

EXECUTIVE SUMMARY

This policy brief discusses various elements that should be taken into account in the current review process of the European Council's Common Position 2008/944, which defines common rules for the assessment of arms exports by EU Member States. In order to promote the convergence of Member States' arms export policies and their interpretation of the common assessment criteria set out in it, the Common Position — among other things — stresses the importance of strengthening the exchange of information on arms exports and arms export policies. This policy brief argues that Member States should first take concrete measure to increase the comparability, comprehensiveness, user-friendliness and timeliness of the EU's consolidated annual report on arms exports. Secondly, the Common Position review process also offers opportunities to discuss the increased exchange of relevant information among Member States' authorities on cases of diversion, informal export denials, and more generally of information on specific end users, countries of end use, etc. Strengthening cooperation, information exchange and transparency on arms exports among EU Member States could promote the convergence of arms export policies and ensure that this convergence results in more efficient and effective arms export controls.

Strengthening EU arms export controls through increased information exchange

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The 2018 review of Common Position 2008/944

Ten years after European Council Common Position 2008/944 'defining common rules governing control of exports of military technology and equipment' was adopted, the Working Group on Conventional Arms Export (COARM) was tasked

by the European Council with reviewing the Common Position's implementation and the fulfilment of its objectives.¹ COARM is an important platform for EU Member States to meet on a regular (monthly) basis to discuss the application of export policies to non-EU countries, and to share information on national denials of arms export licences to non-EU countries.

In order to review the full scope of the Common Position and its implementation, COARM has set up four working groups to deal with different issues. Their areas of focus are: (1) 'the common criteria' (chaired by Poland), (2) 'technical amendments' (Germany), (3) 'public reporting and transparency' (Belgium), and (4) 'other matters' (the Netherlands). These working groups should create opportunities for EU Member States to thoroughly reflect on and discuss possible measures to promote the further convergence of their arms export policies. The 2018 review marks another step in a process that has been ongoing for almost 30 years, during which the EU has undertaken continuous efforts to harmonise Member States' arms export policies since 1991.² Despite these efforts, EU Member States' arms export policies still diverge significantly. A common European assessment and interpretation of the common criteria in relation to specific countries of concern appears to be far from a reality.³ In recent years significant differences between EU Member States' policies and practices regarding exporting arms to countries involved in the so-called 'Arab Spring' and the conflict in Yemen illustrate this lack of European convergence. While some Member States have reassessed their policies and have taken a more stringent approach to arms exports to the countries in which the Arab Spring took place and to those involved in the Yemen conflict (such as Saudi Arabia and the United Arab Emirates), others continue to do *business as usual* and still export substantial amounts of military goods to these countries.⁴

However, recent history suggests that fundamental steps towards further European convergence are unlikely to occur soon. The first review process of the Common Position, which started in 2012 and eventually resulted in formal Council Conclusions in July 2015, clearly illustrated a lack of political will to embrace reform, because no substantial changes were agreed on. Moreover, despite the principle of European convergence on arms export controls remaining generally accepted, significant doubts exist among both civil society and various Member States

The European Council's adoption of **Common Position 2008/944** on 8 December 2008 marked the provisional end of a process that started when the European Council in 1991–1992 agreed on eight criteria for exports of military equipment and technology that should be taken into account when assessing arms export licences. These criteria were further formalised in the politically binding 1998 **EU Code of Conduct**, which elaborated the eight common criteria, included explicit grounds for the refusal of licences in the criteria's formulation, and laid down a hierarchy of these criteria in which human rights, peace and conflict prevention were prioritised over economic, commercial and industrial interests. Pressure by civil society, some Member States and the European Parliament eventually resulted in the European Council turning the Code of Conduct into a **legally binding** Common Position.

In addition to the eight criteria, various measures are included in the Common Position to promote the exchange of information, which is seen as the main instrument to promote the convergence of EU countries' arms export policies. Firstly, the **denial notification procedure** foresees a consultation procedure if a Member State is dealing with a licence application similar to one previously denied by another Member State. This procedure envisions greater consistency in Member States' export policies by preventing the 'undercutting' of other Member States' arms export policies. Secondly, the Common Position imposes several obligations on EU Member States to make data on arms exports public. Member States need to annually publish a **national report** on arms exports and to submit information on arms exports to the EU, which are in turn integrated into a **consolidated annual EU report**.

that the short-term harmonisation of EU Member States' arms export policies could only hap-

pen at the level of the **lowest common denominator**.⁵ As a consequence, little political will currently seems to exist to fundamentally alter the framework on arms exports set out by the Common Position.

However, further convergence in the field of arms export controls continues to have **several advantages**. Convergence in Member States' interpretations of the high common standards set out in the Common Position would result in a more 'responsible' arms trade in which human rights, humanitarian issues and conflict prevention are prioritised over (short-term) economic and industrial interests.⁶ A further harmonisation of arms export policies could also help to create a **European level playing field** in which all players can play by the same set of rules, thus reducing unfair competition among European companies and governments. More generally, European harmonisation could help to change the dynamic from competition among Member States to cooperation, which in turn could result in more efficient and more effective arms export controls.

Pivotal in the process towards further convergence is, as the Common Position stresses, the need 'to strengthen the exchange of relevant information with a view to achieving greater transparency'. In other words, strengthening the quality, reliability and scope of the information exchange is essential to promoting European convergence towards a more responsible arms trade. Such information should in the first instance be exchanged among Member States (and their licensing authorities), but also shared with national/European parliaments and society at large. The exchange of reliable and valid information on arms exports serves various objectives: it could make export controls more efficient and effective by giving the competent licensing authorities access to additional information that would be useful in risk assessment procedures, it would help to build confidence among states, and it would allow EU Member States to have reliable and meaningful discussions on arms export policies with a view to

The eight common assessment criteria:

1. Respect for international obligations and commitments
2. Respect for human rights and international humanitarian law
3. The internal situation in the country of end use
4. The preservation of regional peace and stability
5. The national security of EU Member States, allies and friendly countries
6. The behaviour of the buyer country vis-à-vis the international community
7. The risk of illegal diversion
8. The compatibility of exports with an end user's technical and economic capacity

achieving more harmonised arms export policies.⁷ In addition, public reporting on arms exports is a necessary condition to holding governments accountable for their arms export policies.⁸

This policy brief presents several suggestions to both improve and further develop existing initiatives on information exchange foreseen in the Common Position and put into practice within the COARM framework. Suggestions for improving the exchange of information in the context of the Common Position firstly refers to **information on licensed and actual arms exports** in the EU consolidated annual report on arms exports. Secondly, the information that is exchanged could also refer to information that Member States need during the risk assessment procedures when they are dealing with arms export licence applications.

Strengthening and harmonising public reporting

The Common Position obliges EU Member States to publish annual national reports on arms exports and to submit data on arms exports to the EU, which are integrated into a consolidated EU annual report

on arms exports.⁹ On 14 February 2018 the nineteenth EU annual report on arms exports was published, illustrating the EU's tradition of publicly reporting on arms exports, which is unprecedented at the international level. However, several issues limit the reliability and comprehensiveness of these reports. In order to strengthen the level and quality of public transparency on arms exports in the EU, three aspects should be dealt with. Although the Common Position obliges Member States to publish data on arms exports nationally and to forward that data to the EU, **no substantive guidelines** exist on what information needs to be reported.¹⁰ As a consequence, national submissions to the EU consolidated report differ substantially. Although problems affecting the comprehensiveness, comparability and compatibility of Member States' submissions have been identified on several occasions, Member States still fail to make full submissions to the EU, including disaggregated data on licensed arms exports, actual exports and licence denials.¹¹ Moreover, the number of Member States making full submissions to the EU appears to be decreasing.¹²

Several specific problems, however, severely limit the comparability and comprehensiveness of the data in the EU annual report. Data reported by Member States on both the licensed and actual values of arms exports suffer from uncertainties about what exactly these data consist of, seriously undermining their reliability. Moreover, both the accessibility and timeliness of the EU report has decreased over the past few years. As a consequence, in order to produce reliable and comprehensive information on arms exports, various measures are needed.

Increased comparability and comprehensiveness

As with regard to the **licensed values** that are reported, it is unclear what these values refer to.

In this context two problems arise. Firstly, there are differences between the specific scope of the licences. The French reporting procedures clearly illustrate this. Because of the 2014 changes to the French licensing system, French defence companies need to obtain an individual licence at the early stages of the process of negotiating a contract. While previously separate licences existed for the negotiation stage, on the one hand, and for the signing of contracts, on the other hand, currently only one licence exists that should indicate the potential of the transaction. From the negotiation stage onwards, any processes involved in the negotiation and signing of a contract requires a licence: the transmission of documentation, demonstrations of the arms that will form part of the contract, participation in calls for tenders, etc. As a consequence, the reported values of annual licensed arms exports from France have increased from approximately €10 billion before 2014 to over €150 billion since 2014.¹ Secondly, differences exist among Member States as to what extent the reported licensed values refer to the values of individual licences, or also include the values of the global licences that were issued in the reporting period. Some countries, such as Germany and the Netherlands, include the values of global licences in the licensed values, while other Member States only report the values of actual exports under global licences (if they are reported at all). Because global licence values reflect potential or hypothetical trade flows, these values are often highly inflated compared to individual licence values, which in principle represent actual contract values. As a consequence, comparing licenced values risks becoming a process of comparing apples and oranges.

Similar problems arise regarding the reported values of **actual arms exports**. The need for more Member States to publish data on actual exports was recently stressed in a report to the European Parliament on the further development of the

¹ However, the French national reports published by the French Ministry of Defence do include separate data on contract values for arms exports, which in other Member States constitute the value of licences (see <https://www.defense.gouv.fr/actualites/articles/rapport-au-parlement-2018-sur-les-exportations-d-armement>). COARM therefore should discuss how the changes in French reporting practices could be accommodated, because these practices inflate the licensed arms export values to the extent that any comparison or analysis becomes irrelevant.

Common Position.¹³ The importance of reporting data on actual arms exports has become more apparent because of the implementation of global and general licences by EU Member States. Directive 2009/43/EC was designed to facilitate the intra-EU trade in defence-related products, and obliges Member States to implement both types of licences.¹⁴ Two important issues arise regarding the reporting of actual arms exports. Firstly, it is not clear to what extent Member States that report on actual exports also include exports carried out under global and general licences in these numbers. Only very few governments include numbers on the actual use of general licences in their national reports.¹⁵ Secondly, several EU Member States — especially those with substantive defence industrial bases such as Germany, the United Kingdom, Italy and France — do not report (disaggregated) data on actual arms exports. Because of the increased popularity of (global and) general licences, this lack of data on actual arms exports inevitably results in a growing proportion of the foreign arms trade not being included in the EU consolidated report, thus decreasing the level of public transparency on arms exports.

Greater uniformity of Member States' submissions is thus needed to increase the reliability and comprehensiveness of the consolidated report. During the review process COARM should therefore work on the **development of standardised reporting requirements** for Member States. This would require an assessment of what exactly Member States submit in terms of both licensed values and actual export values, a discussion on the reasons why authorities would not or could not submit all the relevant data on arms exports, and the identification of the existing practices of Member States that publish comprehensive data. Such information would allow for a profound and meaningful discussion on common definitions and would result in specific guidelines being drawn up that would clarify what information should be included (or not) in the values reported to the EU.

Increase the user-friendliness

The increased inaccessibility of the EU consolidated report is a second important issue COARM

should pay attention to during the review process. Because of the growing number of EU Member States and the EU's policy to publish all data in a raw format, the EU consolidated report has become a very lengthy and technical document — the 2016 report comprised 559 pages in pdf format — consisting of numerous tables, including the licensed (and actual) arms transfers according to Common Military List (ML) category for each country of destination, without any synthesis of these data or a more qualitative interpretation or framing of the data.¹⁶ As a consequence, the current consolidated report is difficult to read or to interpret with a view to identifying specific trends and evolutions in EU Member States' arms export policies and practices.

Initiatives to make the annual report more useable and accessible are needed.¹⁷ The development of an interactive and user-friendly online database to consult the data currently included in the annual report could make EU arms exports data more easily accessible. Such an online database should be designed to allow one to obtain a clear understanding of the arms export flows from the EU to non-EU countries. Moreover, it could allow the development of a new style of annual consolidated report, including a synthesis of the raw data, some basic statistical analyses, and a contextualisation of the data in time and space. In addition, a new template could also include a more qualitative part describing the work and activities of COARM and the activities and initiatives of the EU in this field in a given year.

Increased timeliness

The timeliness of the consolidated report's publication should be a third priority for COARM to address. In general, the EU's consolidated annual reports are published with a delay of about one-and-a-half years. The most recent report, containing the 2016 data, was published on 14 February 2018.¹⁸ Although this is timelier than the 2013, 2014 and 2015 reports, which were published in April/May of, respectively, 2015, 2016 and 2017, data on EU arms exports are in general made public more than a year after the licences they record were

Table 1: Publication date of the EU Consolidated annual report on arms exports in the *Official Journal of the EU*, 1998-2018

Year	Publication date	Year	Publication date
2016	14 February 2018	2008	6 November 2009
2015	16 May 2017	2006	26 October 2007
2014	4 May 2016	2004	23 December 2005
2013	27 March 2015	2002	31 December 2003
2012	21 January 2014	2000	11 December 2001
2010	30 December 2011	1998	3 November 1999

issued or the arms exports effectively took place. There also appears to be a tendency to postpone the publication date, as Table 1 indicates. While in the 1998–2008 period publication of the report was about 10–12 months after the end of the reference year, publication dates have become later in the year, up to 16–18 months after the reference year.

There are several reasons for the gradual postponement of the publication date. The first is the policy of waiting for all national submissions before publishing the consolidated report. Because some countries were notoriously late with their national reports, or even failed completely to submit data to the EU, the report's publication date was significantly delayed. The more timely publication of the most recent report in 2018 — three months earlier than in 2017 and 2016 — appears to be the result of the decision not to wait for the Greek submission. As a result, no information on arms exports from Greece are included in the 2016 annual report (nor in the 2015 and 2014 reports).¹⁹ A second reason is the publishing of national reports on arms exports before the information these reports contain is submitted to international reporting instruments. A related third reason delaying reporting to the EU is 'reporting fatigue'. The increased international cooperation on the (il)licit arms trade implies that governments have to submit data on conventional arms transfers to numerous international regimes, such as the UN Register of Conventional Arms, the Arms Trade

Treaty, the UN Programme of Action on small arms, etc.²⁰ Reporting templates, reporting procedures and the information required for each regime differ, creating a substantial additional workload for national authorities.

COARM should therefore also suggest procedures during the current review process that will allow for a more timely publication of the consolidated report. This would substantially increase its relevance for societal and parliamentary scrutiny and could make more relevant discussions among Member States possible. In order to reduce the bureaucratic burden and decrease 'reporting fatigue', a further convergence of national arms export reports could be useful in creating synergies between national and EU reporting obligations. However, a more timely publication of the consolidated report should not come at the expense of more Member States' submissions not being included in the reported data. Again, a discussion on EU Member States' existing practices could help to share information on publication formats. Several Member States have more frequent reporting practices than the annual EU report. The Netherlands, Sweden and Flanders, for example, publish monthly reports on both issued and denied arms export licences, while the United Kingdom issues four-monthly and Germany six-monthly reports.²¹

Because national reports often have an independent value apart from the EU consolidated report,

COARM should aim at drawing up **common minimum standards for European reporting**, which would still allow Member States to include additional information in their national reports (and to report more frequently) to fulfil the accountability requirements of their respective national parliaments, while at the same time increasing the reliability and relevance of the annual consolidated EU report.

Promoting information exchange practices: developing the online database

A crucial element in the Common Position and the EU's attempts to work towards convergence is **information exchange**. The denial notification system — i.e. the exchange of information on formal licence denials by Member States — is an important instrument to promote the convergence of national arms export policies. This mutual exchange of information aims to prevent Member States from undercutting one another's arms export policies to their own advantage. Although Member States still decide autonomously on export licences, the initiatives on information exchange have in reality increased their ability to discuss sensitive cases and to put political pressure on other Member States.²² Moreover, increased information exchange could also strengthen Member States' export control systems, because states appear to benefit from information provided by other states, which allows them to conduct a more thorough risk assessment during the licence application process.²³

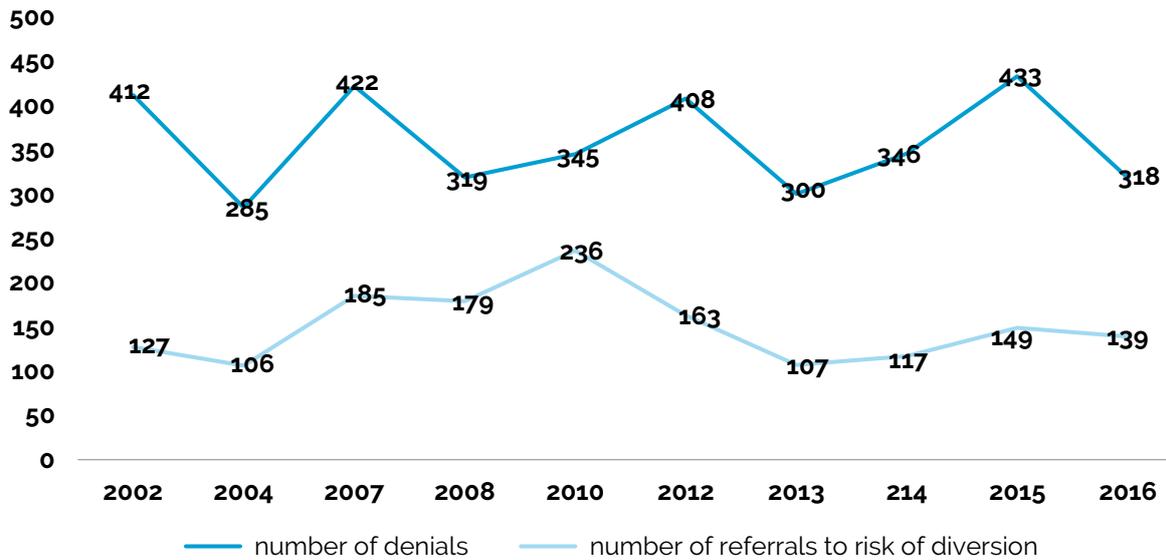
COARM recently developed an **online database** to facilitate the denial notification system for licences that are denied, allowing information on licence denials to be shared almost in real time among all EU Member States. This database in principle creates the possibility of Member States sharing detailed information on how they interpret the common criteria in specific cases and in relation to specific countries of end use. Member States should therefore be encouraged to include substantive information on their assessments and

motivations that led to the denial of an export licence.

In addition, the newly developed database could be an incentive to extend current information exchange practices. New information to be shared among Member States could firstly include additional information on **licence decisions**. Secondly, the online database could allow for the exchange of information to support the **decision-making process**. For both aspects, the dual-use export control framework may offer substantive and practical inspiration, because Dual-Use Regulation 428/2009 establishes an online database that allows information to be exchanged among Member States. The European Commission manages this database, with a view to avoiding the transplacement of trade flows and to make export controls more effective.²⁴

The exchange of information on additional licence decisions

With regard to the former aspect of the exchange of information on **licence decisions**, EU Member States should consider including other relevant licence-related decisions, besides formal denials, in their information exchange practice. In the dual-use export control framework information is not only exchanged in cases of formally denied licences, but also when licences are suspended, withdrawn, annulled, substantially limited or revoked, or when Member States have determined that an intended export will not be authorised.²⁵ Broadening the scope of the denial notification procedure in COARM to align it with existing practices in the dual-use control system seems to be relevant and feasible in light of attempts to prevent undercutting. In addition, COARM should discuss possibilities and opportunities to share information on **informal denials** of licences. In reality, formal denials only represent about 1% of arms export licence applications across the EU.²⁶ Because commercial arms trade negotiations are time-consuming, companies and governments have informal contacts very early on in the process to discuss how authorities would assess a future licence applica-

Figure 1: Risk of diversion as reason for licence denials by EU Member States, 2002-2016

tion. Because companies' decisions on whether or not to proceed with the negotiation of a contract will strongly depend on such informal contacts, formal licence denials are in practice often prevented by such informal discussions.

The exchange of information during the decision-making process

Secondly, the online database offers possibilities to share information that could be useful for the risk assessment procedure in the process of deciding whether to grant a licence or not. In first instance, COARM should consider how the online database could be used to share relevant information that Member States could use in the decision-making process. In this context, the database could be a useful platform to share information collected by EU institutions on human rights, peace, and stability in specific regions and countries that could be relevant during the decision-making process. COARM should collect and disseminate this information among Member States.²⁷

The database could also be used to share information on cases of the illegal diversion of arms exported by EU Member States.²⁸ The risk of the exported goods being illegally diverted is the main reason for Member States to deny licences: 30–50% of all formal denials refer to the risk of diversion, as Figure 1 illustrates. However, recent studies indicate that diversions of exported military goods continue to occur.²⁹ Information collected on cases of diversion via the EU-funded iTrace programme² and via individual Member States could be disseminated through the online database. Disaggregated and specific information on the country of end use, the diverted goods, and the actors involved or responsible for the diversion should be included. Again, existing practices in the dual-use regulatory framework could facilitate COARM's work. The database on dual-use export controls is used to share information on exporters denied the right to use national or EU general export authorisations and on sensitive end users and actors involved in suspicious procurement activities.³⁰

In addition, the database could also be further developed as a platform for Member States to

² iTrace is an EU-funded project (Council Decision 2017/2283/CFSP) implemented by Conflict Armament Research aimed at providing policymakers with dynamic, quantified data on transfers of diverted conventional military goods.

request substantive and practical support from other Member States in specific circumstances. Because not all EU Member States have elaborate information collection systems and diplomatic networks at their disposal, COARM should reflect on the possibility of promoting cooperation among Member States on specific issues such as the legalisation of end-use certificates by local embassies or diplomatic posts, the sharing of information on specific countries of concern, the provision of practical support to the process of physically verifying deliveries, the sharing of confidential information on private and public end users, etc. The database could be used as a platform for Member States to submit such concrete requests.

Increasing the possibilities for information exchange among Member States' competent authorities would result in more efficient and effective controls on arms exports, because it would give Member States — particularly the smaller ones — access to new sources of relevant information for the assessment of export licence applications.

Better information-exchange, further convergence?

Despite thirty years of ongoing initiatives to promote the convergence of EU Member States' arms export policies and practices, Member States' application and interpretation of the common criteria currently codified in Common Position 2008/944 still differ significantly. The 2018 review process of this Common Position within COARM offers an important opportunity for EU Member States to identify and reflect on current shortcomings in reporting procedures, to share good practices and output, and to formulate specific recommendations to rectify these shortcomings with a view to ameliorating and increasing information exchange on arms export practices and policies. Greater transparency on arms exports and increased cooperation among Member States are key to stimulating convergence towards the common application of high standards on conflict pre-

vention, human rights and peace by all EU Member States. The effectiveness of Member States' arms export controls could strongly benefit from increased cooperation and information exchange, which would add to the amount of relevant information authorities could use to assess licence applications.

However, increased and ameliorated information exchange practices is a necessary, but not a sufficient condition to promote convergence in EU Member States arms export policies. European harmonisation, importantly, is as an incremental process, strongly depending on Member States' willingness to advance this process. Progress towards more convergence will thus not occur overnight or automatically. Because of the intergovernmental character of COARM, the main responsibility for determining the pace and direction of European convergence on arms export policies, continue to rest on the Member States. Steps towards further convergence in the direction of a more 'responsible' European arms export policy have been driven by a (small) group of Member States.³¹ In other words, despite the general sense of reluctance towards European harmonisation, especially among those Member States seeing themselves as being more stringent than others, the reality 'agency' creates both possibilities and responsibilities for Member States to determine the pace and direction of European convergence in the field of arms export policies.

This policy brief has discussed several operational or practical initiatives that could significantly improve the extent and quality of the information exchanged among EU Member States on arms exports without fundamentally changing the content of the Common Position. This would not only promote convergence among Member States' policies, but would also strengthen the efficiency and effectiveness of Member States' export controls and risk-assessment procedures, because it would create additional possibilities for information gathering and sharing among EU Member States.

Endnotes

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