, of the same decree".

It thus follows from the aforementioned cancellations that the license referred to in this case and the opinion of the advisory committee cannot be excluded from the scope of the aforementioned decree of March 30, 1995 and that the requesting parties could perfectly send to the Walloon Government to request a copy of the aforementioned documents, which was done by letter dated October 19, 2017 and reiterated by a second letter dated October 27. By a letter dated November 3, 2017, the Minister-President limited himself to general considerations on the policy carried out with regard to the allocation of authorizations for the export of military equipment and on the same day, the director of cabinet of the Minister-President indicated to the second applicant that the Minister-President was not in a position to grant an immediate response to his request for communication of the administrative acts concerned, this request being submitted to the administration for examination and that in any event, a decision would be communicated to him within the period of fifteen days provided for in article 6, § 5 of the decree of March 30, 1995, cited above. Without waiting for this deadline, the applicants filed an extremely urgent appeal with the Council of State on November 13, 2017, arguing that they learned of the existence of these decisions from the press and more particularly from a article published in La Libre Belgique of October 18, 2017, that they are unable to send a copy of the contested act, the opposing party having reserved no response to their express and repeated requests and that, given the urgency to see the legality of these controlled decisions, they cannot adapt to the procedure and the deadlines provided for by the decree of March 30, 1995, cited above. What was noted by the Council of State since by some of its judgments of March 6, 2018, pronounced this time within the framework of the suspension

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ordinary, it dismissed the appeals on the grounds that several licenses had already been executed in the meantime.

Although Article 87 of the general rules of procedure allows the parties to request the confidentiality of certain documents which, in principle, should be useful in resolving the dispute, it should be recalled that the filing of the administrative file is prescribed by the legislation in the aim of enabling the judge to rule on the basis of knowledge that is as precise as possible of the factual circumstances and the legal grounds which led to the drawing up of the contested act. It is thus up to the Council of State to assess the alleged confidentiality of certain documents contained in the administrative file, by balancing the requirements of a fair trial against those of business secrecy or the safeguard of the economic or international interests of a region, with a view to subjecting these documents to the contradiction of the parties or, on the contrary, with a view to removing them from it.

Thus, the "issues linked […] to the international relations of the Walloon Region" may justify a favorable response to the request for confidentiality made by this party. The agreement of the opposing party is indeed required for an export of military equipment to take place to Saudi Arabia. If the elements justifying its position were revealed, they would be likely to have repercussions on its international and economic relations.

The concern expressed by the authority to avoid harm to its international relations therefore makes it possible to consider that the confidentiality of the documents for which it is requested deserves to be maintained, even if the requesting parties are not in a competitive position with respect to its
FN Herstal or its CMI *Defence.* It should also be noted that maintaining confidentiality is not such as to prevent an effective control of legality, as requested by the applicants, from being exercised by the Council of State. However, these reasons do not justify confidentiality going so far as to prevent requesting parties from correctly identifying the nature of the material to which each license applies. The opposing party acknowledged this by providing the requesting parties with a summary table listing the various licenses issued between November 2016 and October 2017 and indicating for each of them the category of goods concerned. However, it appeared that this table contained errors, particularly as regards the nature of the goods covered by certain contested licenses.

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For the continuation of the examination of the appeal, the opposing party is invited to communicate to the requesting parties exact information on the nature of the goods covered by the license concerned by filing new documents in the administrative file as soon as possible.

For the rest, the request for maintaining the confidentiality of documents formulated by the opposing party is favorably received.

V. Third plea

V.1. Theses of the parties

The third plea alleges "breach of Articles 1, § 1, 2 and 10, of Council Common Position 2008/944/CFSP of 8 December 2008 defining
common rules governing the control of exports of technology and military equipment, of Article 14, § 1, paragraph 2, 2 (second criterion), *litteras*
a), b) and c), 4. (fourth criterion), *litteras* a) and c) and 6. (sixth criterion), *litteras* a) and b) of the decree of 21 June 2012 relating to the import, export, transit and transfer of civilian arms and defence-related products, breach of the principle of good administration, the duty of thoroughness and prudence, and excess of power".

The applicants indicate that Article 14, § 1, paragraph 2, of the aforementioned decree of June 21, 2012 **-** the violation of which is alleged **-** provides that "export requests are rejected after examination [...]", if appears that they do not satisfy precisely defined criteria, which are eight in number.

In their view, these various criteria are independent of any common position adopted by the United Nations, the European Union or the Organization for Security and Cooperation in Europe (OSCE) with regard to a recipient country, in particular in the under an embargo. They deduce from this that the effective implementation of these various criteria is binding on the opposing party regardless of the possible attitude of the other Member States which might fail to meet their own obligations arising from the aforementioned Common Position. They also add that, in accordance with Article 10 of the aforementioned Common Position, social or economic objectives cannot affect the application of the criteria defined in Article 14, § 1, paragraph 2, of the aforementioned decree.

In the first part, they find that the contested license mentions in its operative part that "the validity of this license is suspended when the recipient country is involved in an international conflict or

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According to them, it follows from this condition that the opposing party has not examined the question of whether or not the recipient country is involved in an international or internal conflict, whereas the provisions referred to in the plea require it to operate Moreover, they indicate that it is up to the opposing party itself to assess this condition when it decides on the export request and not to other services such as customs or the administration when permission is already given.

In a second limb, they argue that by authorizing deliveries of arms to Saudi Arabia, the opposing party violates the prohibition imposed on it by Article 14, § 1, paragraph 2, 2. (second criterion) of the aforementioned decree, taking into account the clear risk that the arms delivered are used for internal repression and taking into account the indications, with regard to the country of destination, that the export there will contribute to a flagrant violation of human rights and by article 14, § 1 paragraph 2, 4. (fourth criterion) in view of the clear risk that Saudi Arabia will use the delivered weapons aggressively against another country, in view of the armed conflict against Yemen. According to them, the opposing party should exercise particular caution with regard to Saudi Arabia in view of the serious violations of human rights which have been observed by the competent bodies of the United Nations and by the European Union. Referring to the guide to the use of the aforementioned Common Position, they consider that the opposing party had to carry out a meticulous examination of the situation in Saudi Arabia to determine whether or not criteria 2 and 4 are met in this case. Not having access to the opinions of the advisory committee on export licenses, they explain that either the opposing party did not carry out this meticulous analysis, in which case the plea is serious, or it did so but incomplete manner and they reach the same conclusion, i.e. if it carried out this analysis and concluded that there was no risk, they are of the opinion that a manifest error of assessment must be noted. They maintain that this observation is even more necessary with regard to the sixth criterion because, unlike the second and fourth criteria, it is not assessed by taking into account the specificities of the material to be delivered but only with regard to "the behavior of the buyer country with regard to the international community and, in particular, its attitude towards terrorism, the nature of its alliances and respect for international law". According to them, in this context, the opposing party should have prepared its decision taking into account the buyer country's track record in the areas of support for terrorism and non-compliance with its international commitments, through the use of force and its lack of knowledge of the IHL. In view of Saudi Arabia's involvement in the conflict in Yemen and the resulting humanitarian disaster, they claim that the party

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opposing party should have rejected the export license applications, failing which a manifest error of assessment must be sanctioned.

In its note of observations, the opposing party maintains that the license challenged here is based on the opinion given by the advisory committee at its meeting of March 17, 2017 which is based, according to it, on a complete and nuanced analysis of the situation in Saudi Arabia, quoting a passage from this opinion on criterion 4. She adds that this analysis is also confirmed in the annual report sent to the Walloon Parliament. It also notes that the advisory committee adopted nuanced positions which led the Minister-President to refuse certain license applications with regard to certain types of equipment and the final recipient, taking particular account of the situation in Yemen. She deduces that the contested decision is provided with a formal statement of reasons since the opinions on which the license in question is based are themselves reasoned, even if they are confidential. It also notes that its jurisdiction is not linked and that it does have broad discretionary power, in particular for the examination of the criteria, so that the control of the Council of State is marginal and must be limited to the possible observation of a manifest error of assessment. In its view, that cannot be the case in the present case since the contested decision is based on reasoned, detailed and converging opinions issued by the advisory committee, on the one hand, and these opinions are shared by other countries with the same values as those of the opposing party, on the other hand. It thus refers to a decision of the Federal Court of Canada of January 24, 2017 as well as a decision of the British High Court of Justice of July 10, 2017 which concluded that the criteria for granting licenses of arms export to Saudi Arabia. In view of these elements, it concludes that it did not commit a manifest error of assessment, the aforementioned decisions having been pronounced in contexts similar to those which led it to adopt the contested licence.

V.2. Appreciation

The third plea alleges in particular infringement of Article 14 of the decree of June 21, 2012 mentioned above which is worded as follows:

"Art. 14. § 1. The Government issues licenses for the export to a country which is not a member of the European Union of defence-related products on the basis of a procedure which it determines .
Export requests are rejected after examination against the following criteria, based on Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing the control of exports of military technology and equipment:

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1. First criterion: compliance with the international obligations and commitments of Wallonia and Belgium, in particular the sanctions adopted by the United Nations Security Council or the European Union, agreements on, in particular, non-proliferation , as well as other international obligations.
An export license is refused if it is incompatible with, among other things:
a) Belgium's international obligations and commitments to apply the arms embargoes decreed by the United Nations, the European Union and the Organization for Security and Cooperation in Europe;
b) the international obligations incumbent on Belgium and the Walloon Region under the treaty on the non-proliferation of nuclear weapons, the convention on biological and toxin weapons and the convention on chemical weapons;

c) the commitment made by Belgium and the Walloon Region not to export any type of anti-personnel landmine;
d) the commitments that Belgium has made within the framework of the Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement and the Hague Code of Conduct against ballistic missile proliferation.
The Government refuses the export license when it appears that the export would seriously contravene the external interests of Belgium or the international objectives pursued by Belgium;

2. Second criterion: respect for human rights in the country of final destination and respect for international humanitarian law by that country.
After having assessed the attitude of the recipient country with regard to the principles set out in this regard in international human rights instruments, the Government:
a) refuses the export license if there is a clear risk that the military technology or equipment whose export is envisaged will be used for internal repression or if there are sufficient indications with regard to a country recipient given that the export will contribute to a gross violation of human rights there or where it is established that child soldiers are fielded in the regular army;

(b) exercise, in each case and taking into account the nature of the military technology or equipment in question, particular caution in issuing licenses to countries where serious violations of human rights man have been observed by the competent bodies of the United Nations, by the European Union or by the Council of Europe.
To this end, technology or equipment that could be used for internal repression includes, in particular, technology or equipment for which there is evidence of use, by the intended end user, of these or of a similar technology or equipment for internal repression purposes or for which there is reason to believe that the technology or equipment will be diverted from its declared end use or its declared end user to be used for internal repression.

The nature of the technology or equipment will be carefully considered, particularly if it is intended for internal security purposes. Internal repression includes, inter alia, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other serious violations of human rights and fundamental freedoms mentioned relevant international human rights instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

After having assessed the attitude of the recipient country with regard to the principles set out in this regard in the instruments of international humanitarian law, the Government;

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(c) refuse the export license if there is a clear risk that the military technology or equipment to be exported will be used to commit serious violations of international humanitarian law;

3. Third criterion: internal situation in the country of final destination (existence of tensions or armed conflicts).
The Government refuses the license for the export of technology or military equipment likely to provoke or prolong armed conflicts or to aggravate existing tensions or conflicts or in the event of civil war in the country of final destination;

4. Fourth criterion: preservation of regional peace, security and stability.

The Government refuses the export license if there is a clear risk that the intended recipient will use the military technology or equipment proposed for export aggressively against another country or to enforce a territorial claim by force. When examining these risks, the Government takes the following elements into account in particular:

(a) the existence or likelihood of an armed conflict between the recipient and another country;
(b) a claim to the territory of a neighboring country which the recipient has in the past attempted or threatened to assert by force;
(c) the likelihood that the military technology or equipment will be used for purposes other than the recipient's legitimate national security and defense;
(d) the need not to significantly undermine regional stability;

5. Fifth criterion: national security of Belgium and the Walloon Region and of the territories whose external relations fall under their responsibility, as well as that of friendly or allied countries.
The Government takes into account the following elements:
(a) the potential impact of the military technology or equipment proposed for export on their defense and security interests as well as those of Member States of the European Union and those of friendly or allied countries, any recognizing that this factor cannot prevent consideration of the criteria relating to respect for human rights and regional peace, security and stability;

(b) the risk of seeing the military technology or equipment concerned used against their forces or those of Member States of the European Union and those of friendly or allied countries;

6. Sixth criterion: behavior of the buyer country with regard to the international community and, in particular, its attitude towards terrorism, the nature of its alliances and respect for international law.
The Government takes into account, among other things, the track record of the buyer country in the following areas:
(a) its support or encouragement of terrorism and international organized crime;

(b) compliance with its international commitments, in particular with regard to the non-use of force, and with international humanitarian law;
c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signing, ratification and implementation of relevant arms control and disarmament conventions referred to in point (b) of the first criterion;

7. Seventh criterion: existence of a risk of diversion of technology or military equipment in the buyer country or of re-export of these under undesirable conditions.

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When assessing the impact of the military technology or equipment proposed for export on the recipient country and the risk of such technology or equipment being diverted to an undesired end-user or for undesired final, the following elements are taken into account:

(a) the legitimate interests of the recipient country in terms of defense and national security, including its possible participation in peacekeeping operations of the United Nations or other organisations;
(b) the technical capacity of the recipient country to use this technology or equipment;

(c) the ability of the recipient country to exercise effective control over exports;

(d) the risk of such technology or equipment being re-exported to undesired destinations and the recipient country's track record of compliance with any re-export provisions or prior consent to re-export that the exporting Member State deems appropriate to impose;

(e) the risk of such technology or equipment being diverted to terrorist organizations or terrorists;
(f) the risk of reverse engineering or unintended technology transfer;

8. Eighth criterion: compatibility of exports of technology or military equipment with the technical and economic capacity of the recipient country, taking into account the fact that it is desirable for States to meet their legitimate security and defense needs by devoting minimum human and economic resources to armaments.

The Government examines, in the light of information from authorized sources such as the reports of the United Nations Development Programme, the World Bank, the International Monetary Fund and the Organization for Economic Co-operation and Development, whether the project export risks seriously compromising the sustainable development of the recipient country. In this respect, it examines the comparative levels of military and social expenditure of the recipient country, also taking into account possible aid from the European Union or possible bilateral aid.

§ 2. Export licenses are valid for eighteen months. They may be renewed as many times as necessary for the performance of the contract for which the initial license was granted.

In their application, the applicants submit observations regarding compliance with the second, fourth and sixth criteria, questioning the manner in which the opposing party exercised its duty of thoroughness and prudence in analyzing the situation in Saudi saudi.

The argument presented by the opposing party in its observation note tends only to establish that the claims which gave rise to the
contested decision have been adequately examined according to the fourth criterion provided for in Article 14, § 1, paragraph 2, of the aforementioned decree of June 21, 2012, but, notably, not according to the sixth of them. The committee's opinion is in
silent effect on this sixth criterion which concerns "the behavior of the buyer country with regard to the international community and in particular its attitude towards terrorism, the nature of its alliances and respect for international law", the government being invited to take into account the track record of the buyer country in the

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areas, in particular compliance with its international commitments with regard to concerns the non-use of force and international humanitarian law.

It follows that the second limb of the third plea is, at this stage of the procedure, considered serious.

VI. Emergency

Asked about the implementation of the contested license, the opposing party informs the Council of State that it is still in progress.

In its judgment no. 240.909, cited above, the Conseil d'État noted that the opposing party in no way disputed the urgency alleged by the applicants in its pleadings. Since this license is running and once the goods have been delivered, it will no longer be possible to recover them, the urgency is justified. It is all the more justified as its validity limit is set at September 26, 2018.

The conditions required by Article 17, § 1, of the laws on the Council of State, coordinated on January 12, 1973, for the latter to be able to order the suspension of the execution of the contested act, are met.

FOR THESE REASONS,
THE COUNCIL OF STATE DECIDED:

Article 1er

The confidentiality of exhibits 1 and 2 of the administrative file is maintained.

The opposing party is invited to file in the administrative file documents containing the information referred to in the reasons for this judgment.

Article 2.

The suspension of the execution of the decision of October 18, 2017 of the Minister-President of the Walloon Region to issue to FN Herstal the arms export license n° 2178/030703 for delivery to the Kingdom of Arabia Hardware Arabia (ML1) is ordered.

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Article 3

The costs, including the procedural indemnity, are reserved.

Thus delivered in Brussels, in open court of the XVth Chamber sitting in chambers, on the twenty-ninth of June two thousand and eighteen, by:

Pascal VANDERNACHT,	President of the Chamber,
Diane DÉOM,	Councilor of State,
Marc Joassart,	Councillor of state,
Florence VAN HOVE,	clerk.

The Registrar, President,

Florence VAN HOVE. Pascal TONIGHT.