

IV. Developments in the European Union's dual-use and arms trade controls

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The European Union (EU) is currently the only regional organization with a common legal framework for controls on the export, brokering, transit and trans-shipment of dual-use items and, to a certain extent, also military items. The key elements of this legal framework are EU arms embargoes, the EU Dual-use Regulation, the EU Common Position on Arms Exports (EU Common Position), the Intra-Community Transfers Directive and the Anti-Torture Regulation.¹ Developments in EU arms embargoes are addressed in section II of this chapter. This section focuses on developments with regard to the EU Dual-use Regulation and the EU Common Position, which were both the subject of review processes in 2019. The EU member states and the European External Action Service (EEAS) completed the process of reviewing the EU Common Position in September 2019. However, the review of the EU Dual-use Regulation was ongoing at the end of 2019.

Review of the Dual-use Regulation

The EU Dual-use Regulation covers controls on the export, transit, trans-shipment and brokering of dual-use goods, software and technology. The regulation is directly applicable law in EU member states but is implemented and enforced via their national control systems. As mandated in Article 25 of the Dual-use Regulation, the instrument has been under review since 2011. As part of this process, the European Commission published a 'recast' proposal in the form of a draft of a new version of the regulation in September 2016.² The European Parliament published its proposed amendments to the Commission proposal in January 2018 and the Council of the EU

¹ Council Regulation 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, *Official Journal of the European Union*, L134, 29 May 2009; Council Common Position 2008/944/CFSP of 8 Dec. 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L335, 8 Dec. 2008; Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community, *Official Journal of the European Union*, L146, 10 June 2009; and Regulation (EU) 2016/2134 of the European Parliament and of the Council of 23 Nov. 2016 amending Council Regulation (EC) 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, *Official Journal of the European Union*, L338, 13 Dec. 2016.

² European Commission, 'Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast)', COM(2016) 616 final, 28 Sep. 2016. See also Bauer, S. and Bromley, M., 'Developments in EU dual-use and arms trade controls', *SIPRI Yearbook 2017*, pp. 612–15.

published its own negotiating mandate in June 2019.³ Unlike the Parliament's amendments—which largely endorsed or expanded on the Commission's proposal—the Council's mandate pushes back on many parts of the Commission's text and seeks to keep large sections of the existing regulation intact.⁴

One key area where the Council's mandate differs from the positions taken by the Commission and the Parliament regards the creation of an 'autonomous' EU control list for items not covered by the lists of the multilateral export control regimes (see section III of this chapter). The creation of an autonomous list was proposed by the Commission and endorsed by the Parliament, primarily as a means of creating EU controls on exports of cyber-surveillance technologies that were not controlled by the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-use Goods and Technologies. The Commission has since indicated that the autonomous list could also be a mechanism through which the EU could keep pace with efforts by the United States to create new controls on exports of so-called 'emerging technologies'.⁵ During the negotiations that led to the adoption of their negotiating mandate, EU member states appear to have been divided over whether to endorse the creation of an autonomous EU list. In January 2018 a group of 11 EU member states issued a working paper that gave qualified support for the proposal.⁶ However, in May 2018 a group of nine other EU member states issued a second working paper that rejected it, arguing that it would place EU-based companies at a disadvantage and limit the value of the existing EU dual-use list as a composite of those drawn up in the regimes.⁷ The Council's negotiating mandate omits all references to the creation of an autonomous list.

³ European Parliament, 'Amendments adopted by the European Parliament on 17 Jan. 2018 on the proposal for a regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast) (COM(2016)0616—C8-0393/2016—2016/0295(COD))', 17 Jan. 2018; and Council of the European Union, 'Proposal for a for a regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast)—Mandate for negotiations with the European Parliament (2016/0295(COD))', 5 June 2019.

⁴ For a more detailed overview of the European Commission's proposal and the European Parliament's amendments, see Bromley, M. and Maletta G., 'Developments in the European Union's dual-use and arms trade controls', *SIPRI Yearbook 2019*, pp. 532–37.

⁵ See European Commission, *Progress Report on the Implementation of the EU–US Joint Statement of 25 July 2018*, 25 July 2019, pp. 25–26. For more information on the US steps towards adopting expanded national controls on emerging technology, see Bromley, M. and Brockmann, K., 'Controlling technology transfers and foreign direct investment: The limits of export controls', *SIPRI Yearbook 2019*, pp. 538–45.

⁶ Council of the European Union, General Secretariat, 'EU export control: Recast of the Regulation 428/2009', Working paper WK 1019/2018 INIT, 29 Jan. 2018.

⁷ Council of the European Union, 'Paper for discussion: For adoption of an improved EU Export Control Regulation 428/2009 and for cyber-surveillance controls promoting human rights and international humanitarian law', Working paper WK5755/2018 INIT, 15 May 2018.

Other areas where the Commission, Parliament and Council positions differ include the creation of new EU General Export Authorisations (EUGEAs) to facilitate ‘low risk’ exports; the insertion of language on human rights and international humanitarian law (IHL) into the text of the Dual-use Regulation; making changes to the definition of brokering; reducing controls on items that employ cryptography; and creating greater harmonization in the penalties states impose for export control violations. In all areas the Council’s negotiating mandate rejects the changes that were put forward in the Commission’s proposal and which were either endorsed or expanded on in the Parliament’s amendments.⁸

In accordance with EU legislative procedures for adopting a final version, during the second half of 2019 the Commission’s proposal began to go through a process of ‘trilogue’ involving the Commission, the Parliament and the Council (represented by Finland, which held the Council presidency until the end of 2019). The parties to the trilogue were unable to reach a final agreement.⁹ The process will therefore continue during 2020 with Croatia, which holds the Council presidency from the start of 2020, replacing Finland in representing the Council.

At the time of writing it is unclear if the trilogue process will result in a new version of the regulation to which all parties agree. As it stands, the differences between the positions adopted by the Commission, the Parliament and the Council are substantial. Indeed, they point to divergent views about the overall purpose of the Dual-use Regulation and the extent to which the EU can and should go beyond the norms established multilaterally when determining content and focus of EU export controls. Nonetheless, the failure to conclude the review process did not prevent the taking of other steps to promote a more harmonized implementation of the existing regulation. For example, in July 2019 the EU published a set of non-binding guidelines aimed at companies, providing information on how to set up and implement internal compliance programmes to help them meet the requirements of the Dual-use Regulation.¹⁰ The Commission and EU member states also continued work on the development of an additional set of compliance guidelines aimed at the research sector.¹¹

⁸ For a summary, see Akin Gump, ‘EU trade update: Council issues negotiating mandate for recast Dual Use Regulation’, Press release, 11 June 2019; and Bromley, M. and Gerharz, P., ‘Revising the EU Dual-use Regulation: Challenges and opportunities for the trilogue process’, SIPRI Topical background, 7 Oct. 2019.

⁹ Chardon, S., ‘EU export controls: 2019 update’, Paper presented at the Export Control Forum 2019, 13 Dec. 2019, p. 4.

¹⁰ Commission Recommendation (EU) 2019/1318 of 30 July 2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) No 428/2009, *Official Journal of the European Union*, L205, 5 Aug. 2019.

¹¹ Chardon (note 9), p. 8s.

Box 14.1. The eight criteria of the European Union Common Position on arms exports

1. Respect for the international obligations and commitments of member states, in particular the sanctions adopted by the United Nations Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations.
2. Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law.
3. Internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts.
4. Preservation of regional peace, security and stability.
5. National security of member states and of territories whose external relations are the responsibility of a member state as well as that of friendly and allied countries.
6. Behaviour of the buyer country with regard to the international community, in particular its attitude to terrorism, the nature of its alliances and its respect for international law.
7. Existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions.
8. Compatibility of the exports of the military technology or equipment with the technical and economic capacity of the recipient country, taking into account the desirability that states should meet their legitimate security and defence needs with the least diversion of human and economic resources for armaments.

Source: Council Common Position 2008/944/CFSP of 8 Dec. 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L335, 8 Dec. 2008.

Review of the EU Common Position on Arms Exports

At the beginning of 2018, as mandated by the Council of the EU in 2015, the EEAS and the EU member states initiated a process of review of the EU Common Position with the goal of assessing its implementation and ‘the fulfilment of its objectives’.¹² After almost two years, this process was completed in September 2019 with the adoption of a new Council Decision amending the text of the EU Common Position.¹³ The User’s Guide to the EU Common Position, which provides guidance on how this instrument should be applied, was also subject to some modifications.¹⁴ In contrast, the previous and first review of the EU Common Position between 2011 and 2015 left the

¹² Council of the European Union, ‘Council conclusions relating to the review of Common Position 2008/944/CFSP on arms exports and the implementation of the Arms Trade treaty (ATT)’, 20 July 2015.

¹³ Council of the European Union, ‘Control of arms export: Council adopts conclusions, new decision updating the EU’s common rules and a revised user’s guide’, Press release, 16 Sep. 2019.

¹⁴ Council of the European Union, ‘User’s Guide to Council Common Position 2008/944/CFSP (as amended by Council decision (CFSP) 2019/1560) defining common rules governing the control of exports of military technology and equipment’, 12189/19, 16 Sep. 2019.

language of the main document unchanged and focused amendments only on the User's Guide.¹⁵

The changes implemented in the text of the EU Common Position were mostly limited to some formal adjustments. The language of the eight criteria that states are obliged to consider when assessing arms exports (box 14.1) remains substantially untouched. The only substantive change made was in criterion one, which covers states' international obligations, to expand the list of relevant international instruments.¹⁶ A change to the Preamble was the addition of references to the 2013 Arms Trade Treaty (ATT), the United Nations 2030 Agenda for Sustainable Development and the 2018 EU strategy against illicit firearms, small arms and light weapons (SALW).¹⁷ No further adjustments have been made to the text of the criteria, despite calls from non-governmental organizations (NGOs) to better align certain sections with the language of the ATT.¹⁸

By contrast, changes to the User's Guide have aligned the EU Common Position and the ATT, by expanding existing references to states' obligation to assess the risk of exported weapons being used to commit acts of gender-based violence (GBV) and providing guidance on how to conduct this process as part of implementing criterion 2; and by including further guidance on implementing criterion 7.¹⁹

Other amendments to the text of the EU Common Position affected operational provisions such as reporting obligations. To limit delays in the publication of the EU Annual Report on arms exports—often noted as one of the flaws in the implementation of the EU Common Position—the deadline for member states to submit information feeding into the report is now 30 June of each year.²⁰ In addition, following the recommendations often

¹⁵ On the outcome of the first review process of the EU Common Position, see Bauer, S. and Bromley, M., 'European Union export control developments', section IV in 'Dual-use and arms trade controls', *SIPRI Yearbook 2016*, pp. 768–69.

¹⁶ The EU Common Position now explicitly references the Arms Trade Treaty (ATT), the Convention on Certain Conventional Weapons (CCW) and their relevant Protocols, the Ottawa Convention and the UN Programme of Action on Small Arms and Light Weapons (UNPOA) as international instruments whose obligations must be taken into account by member states while assessing arms export authorizations. See Council of the European Union, 'Council Decision (CFSP) 2019/1560 of 16 Sep. 2019 amending Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment', L239, 17 Sep. 2019.

¹⁷ For a summary and other details of the Arms Trade Treaty see annex A, section I, in this volume. For the 2030 Agenda for Sustainable Development, see United Nations, *Transforming our World: The 2020 Agenda for Sustainable Development*, A/Res/70/1. For the EU SALW strategy, see Council of the European Union, 'Council conclusions on the adoption of an EU strategy against illicit firearms, small arms & light weapons and their ammunition', 1351/18, 19 Nov. 2018, annex.

¹⁸ Saferworld, 'Notes from civil society—COARM workshop on the review of Common Position 2008/944/CFSP', Nov. 2018.

¹⁹ Council of the European Union, L2189/19 (note 14).

²⁰ Council of the European Union, L239 (note 16); Bauer, S., et al., *The Further Development of the Common Position 944/2008/CFSP on Arms Exports Control* (European Parliament, Directorate-General for External Policies, Policy Department: Brussels, July 2018), p. 24.

formulated by think tanks, NGOs and EU parliamentarians to improve the user-friendliness of the EU Annual Report, it was decided that the Report will also become a ‘searchable online database’ to make the presentation of the data more accessible and, thus, transparent.²¹ The User’s Guide now also contains additional information on how to comply with reporting obligations, such as clarifications on the terms ‘export’, ‘export licence’ and ‘actual exports’ under these provisions.²² Additionally, the review of the EU Common Position will now occur every five years instead of three. Other amendments included more elaborated instructions on the role and use of the Council Working Party on Conventional Arms Exports (COARM) online system.²³ Finally, the Council conclusions on the review process also called on COARM to ‘consider a decision on end-user certificates’ for the export of SALW and their ammunitions, an issue that was also mentioned in the 2018 EU SALW strategy.²⁴

Amendments to Article 7 of the EU Common Position call on member states to identify ‘possible measures to further increase convergence’.²⁵ However, among EU member states there seems to be significant resistance to taking concrete steps towards promoting substantive convergence, as well as significant differences over the implementation of the EU Common Position. During this review process, these differences have been particularly evident in the different approaches that EU governments have taken in relation to arms exports to members of the coalition led by Saudi Arabia militarily engaged in Yemen since 2015.²⁶

Divergences in European Union arms exports policies towards Saudi Arabia

Concerns that members of the Saudi-led coalition might have violated IHL in the conduct of their war operations in Yemen—as alleged in reports produced by UN bodies and international NGOs—have sparked national debates throughout the EU about whether arms exports to these states are in line with the criteria of the EU Common Position and the obligations set

²¹ Council of the European Union, L239 (note 16), p. 3; Bauer et al. (note 20), p. 24; Saferworld (note 18); and European Parliament, ‘Report on arms exports: Implementation of Common Position 2008/944/CFSP (2018/2157(INI))’, A8-0335/2018, 16 Oct. 2018, para. 7(e).

²² Council of the European Union, 12189/19 (note 14).

²³ The Council Working Party on Conventional Arms Exports (COARM) handles work concerning export controls for conventional arms. COARM also deals with engagement in outreach activities, establishment of political dialogue with non-EU countries and participation in the UN process concerning the ATT.

²⁴ Council of the European Union, ‘Council conclusions on the review of Council Common Position 2008/944/CFSP of 8 Dec. 2008 on the control of arms exports’, 12195/19, 16 Sep. 2019, para. 13. See also Council of the European Union, 1351/18 (note 17), annex, pp. 12, 15.

²⁵ Council of the European Union, 12195/19 (note 24), annex, para. 1.

²⁶ On the armed conflict in Yemen, see chapter 6, section V, in this volume.

out in the ATT.²⁷ Partly as a result, some EU member states—including the Netherlands, Germany and Sweden, among others—have decided to halt or suspend some of their arms exports to some members of the Arab coalition and, in particular, Saudi Arabia.²⁸ The murder in October 2018 of the Saudi journalist Jamal Khashoggi in the Saudi Arabian consulate in Istanbul has also influenced the decision of some of these EU member states to adopt more restrictive arms export policies towards Saudi Arabia.²⁹ In contrast, other member states—such as the United Kingdom, France and, until July 2019, Italy—have resisted public pressure and continued with their supplies. In response, civil society organizations and NGOs in these countries have sought to challenge the legality of their arms export decisions in court, with varying levels of success.³⁰

In the UK, the Court of Appeal recognized in June 2019 that the process adopted by the British Government to assess the presence of a clear risk of IHL being violated by Saudi Arabia was ‘wrong in law’.³¹ In response, the British Government announced that it would appeal the ruling, but in the meantime would suspend the issuing of new export licences for transfer of arms to Saudi Arabia and ‘other coalition partners’ that might be used in the conflict in Yemen.³² In Italy, a criminal complaint against both the Italian export licensing authority (Unita’ per le autorizzazioni dei materiali d’armamento, UAMA) and the arms manufacturer RWM Italia was dismissed in October 2019 by the public prosecutor.³³ The claimants originally called for the prosecutor to investigate the criminal liability of UAMA and RWM for the export of aircraft bombs allegedly used in a Saudi-led coalition airstrike against civilians in October 2016. The claimants also alleged the

²⁷ In addition to Saudi Arabia, the states are Bahrain, Egypt, Jordan, Kuwait, Senegal, Sudan and the United Arab Emirates; Qatar participated until June 2017 and Morocco until Feb. 2019. For examples of the debates, see United Nations, Security Council, ‘Final report of the Panel of Experts in accordance with paragraph 6 of Resolution 2402 (2018)’, S/2019/83, 25 Jan. 2019, pp. 47–51; Human Rights Watch (HRW), ‘Yemen’, *World Report 2019: Events of 2018* (HRW: New York, 2019), p. 663; and Amnesty International, ‘Yemen’, *Human Rights in the Middle East and North Africa: Review of 2018* (Amnesty International: London, 26 Feb. 2019), p. 70.

²⁸ Bromley and Maletta, ‘Developments in the European Union’s dual-use and arms trade controls’ (note 4), pp. 535–37; Bromley, M. and Maletta, G., ‘The conflict in Yemen and [the] EU’s arms export controls: Highlighting the flaws in the current regime’, SIPRI Essay, 16 Mar. 2018.

²⁹ Bromley, M. and Maletta, G., ‘Developments in the European Union’s dual-use and arms trade controls’ (note 4), pp. 535–37.

³⁰ Maletta, G., ‘Legal challenges to EU member states’ arms exports to Saudi Arabia: Current status and potential implications’, SIPRI Topical backgrounder, 28 June 2019.

³¹ British Courts and Tribunals Judiciary, Press summary of *The Queen (on the application of Campaign Against Arms Trade) v The Secretary of State for International Trade* [2019] EWCA Civ 1020, 20 June 2019, p. 1. For all documents concerning the case, see Campaign Against Arms Trade (CAAT), ‘Saudi Arabia—Legal challenge’, Updated 20 Sep. 2019.

³² Fox, L. (British Secretary of State for International Trade, Department for International Trade), Letter to Graham Jones MP, Chair of the Committees on Arms Export Controls House of Commons, 24 June 2019.

³³ European Center for Constitutional and Human Rights (ECCHR), ‘European responsibility for war crimes in Yemen’, [n.d.].

Italian Government failed to comply with both national and international law regulating arms exports. The Italian Government had already announced in the summer of 2019 its intention to suspend all exports of aircraft bombs and their components to Saudi Arabia and the United Arab Emirates but it is unclear if the legal challenge influenced this decision. In France, the administrative court in Paris rejected a claim in July 2019 that French arms exports to Saudi Arabia should be suspended in view of their incompatibility with France's obligation as a state party to the ATT, a decision which was confirmed by the administrative court of appeal in September 2019.³⁴ In November 2019 the NGOs involved announced their intention to bring their case to the French Council of State.³⁵

Conversely, in at least one case, defence companies have challenged the decisions of their governments to restrict exports towards Saudi Arabia. In December 2019, in Germany, the Frankfurt Administrative Court annulled a defacto ban on the export by a subsidiary of the Rheinmetall group of military trucks to Saudi Arabia. The court argued that the decision of the German Government to suspend previously granted export licences was formally flawed as it did not meet the necessary legal requirements to suspend the validity of the licences. The court went further and stated that foreign and security policy interests did not exempt the government from upholding these requirements in the notices they issue. However, the judgment is not legally binding yet and the German Government can appeal the decision.³⁶

The divisions between EU member states over the export of arms to the Saudi-led coalition, according to some commentators, possibly affects not only the ability of the EU to speak with a common voice on issues related to international and regional security, but also the credibility and relevance of the EU Common Position itself.³⁷ In addition, these divergent positions are also likely to impact the ongoing efforts to strengthen European defence cooperation through the establishment of a European Defence Fund (EDF). The EDF is meant to achieve this goal by supporting cooperative military research and development projects, and, therefore, joint production of

³⁴ Paris Administrative Court, Judgement no. 1807203 of 8 July 2019; Action Sécurité Ethique Républicaines (ASER), 'Le tribunal administratif de Paris se déclare compétent pour juger de la légalité des ventes d'armes de la France dans la guerre au Yémen mais valide celles-ci' [The Paris Administrative Court declares itself competent to judge the legality of arms sales from France in the war in Yemen but validates them], 9 July 2019; and Paris Administrative Court of Appeal, Ordinance no. 19 PA02929 of 26 Sep. 2019.

³⁵ 'Yémen: Des ONG tentent un nouveau recours contre les ventes d'armes françaises' [Yemen: NGOs attempt a new claim against the French arms sales], Reuters, 19 Nov. 2019.

³⁶ Hessen Administrative Court, 'Verwaltungsgericht hebt faktisches Ausfuhrverbot wegen formeller Fehler auf' [Administrative court abolishes defacto export ban due to formal errors], Press release, 3 Dec. 2019.

³⁷ Cops, D. and Duquet, N., 'Reviewing the EU Common Position on arms exports: Whither EU arms transfer controls?', Flemish Peace Institute (FPI) report (FPI: Brussels, 3 Dec. 2019); Bromley and Maletta, 'The conflict in Yemen and [the] EU's arms export controls: Highlighting the flaws in the current regime' (note 28).

weapon systems. However, considering the reliance of the European defence industry on exports, the divergence in the application of export control criteria could potentially represent a challenge to the long-term sustainability of this project.³⁸

Conclusions

The review processes connected to the EU Dual-use Regulation and the EU Common Position were conducted through different legal frameworks and involved different institutional actors. Nonetheless, developments during 2019 point to certain common patterns that may have certain wider implications for the EU's export control system. In both cases, EU member states appeared to resist implementing major amendments to the texts of the instruments and took diverging positions from the EU institutions—and, to some extent, civil society organizations—on the goals the instruments should seek to achieve. The differences between the positions adopted by the European Commission, the European Parliament and the Council of the EU in the review of the Dual-use Regulation were such that this process was not concluded by the end of 2019. At the same time, EU member states themselves diverged in their implementation of these instruments—as their arms export policies towards Saudi Arabia showed—and in their views on what their scope should be, as reflected in the lengthy process of elaborating the Council's negotiating mandate for the Commission's proposed recast of the regulation. These differences raise questions over the long-term relevance of these instruments and their ability to respond to emerging security challenges.

³⁸ Cops, D. and Buytaert, A., 'Sustainable EU funding of European defence cooperation? Accountable and transparent coordination of arms export policies needed', FPI report (FPI: Brussels, 3 Dec. 2019).

