

Reviewing the EU Common Position on arms exports: Whither EU arms transfer controls?

Diederik Cops & Nils Duquet

EXECUTIVE SUMMARY

For almost 30 years the European Union (EU) has attempted to achieve greater convergence of its member states' arms export policies. Starting after the end of the Cold War, this process culminated in the legally binding Common Position on arms exports being adopted by the European Council in December 2008. In 2018, ten years after the Common Position's formal adoption, EU member states initiated a second review process of this document, the results of which were formulated in the Council conclusions of 16 September 2019. (A first review of the Common Position had already been conducted between 2012 and 2015.) Although both review processes took place during periods in which the differences among member states' arms export practices were strikingly apparent in their responses to particular events in the Middle East – the Arab Spring during the first review, arms sales to Saudi Arabia in the context of the war in Yemen during the second – these processes have not resulted in substantial changes to the text of the Common Position.

In this paper we argue that the credibility and political relevance of the 2008 Common Position on Arms Exports and the Working Group on Conventional Arms Exports (COARM) are currently at stake. The recent increase in the EU's focus on defence cooperation is both an opportunity for and threat to attempts to develop a more harmonised European arms export policy. An acknowledgement of the value and relevance of the common assessment criteria that member states committed themselves in 1991/92 to apply to the assessment of arms export licences and a stronger commitment to a further convergence of member states' arms export policies are needed. Both the Common Position and COARM risk losing sight of their original goals and becoming – or reinventing themselves as – mere platforms for sharing national views on arms exports and disseminating information on denied licences. As a result, their initial purpose of instituting a more restrictive and convergent European arms export policy will have less impact. Paradoxically, a refocus on national arms export policies and practices might even trigger a supranational EU claim vis-à-vis this issue, and could result in the European Commission increasing pressures to transfer the competence to decide on and manage arms exports to the European level as part of the EU's common commercial policy, leaving only those arms exports that are truly 'essential for national security interests' to member states' competence. It therefore appears to be necessary for member states to engage in more substantial and open discussions within COARM to identify potential changes to the Common Position and its current surrounding framework in order to maintain both instruments' relevance to the discussion and implementation of arms export policies in the EU.

A Europeanisation of national arms export policies

European states' first steps to work towards the harmonisation of arms export policies were taken at the beginning of the 1990s. Three reasons help to explain this growing focus on the issue of EU arms exports. Firstly, the 1991 Gulf War made European countries aware of the limitations of existing non-proliferation instruments. During this war, European armed forces were confronted with Iraqi troops using military equipment exported by their own governments a few years before. This finding served as a watershed event to spur the development of new conventional arms trade controls initiatives. Secondly, the post-Cold War reality – lower defence budgets, the consolidation of defence companies, the increased internationalisation of defence supply chains, and EU defence companies' growing dependency on exports – changed the outlook of the defence market and brought about the need for a more harmonised European export policy.

Thirdly, in the run-up to the creation of the European Community (through the 1993 Maastricht Treaty), the EU also wanted to become more involved in the domain of foreign policy as a normative power, promoting development, conflict prevention and respect for human rights as central principles guiding the EU's Common Foreign and Security Policy (CFSP).

In 1991/92, at the Luxembourg and Lisbon meetings, the European Council adopted eight common criteria that member states committed themselves to apply to the assessment of arms export licences. The European Council also set up the Working Group on Conventional Arms Exports (COARM), in which member states could compare national legislation and explore the possibility of harmonising export controls. In the years that followed efforts continued to further elaborate and formalise these criteria. These developments resulted in the European Council's

adoption of the politically binding Code of Conduct on arms exports in 1998, which COARM had developed.¹ In this Code of Conduct member states agreed on the various goals they intended to achieve with this document. More specifically, they agreed to:

- “set **high common standards** which should be regarded as the minimum for the management of, and **restraint** in, conventional arms transfers by all EU Member States”;
- “**strengthen the exchange of relevant information** with a view to achieving greater transparency”;
- “**prevent the export of equipment** which might be used for internal repression or international aggression, or contribute to regional instability”; and
- “**within the framework of the CFSP ...** reinforce their cooperation and ... promote their **convergence in the field of conventional arms exports**” (Authors' emphasis added).

While member states continue to have the sole competence to assess arms export licences, they have agreed to work towards a common assessment of such licences across the EU in line with the principles set down in the common criteria. In the Code of Conduct all eight criteria agreed on in 1991/92 were further elaborated, with concrete grounds for the denial of licences included in some of them. In addition, the Code of Conduct also set out several mechanisms that are meant to function as operative provisions for working towards the goal of a harmonised European arms export policy, as reflected in the common interpretation and application of the criteria:

- A **denial notification procedure** has been formalised in which a member state agrees to a consultation procedure when dealing with a licence application similar to one previously denied by another member state. This procedure aims to address ‘undercutting’, i.e. the undermining of one member states' export policy by another member state.

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 diversion
8. The compatibility of exports with an end user's technical and economic capacity

- Member states are requested to provide other EU member states with a confidential **annual report** on their arms exports. Under pressure from civil society, this type of classified document was required to be made public in 1998. The Common Position of 2008 extends this requirement by explicitly including the obligation to publish a European consolidated annual report and a national annual report for each member state.
- A *User's Guide* has been developed to help competent national authorities to interpret the common criteria. This guide provides practical assistance on how the common criteria should be applied, lists relevant sources of information that could be used to conduct the assessment and describes best practices in this area.²
- Member states agreed to work towards establishing a **Common List of military equipment** that should be subject to export controls, in order to harmonise the scope of national export control systems. Since 2000 a Common EU Military List has been in place that is almost identical to the Munitions List of the

Wassenaar Arrangement. All member states are required to control exports of the goods included in this list.³

- **COARM** remains the place for the relevant officials of all member states to meet on a regular (monthly) basis to discuss arms export policies and opportunities to work towards further convergence of these policies. Within the European External Action Service (EEAS) a small COARM Secretariat has been set up, which ensures a degree of structure to COARM activities by organising and hosting the monthly meetings, developing the online information-sharing system, and representing the EU at international conferences and meetings.

It is important to note that these additional procedures and mechanisms are instruments to facilitate the move towards a further convergence of member states' arms export policies. Information sharing among member states and a shared interpretation of the common criteria are not the prime goal of the EU's work on arms exports, but, rather, are objectives that contribute to the further convergence of national arms export policies. Increased and improved information exchange practices are therefore a necessary – but not sufficient – condition for achieving convergence in such policies.

Based on the perception that the Code of Conduct offered few legal incentives for member states to effectively change their export practices and that European harmonisation was still a long way far off, pressures quickly arose to turn the politically binding Code of Conduct into a more legally binding instrument. Ten years after its adoption the Code of Conduct was eventually replaced by a legally binding document: the Council's EU "Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment".⁴ Its contents only differ slightly from those of the Code of Conduct, with the main additions being an explicit reference to respect for international

humanitarian law (IHL) (article 2, criterion 2) and the obligation to publish an annual national report and a consolidated European report on arms exports (article 8). Therefore, the EU's framework to promote the convergence of national arms export policies has largely been the same for more than two decades.

The Common Position on arms exports as part of a broader EU approach to the international arms trade within the framework of the CFSP

Interestingly, the Common Position on arms exports is part of a more comprehensive EU approach to strengthen and harmonise member states' arms export policies.⁵ All these steps are an integral part of the EU CFSP, which was formally established in 1993 by the Maastricht Treaty. In addition to the Common Position, the EU has been taking several initiatives in the area of arms export controls in its foreign and security policy. Firstly, in addition to the arms embargoes imposed by the United Nations (UN) Security Council, the European Council is increasingly imposing legally binding arms embargoes as initiatives to "maintain and restore international peace and security in accordance with the principles of the UN Charter and of [the EU's] common foreign and security policy".⁶ Currently, the EU has 20 arms embargoes in place, some of which are EU-implemented UN embargoes, but others that are specifically imposed by the European Council (e.g. those on Venezuela, Belarus, Zimbabwe and China).⁷ In addition, the EU actively promoted its standards for conventional arms control by lobbying for the Arms Trade Treaty (ATT) and, after its adoption in 2013, seeking to optimise its universal acceptance and effective implementation. Simultaneously with its initiatives on the ATT, the EU increasingly aims to speak with one voice by agreeing on EU positions

in international forums such as the 2001 UN Programme of Action on illicit firearms trafficking, etc. The EU has also more generally developed a broader outreach programme to effectively disseminate the provisions of the Common Position in its neighbourhood.⁸ Since 2008, for example, the EU has funded outreach initiatives – regulatory assistance, training of officials, exchanges of best practices – in 16 countries in its eastern and southern neighbourhoods to strengthen arms export control systems.⁹

In other words, it is clear that arms export controls are an important part of the EU's CFSP. When seen as a geographic entity, the EU is a global arms exporter. The combined total of all arms transfers from EU member states make up about 25–30% of all international arms transfers,¹⁰ and European-made military equipment is sold across the world. While the Middle East and North Africa region is the largest export market for European arms manufacturers outside the EU, European defence companies also export substantial amounts of military equipment to Asia, Oceania and North America.¹¹ In other words, because arms exports constitute a part of the foreign and security policies of all the major powers, the EU could theoretically use its arms export controls as leverage in its CFSP framework. Moreover, through the promotion of the Common Position and its principles, not only in its immediate neighbourhood, but also on a global level through the ATT framework, the EU could – and does – contribute to its overarching foreign policy goals of preventing conflict and promoting respect for human rights and IHL.

Principles versus practice? The (lack of) convergence in arms export policies

Despite the widespread rhetoric on the value of a convergent or uniform Europeanised arms export policy, EU member states' arms export

practices have continued to show little evidence of effective steps being taken to achieve such convergence. Although some analyses of European arms exports that have appeared since 1998 have indicated a reduction in arms exports to countries in conflict and where human rights violations have occurred,¹² little evidence has been found for a substantial convergence in EU member states' arms export policies and practices.¹³

These policies and practices continue to differ for a number of reasons. Differences in political culture as they affect member states' approaches to their respective foreign and security policies, differences in the defence industrial outlook of member states, and differing domestic bureaucratic/administrative/judicial traditions all help to explain why harmonised European policies and systems for implementing uniform arms export controls remain largely theoretical.¹⁴ It is therefore important to understand that the process to achieve harmonised EU arms export policies and practices is neither inevitable nor automatically self-evident and necessitates regular follow-up if it is to be further extended and consolidated. Since the adoption of the Common Position, **two review processes** to assess the adequacy of the existing framework in light of its global goals have been conducted. In these reviews member states evaluated the extent to which changes to the Common Position were deemed necessary in order to further advance its stated goals.

The first review of the Common Position: 2012-2015

Article 15 of the 2008 Common Position states that its implementation should be evaluated three years after its adoption. As a result, in 2011 the European Council tasked COARM with conducting a review process and evaluating the adequacy of the Common Position and its implementation in lights of its general goals.

In the run-up to the first review process several concrete recommendations were suggested to COARM for consideration in order to strengthen the existing arms export control framework. Firstly, it was suggested that substantive changes were needed, such as the inclusion of governance and democracy into the common assessment criteria, adding surveillance technologies to the control system, and conducting a detailed analysis of how effectively states implement the common criteria. Secondly, important procedural elements were deemed necessary to improve the way in which the the arms export control framework functioned, such as improving the utility of COARM meetings, increasing the quality and timeliness of EU annual reporting, creating a role for EU delegations in assisting states to implement their arms export control systems, enhancing the quality of information that officials who were responsible for issuing export licences could use in the assessment procedure, and improving public and parliamentary oversight.¹⁵ In other words, various adjustments and changes to the existing approach to arms export controls in the EU were seen as necessary in order to strengthen this framework.

The first review process eventually took three years. It coincided with the so-called 'Arab Spring', which clearly showed the lack of convergence of national arms export policies and practices when EU member states decided on whether to export arms to countries in the Middle East and North Africa.¹⁶ The Council had already adopted a first preliminary conclusion in November 2012. In this document the Council reaffirmed its adherence to the goals of the Common Position, and concluded that "the provisions of the Common Position, and the instruments it provides for, continue to properly serve the objectives set in 2008 and to provide a solid basis for the coordination of Member States' arms export policies".¹⁷ A further Council conclusion was only released in July 2015.¹⁸ In it the Council reaffirmed its determination to fulfil the Common Position's goals of promoting the convergence of member states' arms export policies

in line with the principles enshrined in the text. Together with this general statement, two concrete initiatives were put forward in these Council conclusions: (1) the further elaboration and adaptation of the *User's Guide* in order to support member states in their operationalisation of the assessment criteria; and (2) the implementation of an IT system to facilitate the sharing of information on export licence denials, to optimise the denial notification procedure and to allow further information sharing on arms exports to specific destinations.

In other words, member states reconfirmed the original objectives of the Common Position (including the promotion of convergence), but did not feel the need to adapt the text of the Common Position itself, which was still considered satisfactory in terms of working towards these objectives. The outcome of this three-year revision process was considered limited, especially by civil society. The main reason for this discontent was the fact that during the Arab Spring, which occurred in the same period as the review process, member states' export practices were deemed to be not sufficiently restrictive, and clearly showed the lack of convergence of national arms export policies when arms exports to countries in the Middle East and North Africa were being licensed.¹⁹

The second review of the Common Position: 2018-2019

The 2015 European Council conclusions on the first review process stated that “the competent working group [is tasked with] ... re-assess[ing] the implementation of Common Position 2008/944/CFSP and the fulfilment of its objectives in 2018, ten years after the adoption of the Common Position”.²⁰ In other words, COARM was tasked with carrying out a second evaluation of the Common Position in 2018, only three

years after the end of the first review. At the start of the process little enthusiasm appeared to exist among member states to work substantively on changing the existing framework, with the exception of some technical adjustments. In addition, several member states wanted the process to be limited to a very short timeframe. However, during the procedure that started at the beginning of 2018 and eventually ended in September 2019, the scope of the review seemed to be widened, with more room to manoeuvre and to discuss potential changes to the Common Position. Four working groups were set up to discuss particular issues and to formulate recommendations; these groups dealt with (1) ‘the *User's Guide*’ (chaired by Poland), (2) ‘technical amendments’ (Germany), (3) ‘public reporting and transparency’ (Belgium), and (4) ‘other matters’ (the Netherlands).²¹

As in 2012, the review process occurred at a time of heightened and heated political and public debates on arms exports across the EU. These debates were driven mainly by the prolonged armed conflict in Yemen and the continued and substantial arms deliveries that several member states had made to countries in the coalition led by Saudi Arabia, which were increasingly criticised. From 2016 onwards growing accounts that the countries involved in the conflict – most notably Saudi Arabia and the United Arab Emirates (UAE) – had committed grave violations of IHL using European-made arms generated public and political opposition.²² Consequently, several member states adjusted their policies on arms exports to these countries. Countries such as the Netherlands, Denmark, Finland, the Belgian region of Flanders, and more recently Germany and Italy have adopted a more restrictive approach and decreased their arms deliveries. In contrast, other member states (such as the United Kingdom, France, Spain, Bulgaria, Slovakia and the Belgian region of Wallonia) have continued to do business as usual and have delivered substantial amounts of military equipment – firearms, military aircraft, bombs, missiles, armoured vehicles – to the countries

involved in the conflict, in particular to Saudi Arabia and the UAE.²³

Therefore, as in the previous review process, the lack of convergence in member states' arms exports policies has been reflected in the ongoing discussions on arms deliveries to, on this occasion, the countries involved in the Yemen conflict. It is important to point out that changes to national arms export policies regarding arms exports to Saudi Arabia (and the UAE) are not a direct consequence of initiatives taken at the EU level. Instead, domestic pressures, generally spearheaded by civil society and parliamentary initiatives, have resulted in changes to arms export policies in several member states. The lack of willingness to adopt a common European perspective caused several member states to develop their own national initiatives. In a similar way, civil society actors have reoriented their work towards the national level, because efforts to promote a common EU initiative seem to be increasingly perceived as ineffective and inefficient.

On 16 September 2019, after an almost two-year review process, the European Council reached formal conclusions and decisions on the implementation of the Common Position. The Council reaffirmed its commitment to strengthen arms export controls and promote cooperation among member states and convergence in national arms export policies. In contrast with the first review process, explicit changes to the text of the Common Position were agreed.²⁴ Besides updating the text with new legislative instruments, such as the ATT, the Convention on Certain Conventional Weapons and the Programme of Action on illicit firearms trafficking, some changes have been included to strengthen the transparency of European arms exports. The development of a searchable online database, the inclusion in the Common Position of a formal deadline of 30 June for member states to submit their reports to the EEAS on arms exports, and the addition of a chapter in the *User's Guide* on transparency requirements are all important measures to further strengthen and promote

convergence on transparency.²⁵ In addition, the European Council noted the added value of increased possibilities for information exchange among member states on their arms export policies and potentially relevant information that national licensing officers could use when assessing applications for arms export licences.

However, increased transparency and exchanges of information are not sufficient in themselves to promote further policy convergence. The increased availability of qualitative information could strengthen national export control practices, but does not mean that member states will use, assess and interpret that information in a similar way. Information sharing therefore does little to strengthen the convergence of EU member states' policies on the assessment of arms export licences. However, COARM and the Council clearly failed to achieve consensus on concrete measures to effectively speed up the process of convergence. No changes to the common assessment criteria were made, such as the use of clearer language and the inclusion of additional grounds for the refusal of licences that would decrease the space for national interpretation.

Arms export controls and the CFSP

The Common Position and the instruments and policies developed at the EU level to converge member states' arms export policies are currently at a crossroads. Moreover, this policy field is also impacted by other developments at the European level, which may either strengthen the process of convergence or make it redundant and superfluous. In this paper we focus on two recent EU actions affecting the CFSP that are related to the issue of arms export controls. Both initiatives are attempts to strengthen the EU's global position and its role as an autonomous foreign policy and security actor. Both originate from or are strongly linked to the 2016

EU Global Strategy that the European Council adopted. Firstly, the recent measures adopted to strengthen European defence cooperation, including the implementation of the European Defence Fund (EDF), by financially supporting European military research and development (R&D) projects will raise related arms exports issues. Despite being primarily designed to stimulate a Europeanised and competitive defence industrial base, European defence cooperation will inevitably impact the implementation of arms export controls in the EU.²⁶ The second initiative was the adoption of a new EU strategy on illicit firearms, small arms and light weapons, and their ammunition (EU SALW strategy) in November 2018.²⁷

The European Defence Fund: towards strategic European autonomy

The 2016 Global Strategy considers increased defence cooperation between member states as essential to the EU's security:

The EU will assist Member States and step up its contribution to Europe's security and defence in line with the Treaties. Gradual synchronisation and mutual adaptation of national defence planning cycles and capability development practices can enhance strategic convergence between Member States. Union funds to support defence research and technologies and multinational cooperation, and full use of the European Defence Agency's potential are essential prerequisites for European security and defence efforts underpinned by a strong European defence industry.²⁸

The Global Strategy thus foresees the establishment of an EU fund for defence-related research and technology. In 2017 the European Commission announced the creation of the EDF in its multi-annual EU budget proposal 2021–2027.²⁹

This fund marks an important switch in the EU's normative and political approach, because for the first time an EU budget will be directly used to fund defence spending. The EDF is part of the EU's industrial policy as a funding tool for joint defence R&D projects that will support the EU defence industry and foster the development of a competitive European defence technological-industrial base.³⁰ Because of its primary purpose of encouraging the EU defence industry to increase intra-European defence cooperation, the European Commission stresses that the EDF does not deal with arms transfers. Yet future EDF-funded programmes will inevitably produce new and innovative military technologies and equipment that, given the strong export orientation of European defence companies, will also be exported to third countries.

Interestingly, the discourse on how the issue of arms exports should be dealt with in the context of European defence cooperation is somewhat contradictory. On the one hand, the supranational regulations and provisions of the EDF explicitly state that European defence cooperation “shall not affect the discretion of Member States as regards policy on the export of defence-related products”.³¹ On the other hand, the European Council notes in its conclusions on the review of the Common Position that “the strengthening of a European defence technological and industrial base ... should be accompanied by closer cooperation and convergence in the field of export control of military technology and equipment”.³² While the latter element acknowledges the need to deal with the issue of arms export controls at the European level, the former makes clear that member states consider arms export policies to be their exclusive competence.

This apparently contradictory position results from the artificial divide between the intra-European supranational and the extra-European intergovernmental levels. Because arms exports are currently seen as part of the CFSP framework, they remain the sole competence of the

European Council. As a result the European Commission cannot concern itself with extra-EU consequences of its policy on (co-)funding joint military R&D programmes.

The EU SALW strategy

In 2018, 13 years after the first version, the European Council adopted a new SALW strategy.³³ This 2018 strategy aims for a comprehensive and integrative approach to combat and prevent the illicit proliferation of SALW. Compared to its predecessor, the new SALW strategy contains several new and positive elements and provides significant added value to previous EU actions and initiatives by taking into account the EU's changing security environment and providing concrete measures to combat illicit SALW proliferation. It involves various EU entities and member states, and focuses on the diversion risks during the different phases of a weapon's life cycle.³⁴

Taken together, EU member states produce and export substantial amounts of SALW globally. For decades, European-made SALW have been exported to conflict-affected regions, fuelling the illicit proliferation of such weapons and resulting in many weapons ending up in the hands of armed groups or terrorist actors.³⁵ The 2018 SALW strategy explicitly aims to promote accountability and responsibility in arms export control policies and focuses on the fact that diversion risks associated with legal arms transfers are considered an important element of combating illicit SALW proliferation. While the previous EU SALW strategy (2005) was criticised for its perceived neglect of the need to improve EU member states' policies to control arms exports, the 2018 SALW strategy includes various concrete measures to upgrade national controls of SALW exports.³⁶ These measures, however, are focused on upgrading risk assessment procedures, and the 2018 SALW strategy does not call for more restrictive arms export policies to manage arms exports to conflict-affected or conflict-prone countries. In

addition, the Common Position is described as an example of best practice that should be promoted and disseminated worldwide, and not as a work in progress that needs further refinement. No attention is given to the need to make substantive changes to EU member states' export control systems or to facilitate a harmonised application of the eight criteria enshrined in the Common Position, nor are initiatives included that might promote these aims. This is justified by the argument that member states are able to deal competently with arms exports and that the results of the – at that time ongoing – Common Position review process should be awaited before any changes to export policies are contemplated.

EU arms export controls (and COARM) at a turning point: national or supranational roads?

Within the CFSP the EU is developing new initiatives that inevitably touch on the issue of arms export controls. However, an analysis of how this topic is discussed in initiatives such as European defence cooperation and the EU SALW strategy illustrates that member states are not willing to formally and publicly recognise the lack of European convergence in national arms export policies, nor show a clear will to effectively and constructively extend this process. In other words, the existence of different approaches to arms exports across member states is likely to affect the efforts to construct a consolidated European defence industrial base.³⁷ It will equally pose challenges to the coordination and governance of national arms export control systems and policies. Despite these issues, the EU's discourse on arms exports continues to focus on its ambition to universalise its normative framework driven by concerns about human rights, IHL and conflict prevention, and on promoting the Common Position as an example of best practice.

Within COARM relatively few initiatives are developed that could result in effective steps towards the convergence of national arms export policies. COARM's current working methods, with all 28 member states around the table, leaves little room for substantive discussions, often limiting the traditional *tour de tables* in discussions focusing on specific countries or regions to little more than 28 monologues describing national views on arms exports to these countries/regions. COARM and its members tend to refer to the political level for real changes to the current framework. This lack of ambition, however, risks limiting COARM's role and its possible contribution to a further Europeanisation of national arms export policies. The apparent lack of convergence at the European level and the fact that very little appetite exists to establish significant steps towards a further alignment of these national policies and practices may result in two approaches to how to deal with arms export controls, but pointing in seemingly opposite directions.

A return to national arms export policies ...

The lack of willingness to take substantial steps towards the further European-wide convergence of national arms export policies, as current controversies surrounding member states' arms exports to Saudi Arabia and the UAE illustrate, may increasingly stimulate calls for a refocus on national decision-making with regard to these policies from both national governments and civil society actors.

Civil society actors, who were early advocates of European export control initiatives, are increasingly sceptical about further European convergence in the field of arms export policies. Although this goal is still accepted in principle, taking con-

crete steps to implement it is no longer deemed desirable, because this would undermine the effective application of high ethical common standards and result in a 'race to the bottom' that would leave European export policy harmonisation at the level of the lowest common denominator.³⁸ Especially civil society organisations in member states with more restrictive export policies are increasingly reluctant to continue to push for further European convergence, because they are concerned this would effectively result in the lowering of national standards.

Similarly, national governments are oscillating between the need for an EU-level approach and a continued emphasis on the national competence to decide on arms exports. Pressured by increased domestic parliamentary and public scrutiny of arms exports, national governments across the EU are (once again) changing their arms export policies, often without waiting for a European-wide perspective or initiative. As a consequence, the intergovernmental process to Europeanise arms export policies may be hollowed out and gradually be replaced by a renewed focus on national policies and practices. In the context of transnational armament programmes, this may result in the return of ad hoc agreements on arms exports policies. The 2019 Franco-German Treaty on Cooperation and Integration (the Aachen Treaty) is conceived in part to deal with this issue, stating that the development of "a common approach to arms exports with regard to joint projects" is needed.³⁹ While insisting once again on the need to discuss arms exports during the establishment of joint armament programmes, the treaty also suggests – by not referring to the Common Position – that new principles and procedures on arms exports will be developed. With Germany and France being the most important EU arms producers and exporters (certainly after the United Kingdom has left the EU), this may in effect result in the hollowing out of the Common Position.

... or the supranationalisation of arms export controls?

This ‘return to the national level’, however, is not the only possible way forward. Seemingly, the lack of progress at the EU intergovernmental level may equally stimulate a supranationalisation of arms export controls. Although armaments are a matter of defence and security policy, they are also ‘goods’ in the meaning of the term as it is used in the EU internal market.⁴⁰ Despite the fact that the Intra-Community Transfers (ICT) Directive through which the European Commission has attempted to liberalise and facilitate the internal trade in defence-related goods has been in existence for over ten years, an important reason for the continued complexity of and diversity in intra-EU arms transfer controls is the fact that member states want to retain full control over their non-EU arms exports. Although the principles laid down by the ICT Directive are designed to harmonise national intra-EU arms transfer procedures, national policies on intra-EU arms transfer controls continue to be diverse, with significant differences in the national implementation of these principles.⁴¹

Member states refer to Article 346 of the Treaty on the Functioning of the EU (previously article 296 of the European Community Treaty) to substantiate their claims to their exclusive right to control the arms export licensing process. This article states that

*any Member State may take such measures as it considers necessary for the protection of the essential interests of its security [emphasis added] which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.*⁴²

Member states use this article, and more specifically the phrase “the protection of the essen-

tial interests of [their] security” to justify excluding the EU from involvement in all arms exports. The question, however, is whether all member states’ arms exports to third countries are effectively and automatically linked to their essential security interests. Since 2000, European Court of Justice (ECJ) case law has made clear that Article 346 is not an automatic exemption of defence matters from EU law, but merely a case-by-case derogation that needs to be interpreted strictly, with the burden of proof resting with member states.⁴³

The possibility exists that, using the ECJ rulings, the European Commission will take steps to increase its competence to control arms export licensing, justifying such a step by viewing arms exports as falling under the EU’s common commercial policy. Article 207 of the Treaty on the Functioning of the EU states that the “common commercial policy”, which falls within the exclusive competence of the European Commission, shall be based on

*the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.*⁴⁴

Previously the European Commission had no direct financial or political incentive to involve itself specifically in arms exports licensing, but the EDF has the potential to change this, because the Commission will make substantial budgetary and practical investments in future collaborative EU armament programmes. Member states would then only be competent for those exports that are clearly related to their essential security interests, while the licensing of all other arms exports would fall within the competence of the European Commission. This could significantly reduce member states’ power to manage arms export licensing, making it the exception rather than the general rule it is today.

Member states and civil society should therefore ask themselves whether transferring control over arms exports to the European Commission (especially to the DG GROW⁴⁵ or the new DG Defence Industry and Space⁴⁶) would be a better alternative.

One of the likely consequences is that economic considerations would become an even greater factor in the assessment of arms exports than they are today. The European Commission will probably be supported by the European defence industry in this regard. As strong proponents of a level European playing field, the industry was one of the drivers behind the start of the process towards more convergence in European arms export policy. Defence companies' increased internationalisation and greater involvement in transnational cooperative projects, which will probably accelerate even more after the effective implementation of the EDF, will continue to be a significant push factor for further European convergence. However, it is clear that from an industry perspective such a process would preferably happen at the level of the lowest common denominator, thus maximising companies' chances of exporting their military equipment. In light of this, the European Commission might be more open to complaints about diverging national policies and their effect on export opportunities.

It is equally interesting to discuss the possible role of the European Parliament. This body has increasingly focused its attention on the topic of arms exports in recent years, with annual assessments of the implementation of the Common Position and the adoption of several plenary resolutions calling on member states to impose an arms embargo on Saudi Arabia.⁴⁷ In November 2018 the European Parliament adopted a resolution calling for a real and substantive review of the Common Position and its implementation by member states, including the inclusion of sanction mechanisms that could be imposed on member states that violate its provisions.⁴⁸ In the run-up to the implementation of the EDF, the European Parliament has

also been pushing to be more strongly involved in the fund's implementation.

It is unclear what direction this greater involvement would take, but the increased attention paid to arms exports in the European Parliament may also enable a Commission-Parliament coalition pushing for the formal Europeanisation of most decisions on arms export. Although the difference between the European Parliament's focus on a more stringent and responsible arms trade and the Commission's views on a more industry-oriented export control policy is substantial, cooperation between these two supranational EU institutions should not be ruled out in advance of any final decision on the way in which EU arms exports should be licensed.

COARM and the Common Position on arms exports: under pressure?

The original enthusiasm for the Europeanisation of arms export policies has gradually shifted to increased scepticism about the feasibility and desirability of a converged European arms export policy. This may not come as a surprise, because more than 20 years after the adoption of the 1998 Code of Conduct, little seems to have changed in national arms export practices.

In this paper we argue that member states and COARM need to take substantial steps towards the further convergence of such practices. If not, the 2008 Common Position, the common assessment criteria and the goals set out in them risk losing their political and practical relevance. Such a failure to deal with the issue of arms export policy at the COARM/member state level could cause the European Commission to take steps to bring the issue of arms exports under the supranational competence of the EU. A return to national-level policies or ad hoc agreements on arms exports in European armaments pro-

grammes may potentially result in the Commission, supported by the defence industry (and even possibly in coalition with the European Parliament), increasing the pressure to strengthen its competence vis-à-vis arms exports via the ECJ, resulting in a further supranationalisation of arms export controls.

Both possible processes – the return to the national level or the supranationalisation of arms export decisions – risk causing a hollowing out of the existing framework. COARM's role would be reduced to providing a place for member states to disseminate information on domestic arms export policies and practices and on denied export licences, which member states could then use in their national export assessment procedures. Although such practices could have an added value for national licensing officers, because they would strengthen the knowledge basis on which these officers would make licensing decisions, the ultimate goal of COARM and the Common Position – a common European application of the assessment criteria – will no longer be relevant. Moreover, this will probably result in an increase in bilateral or multilateral decision-making, with governments developing new and alternative principles and criteria to guide arms exports. In such circumstances, COARM would risk merely functioning as an electronic mailbox for sharing information on arms exports denied by national authorities and as a face-to-face meeting place where national views on arms exports would be expressed, instead of being an instrument for increased cooperation and for the development of measures to promote the European convergence of national arms export policies in line with the criteria and principles set out in the 2008 Common Position. It is worth noting in this regard that in the updated Common Position the European Council has added a sentence stating that member states will “identify possible measures to further increase convergence”.⁴⁹ This was reiterated in the most recent annual consolidated report of the Common Position.⁵⁰ Thus – in theory anyway – increased conver-

gence remains the goal and COARM is mandated to identify (and develop) initiatives to further stimulate the convergence of national arms export policies.

In addition, the Council conclusions explicitly task COARM with taking measures to stimulate transparency and information exchange, but also to explore ways to improve its own working methods.⁵¹ This constitutes an opportunity and mandate for COARM to reflect on its workings, to develop initiatives and procedures that go beyond the mere elaboration of national perspectives, and to effectively implement measures that could promote the convergence of member states' arms export policies. In order to make the most of this opportunity and mandate, national governments need to give their representatives in COARM the explicit mandate to take this task seriously. This, however, requires these governments to realise that the convergence of arms export policies would have advantages for all member states, because they can use it as leverage to strengthen their own respective national positions in the world. For the smaller member states, this is self-evident. But larger countries could also benefit from an Europeanised approach, because

“no single European state today can hope to influence world politics in any significant way. The EU is the only way in which Europe can be a great power and play a distinctive part in the world, respecting the values on which our society is based and promoting them in the rest of the world.”⁵²

However, repeated public displays of disunity among member states, both on general issues but also specifically on arms sales and exports to specific countries (e.g. Libya, Syria, Saudi Arabia and the UAE), affect the credibility of both the EU and its individual member states.

EU foreign and security policy is in a process of constant evolution, which can be both rapid and cumbersome.⁵³ Not only have there been some

institutional changes in the domain of foreign, security and defence policy (e.g. the creation of the posts of an EU president, and EU ‘foreign minister’ to externally represent the EU), but recent initiatives have also broadened and deepened member states’ cooperation in this domain. If the EU wants to promote the Common Position and its other initiatives as best practices, both in its own near neighbourhood and at the global level, a strong internal EU position is needed. A lack of acknowledgment of the existing shortcomings of these initiatives and a lack of willingness to effectively strengthen the framework within which they function will negatively affect the credibility of the EU’s external diplomatic position. As the Global Strategy eloquently puts it, “the EU’s credibility hinges on our unity, on our many achievements, our enduring power of attraction, the effectiveness and consistency of our policies, and adherence to our values”.⁵⁴

The clear contrast between the argument for a multilateral and law-based approach to the arms trade with a responsible and restrictive perspective, on the one hand, and a reality of conflicting views and practices among member states, on the other hand, is most clearly illustrated in the Yemen case, and risks doing exactly what the quotation above warns against: adversely affecting the credibility of the EU. In other words, how can the EU credibly demand that other countries use ‘ethical’ assessment criteria to evaluate arms exports without itself working towards a more unified European perspective on the issue

of arms export controls? Differing interpretations of the common criteria and different views on arms exports therefore not only negatively affect the position of member states, but also that of the entire EU. Inconsistencies in its member states’ arms export policies reduce the EU’s ability to effectively and positively influence the course of armed conflicts across the world. In this sense, convergence in arms export policies is a necessary condition for EU efforts to work towards a wider application of the overarching principles of conflict prevention and respect for human rights.

A further alignment of EU countries’ national arms export policies will not happen overnight, but is an incremental process. At the same time, however, there is a need to acknowledge that after three decades some initial steps have been taken, but much more is needed. The process of convergence is not inevitable, the idea of an ‘ever closer Union’ will not automatically become a reality, and real progress in this regard will only occur when specific actors or small groups of actors are willing and able to step up and take effective action. Several contextual evolutions – the increased political and public scrutiny of arms exports in various member states and recent CFSP initiatives – require a response from national governments. These evolutions are both opportunities for and threats to the goals of the EU’s work on arms export controls. Taking no substantial action and retaining the current status quo risk causing severe damage to the EU’s 30-year-long work on European arms exports.

Endnotes

- 1 Council of the European Union (1998), *EU Code of Conduct on arms exports*, Brussels: European Council; Bauer, S. & Remacle, E. (2004), Theory and practice of multi-level foreign policy: the European Union's policy in the field of arms export controls, In B. Tonra & T. Christiaensen (eds.), *Rethinking European Union foreign policy* (pp. 114-125), Manchester: Manchester University Press.
- 2 Council of the European Union, User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, *COARM 172, 10858/15*, Brussels, 20 July 2015, <http://data.consilium.europa.eu/doc/document/ST-10858-2015-INIT/en/pdf>
- 3 Common Military List of the European Union, adopted by the Council on 13 June 2000, Official Journal of the European Union, *Official Journal of the European Union, C191/1*, 8 July 2000.
- 4 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union, L335/99*, 13 December 2008.
- 5 Bromley, M. (2012), *The review of the EU Common Position on arms exports: prospects for strengthened controls*, Non-Proliferation Paper n°7, EU Non-Proliferation Consortium, 1-2.
- 6 European Council (2004), *Basic Principles on the Use of Restrictive Measures (Sanctions)*, PESC 450, Brussels, 7 June 2004.
- 7 <https://sanctionsmap.eu/#/main>
- 8 Council decision (CFSP) 2018/101 of 22 January 2018 on the promotion of effective arms exports controls, *Official Journal of the European Union, L17/40*, 23 January 2018.
- 9 https://eeas.europa.eu/headquarters/headquarters-home-page/8465/arms-export-control_en
- 10 Wezeman, P., Fleurant, A., Kuimova, A., Tian, N. & Wezeman, S. (2019), *Trends in international arms transfers, 2018*, SIPRI Fact sheet, March 2019, https://www.sipri.org/sites/default/files/2019-03/fs_1903_at_2018.pdf
- 11 Cops, D., Duquet, N. & Gourdin, G. (2017), *Towards Europeanised arms export controls? Comparing control systems in EU Member states*, Brussels: Flemish Peace Institute, p.23.
- 12 Bromley, M. & Brzoska, M. (2008), Towards a common, restrictive EU arms export policy? The EU Code of Conduct on major conventional arms exports, *European Foreign Affairs Review*, 13, (2), 333-356.
- 13 Bromley, M. & Brzoska, M. (2008), Towards a common, restrictive EU arms export policy? The EU Code of Conduct on major conventional arms exports, *European Foreign Affairs Review*, 13, (2), Hansen, S. & Marsh, N. (2015), Normative power and organized hypocrisy: European Union Member States' arms export to Libya, *European Security*, 24, 2, pp.264-286; Manners, I. (2002), Normative power Europe: a contradiction in terms?, *Journal of Common Market Studies*, 40, 2, pp.235-258; Perkins, R. & Neumayer, E. (2010), The organized hypocrisy of ethical foreign policy: human rights, democracy and Western arms sales, *Geoforum*, 41, 2, pp.247-256.
- 14 Cops, D., Duquet, N. & Gourdin, G. (2017), *Towards Europeanised arms export controls? Comparing control systems in EU Member states*, Brussels: Flemish Peace Institute, p. 189-190.
- 15 Bromley, M. (2012), *The review of the EU Common Position on arms exports: prospects for strengthened controls*, Non-Proliferation Paper n°7, EU Non-Proliferation Consortium, 13-16.
- 16 Duquet, N. (2014), *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, Brussels: Flemish Peace Institute.
- 17 Council conclusions on the review of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, PESC 1404, *Council of the European Union*, Brussels, 19 November 2012, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016373%202012%20INIT>
- 18 Council conclusions relating to the review of Common Position 2008/944/CFSP on arms exports and the implementation of the Arms Trade treaty (ATT), *COARM 174/CFSP/PESC 401, Council of the European Union*, Brussels, 20 July 2015, <http://data.consilium.europa.eu/doc/document/ST-10900-2015-INIT/en/pdf>
- 19 Duquet, N. (2014), *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, Brussels: Flemish Peace Institute.
- 20 Council conclusions relating to the review of Common Position 2008/944/CFSP on arms exports and the implementation of the Arms Trade treaty (ATT), *COARM 174/CFSP/PESC 401, Council of the European Union*, Brussels, 20 July 2015.
- 21 Cops, D. (2018), *Strengthening EU arms export controls through increased information exchange*, Policy brief 01/2018, Brussels: Flemish Peace Institute.
- 22 UN Panel of Experts (2016), *Final report of the Panel of Experts on Yemen established pursuant to Security Council resolution 2140 (2014)*, Security Council, S/2016/73, http://www.un.org/ga/search/view_doc.asp?symbol=S/2016/73; Maletta, G. (2019), *Legal challenges to EU member states' arms exports to Saudi Arabia: current status and potential implications*, SIPRI topical background, <https://www.sipri.org/commentary/topical-background/2019/legal-challenges-eu-member-states-arms-exports-saudi-arabia-current-status-and-potential>
- 23 Maletta, G. (2019), *Legal challenges to EU member states' arms exports to Saudi Arabia: current status and potential implications*, SIPRI topical background.
- 24 Council Decision amending Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, *Council of the European Union, 10707/19, COARM 107*, Brussels, 9 September 2019, <https://www.consilium.europa.eu/media/40658/st10707-en19.pdf>
- 25 Article 1 (5) Council Decision amending Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, *Council of the European Union, 10707/19*, Brussels, 9 September 2019.
- 26 Cops, D. & Buytaert, A. (2019), *Sustainable EU funding for European defence cooperation? Accountable and transparent coordination of arms export policies needed*, Brussels: Flemish Peace Institute.
- 27 Council of the European Union, *Council Conclusions on the adoption of an EU strategy against illicit firearms, small arms and light weapons and their ammunition*, Brussels, 19 November 2018, 13581/18.
- 28 European Union (2016), *Shared vision, common action: a stronger Europe. A global strategy for the European Union's foreign and security policy*, p. 20-21, http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf
- 29 European Commission (2017), *A European Defence Fund: €5,5 billion per year to boost Europe's defence capabilities*, press release, Brussels, 7 June 2017, https://europa.eu/rapid/press-release_IP-17-1508_en.htm
- 30 Mawdsley, J. (2018), The emergence of the European defence research programme, In N. Karampekios, I. Oikonomou & E. Carayannis (eds.), *The emergence of EU defence research policy. From innovation to militarization*, New York: Springer, 210-211.
- 31 Council of the European Union, *Proposal for a regulation of the European Parliament and of the Council establishing the European Defence Fund (First reading) - Partial general approach*, 14094/1/18, Brussels, 15 November 2018, p. 43.

- 32 Conclusion 11 of the Council Conclusions on the review of Council Common Position 2008/944/CFSP of 8 December 2008 on the control of arms exports, as adopted by the Council ("General affairs"), *Council of the European Union, 12195/19, COARM 154*, Brussels, 16 September 2019.
- 33 Council of the European Union, *Council Conclusions on the adoption of an EU strategy against illicit firearms, small arms and light weapons and their ammunition*, Brussels, 19 November 2018, 13581/18.
- 34 Duquet, N. (2019), *The 2018 EU SALW strategy: towards an integrated and comprehensive approach*, Non-proliferation and disarmament papers n° 62, European Non-Proliferation and Disarmament Consortium, April 2019.
- 35 See for example Conflict Armament Research (2017), *Weapons of the Islamic State*, London: Conflict Armament Research, https://www.conflictarm.com/download-file/?report_id=2568&file_id=2574
- 36 Duquet, N. (2019), *The 2018 EU SALW strategy: towards an integrated and comprehensive approach*, Non-proliferation and disarmament papers n° 62, European Non-Proliferation and Disarmament Consortium, April 2019, p. 16.
- 37 Maletta, G. (2019), *Legal challenges to EU member states' arms exports to Saudi Arabia: current status and potential implications*, <https://www.sipri.org/commentary/topical-backgrounder/2019/legal-challenges-eu-member-states-arms-exports-saudi-arabia-current-status-and-potential>
- 38 Cops, D., Duquet, N. & Gourdin, G. (2017), *Towards Europeanised arms export controls? Comparing control systems in EU Member states*, Brussels: Flemish Peace Institute, p. 165.
- 39 *Treaty between the Federal Republic of Germany and the French Republic on Franco-German Cooperation and Integration*, Aachen, 22 January 2019, p. 6.
- 40 Trybus, M. (2014), *Buying defence and security in Europe. The EU defence and security procurement directive in context*, Cambridge: Cambridge University Press, p. 113.
- 41 Trybus, M. & Butler, L. (2017), The internal market and national security: transposition, impact and reform of the EU Directive on Intra-Community Transfers of Defence Products' *Common Market Law Review*, 54, 2, pp. 410.
- 42 Article 346 of the Treaty on the functioning of the European Union, Consolidated version, *Official Journal of the European Union, C202*, 7 June 2016, p. 194.
- 43 Randazzo, V. (2014), *Article 346 and the qualified application of EU law to defence*, Issue Brief 22/2014, European Union Institute for Security Studies.
- 44 Article 207 1° of the Treaty on the functioning of the European Union, *Official Journal of the European Union, C115/47*, 9 May 2008, p. 140.
- 45 Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs.
- 46 https://ec.europa.eu/commission/sites/beta-political/files/allocation-portfolios-supporting-services_en_0.pdf
- 47 Resolution of 25 February 2016 adopted by the European Parliament on the humanitarian situation in Yemen (2016/2515(RSP), *European Parliament, 2014-2019*; Resolution of 25 October 2018 adopted by the European Parliament on the killing of journalist Jamal Khashoggi in the Saudi consulate in Istanbul, 2018/2885(RSP), *European Parliament, 2014-2019*
- 48 Resolution of 14 November 2018 adopted by the European Parliament on arms exports: implementation of Common Position 2008/944/CFSP, *European Parliament, 2014-2019*, http://www.europarl.europa.eu/doceo/document/TA-8-2018-0451_EN.pdf
- 49 Article 1 (4) Council Decision amending Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, *Council of the European Union, 10707/19*, Brussels, 9 September 2019
- 50 Council of the European Union, Twenty-First Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, *COARM 206/CFSP/PESC 893*, Brussels, 21 November 2019, <https://data.consilium.europa.eu/doc/document/ST-14431-2019-INIT/en/pdf>
- 51 Conclusion 9 of the Council Conclusions on the review of Council Common Position 2008/944/CFSP of 8 December 2008 on the control of arms exports, as adopted by the Council ("General affairs"), *Council of the European Union, 12195/19, COARM 154*, Brussels, 16 September 2019.
- 52 Biscop, S. (2019), *European strategy in the 21st century. New future for old power*. London: Routledge, p. 3.
- 53 Tonra, B. & Christiansen, T. (2004), The study of EU foreign policy: between international relations and European studies, In B. Tonra & T. Christiaensen (eds.), *Rethinking European Union foreign policy* (pp. 1-9), Manchester: Manchester University Press, p. 9.
- 54 European External Action Service (2016), *Shared Vision, Common Action: A Stronger Europe. A global strategy for the European Union's foreign and security policy*, p. 44.

Flemish Peace Institute

The Flemish Peace Institute was founded by decree of the Flemish Parliament as an independent institute for research on peace issues. The Peace Institute conducts scientific research, documents relevant information sources, and informs and advises the Flemish Parliament and the public at large on questions of peace

Authors

Diederik Cops is senior researcher in the arms trade and arms use research cluster at the Flemish Peace Institute and has published on European arms export controls. Nils Duquet is senior researcher in the arms trade and arms use research cluster at the Flemish Peace Institute and has published extensively on arms export controls and illicit arms trafficking.

email: diederik.cops@vlaamsparlament.be