

# EU Common Position review: Policy briefings

Saferworld has developed the following policy briefings as a contribution to the current review of the [European Union \(EU\) Common Position 2008/944/CFSP](#) as amended by Council Decision (CFSP) 2019/1560.

## Export control of jointly funded and produced products to non-EU countries

This briefing offers recommendations on how European Union (EU) member states should manage the onward export of commonly funded and produced military equipment. The decision to select 'onward export of jointly produced items' as the subject for one of only three Common Position review Focus Groups is unsurprising in light of the increase in joint production that has already occurred and the drive to develop this trend further, including in the context of Ukraine.

However, that this focus is considered necessary speaks powerfully to the fact that, 15 years since the Common Position was first agreed (and ten more since the EU Code of Conduct was adopted), the ongoing level of divergence of arms export policies and practices across the EU remains significant, especially in problematic or highly fluid contexts. Indeed, with respect to exports to Saudi Arabia in the context of the war in Yemen, this divergence has been extreme, while the current Israel/Gaza crisis has the potential to expose further rifts. Moreover, it is of concern that the fundamental purpose of the Focus Group appears to be to *facilitate* onward export, not to advance the application of the highest possible standards of export control across the EU.

We understand the Focus Group has made a number of proposals designed to facilitate or streamline onward export authorisation for jointly produced military equipment, including:

- treating the EU member state of final assembly as the end-use destination for contributing exports by 'intermediate' member states, who would therefore have no say about subsequent exports
- participating/intermediate states using global/general licences for transfers to the member state of final assembly, which would again leave it to the final assembly state to make all subsequent export decisions
- establishing rules for a participating state to object to specific onward exports on specific grounds, although these would be more limited than the Common Position criteria, for example only on the basis of national security concerns
- developing a shared decision-making process among participating member states, with the view of a member state with a larger stake (however defined) carrying more weight, and possibly involving a *de minimus* principle (of, for example, 20 per cent by value), below which an intermediate state would have no say regarding onward export

Saferworld could see the value, if member states were arriving at the same export decisions, of streamlining decision-making about onward exports to avoid the *process* issue of possible delays caused by multiple jurisdictions applying duplicative procedures to come to the same decision. However, applying the same streamlining mechanisms where different member states disagree on which exports are appropriate, and which are not, is fundamentally problematic.

Where there is a divergence of decision-making, the inevitable logic of prioritising the decisions of the state of final assembly over those of intermediate states would be to push the EU towards a position of 'lowest common

denominator' and thereby lower standards. The greater the divergence and the lesser say granted to the intermediate states, the more pronounced this trend would be.

Under current rules, each participating state has the option to refuse permission for an onward export. That is, where the authority in the country of final assembly approves an export but where there is a difference in application of the criteria by a participating state, the system now provides for the participating state to place a hold on that export. This also provides for member states to 'operate more restrictive national policies', an explicit right set out in Common Position Article 3.

All the 'streamlining' proposals, however, make it more likely that a contentious onward export will be approved, as objections to export will be more easily overridden. **The streamlining proposals do not create a circumstance where an otherwise-approved export would be refused; the only change will be where exports that would otherwise have been denied are allowed.** These proposals could even, in some cases, over time, lead companies to decide to locate final assembly in member states understood to operate a more permissive licensing regime.

Developing a shared decision-making process, if well-managed and consensus-based, could conceivably promote convergence without compromising rigour. This would also be consistent with Common Position Article 9, which reads 'member States shall, as appropriate, assess jointly through the CFSP [Common Foreign and Security Policy] framework the situation of potential or actual recipients of exports of military technology and equipment from member states'. But even here there is the obvious danger that in practice the interests of larger member states or the country of final assembly will hold disproportionate sway.

Beyond this overarching concern, there are elements in these proposals that suggest several problematic attitudes towards some of the fundamental principles of the EU's export control system. For example, the proposals that for intermediate states:

- the EU member state of final assembly could be considered the end-use destination, rather than the actual country of subsequent end-use (including even when known in advance)

- the grounds for licence refusals would be reduced from the Common Position criteria to national security concerns

Member states should not be willing to sacrifice these basic tenets of EU export control in the interests of making it easier for one member state to override the legitimate concerns of others.

In summary, until the divergence of arms export decision-making across EU member states is significantly reduced from its current levels, the Common Position should not be amended to reduce the current prerogatives of intermediate countries involved in jointly funded or produced military items with respect to onward export. However, the perceived need to do more in this area should be seen and used by EU member states as a spur to develop more convergent application of the different criteria, which would be a much better way of dealing with the current issue.

Until we reach that point, if member states are determined to proceed along the lines currently being considered, we recommend considering at least the following safeguards:

- All member states involved in production are part of a joint and equal decision-making process about prospective onward exports, applying all of the Common Position criteria in all cases.
- In the event that member states choose to apply *de minimis* rules:
  - prospective non-EU buyers of jointly produced items should be separated into 'uncontroversial' and 'potentially controversial' lists, with those lists being developed and periodically updated by all EU member states participating in that production
  - the *de minimis* rules should be set at different levels for the different buyer/end-user lists, and at no more than five per cent for those on the 'potentially controversial' list, with this rule to be waived for producers/suppliers of critical components

## Possible changes to the EU Common Position criteria

This briefing offers recommendations for how EU member states could develop Common Position Article 2 (criteria). The previous Common Position review did make some minor changes to the criteria in light of member states becoming States Parties to the Arms Trade Treaty (ATT); however, several clear and ultimately inexplicable gaps between Article 7 ('Export and Export Assessment') of the ATT and the criteria of the EU Common Position remain. Since all EU member states are States Parties to the ATT and therefore bound by its provisions, addressing these gaps in the Common Position would represent an obvious and straightforward way of aligning member states' different arms export control obligations. We therefore recommend member states address the following:

### Human rights

ATT Article 7(1) obliges States Parties to assess the potential that the relevant items to be exported could be used to commit or facilitate a serious violation of international humanitarian law (IHL) or of international human rights law (IHRL). Common Position criterion 2 effectively mirrors the ATT language on IHL; however, the issue of [IHRL is only addressed indirectly](#), through a reference to assessing 'the recipient country's attitude towards relevant principles established by international human rights instruments'. This is followed by a reference to specific cases where the United Nations has established that there are serious violations of human rights, and an explanatory paragraph on the range of actions that would constitute 'internal repression', a term that does not appear in the ATT.

Member states should address this shortcoming by adopting similar 'mirror' language from the ATT on IHRL as it has done for IHL.

### Facilitation

[ATT Article 7\(1\)](#) obliges States Parties to assess the risk that a transfer of conventional arms or items could be used to 'commit or facilitate [our emphasis]' serious violations of IHL or IHRL. The term 'facilitate' is, however, absent from the Common Position, which refers only to equipment being 'used'. As its addition is significant, creating an additional obligation beyond direct use, **the term 'facilitate' should be included in the criteria to mirror its use in ATT Article 7.**

By contrast, the EU User's Guide makes multiple references to facilitation, in the context of both the ATT and the guidance on interpreting certain Common Position criteria, without defining what is meant by facilitation in this context. Discussions with member states indicate there is no common understanding of the term. Therefore, **an elaborated definition should be included in the User's Guide.**

### Gender-based violence

The EU Common Position makes no mention of gender-based violence (GBV). [ATT Article 7\(4\)](#), however, explicitly obliges States Parties to consider the risk of arms exports 'being used to commit or facilitate serious acts of [GBV] or serious acts of violence against women and children'. The User's Guide makes it clear that 'the issue of [GBV] against women and children should be taken into account when examining Criterion 2', as part of the broader respect for IHL and IHRL.

Officials from EU member states have confirmed that they do consider GBV in their licensing processes, but approaches differ significantly in practice due to the absence of a clear definition and guidance on conducting GBV assessments under the Common Position. **Member states should include explicit reference to assessing the risk of GBV in Common Position criterion 2.**

### Implications for the EU Common Position

Addressing these three key gaps between the Common Position and the ATT – namely, facilitation, IHRL and GBV – would be simple. Saferworld recommends the following language be incorporated into criterion 2:

*Member States shall: ... (a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in or to facilitate the commission of serious violations of international humanitarian law or international human rights law, including serious acts of gender-based violence.*

### Additional criteria

The review of the Common Position also provides an opportunity for member states to think critically about the scope of the criteria and whether any

gaps exist that should be addressed. In recent years there have been growing discussions on potential issues that could usefully be captured under new criteria. These include:

- **Corruption.** The link between corruption and the arms trade is well documented, both through analyses of large-scale corruption cases<sup>1</sup> and in academic and research circles. Corruption equally involves the buyer and the seller; however, its impacts are felt most sharply in fragile and conflict-affected contexts, where it: undermines democracy, social cohesion, state budgets and trust in public institutions; bolsters violent and organised crime groups; and hinders the ability of state defence and security institutions to respond to conflict and crisis. Establishing a specific, risk-based criterion on corruption would create an invaluable preventative mechanism to ensure that arms exports do not exacerbate or fuel corruption and its pernicious effects. This would be more effective than relying on existing legislation, which tends to deal with corruption after the fact and requires proof 'beyond reasonable doubt'. **Member states should consider a new criterion that would require licences to be denied where there is a clear risk that the transfer might involve serious levels of corrupt practices.**
- **Governance.** Authoritarian or repressive regimes can survive for significant periods, potentially using the *threat* or *possibility* of force rather than actual violence as an effective means of inhibiting dissent and maintaining power. The risk of an eventual breakdown of those structures may however be very real, even if apparently distant, with potentially catastrophic consequences. Libya under Muammar Gaddafi stands as a prime example. In practice, this situation might sometimes be caught under criterion 2, 3 or possibly 4, but these regimes may continue to receive arms from EU member states on the grounds that they do not raise enough of a red flag under the existing criteria to provoke licence denials, given that member states typically focus on (expectation of) specific instances of misuse. In these

circumstances a governance criterion may prove a valuable addition, as these 'brittle' regimes will often reveal themselves through their poor governance, with a range of external data sources available to help in these assessments – for example, the World Bank [Worldwide Governance Indicators](#). Sweden's national 'democracy criterion' may also be of interest in this context. **Member states should therefore explore the addition of a new criterion on governance, which would consider whether certain standards of governance are met before authorising a transfer.**

<sup>1</sup> For examples of cases, see: World Peace Foundation, '[Compendium on Arms Trade Corruption](#)'; [Corruption Tracker](#)

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## Post-shipment controls

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This briefing offers recommendations on how EU member states could better address the issue of post-shipment controls (PSC). The previous review of the EU Common Position, concluded in 2019, did not substantively address the issue of PSC. However, in the context of the current review, this briefing considers the scope for, and benefits of, the wider adoption of PSC among EU member states.

In an effort to enhance their capacity to prevent and combat arms diversion and misuse, an increasing number of EU member states and partner countries are adopting PSC as part of an enhanced suite of arms transfer controls. Indeed, EU member states are not alone in understanding and pursuing the benefits that can accrue from PSC implementation. For example, States Parties to the Arms Trade Treaty have also shown a keen desire to prevent and combat diversion of conventional arms transfers, as reflected by the establishment of the Diversion Information Exchange Forum and the discussions on post-shipment cooperation that took place during the German presidency of the Eighth Conference of States Parties (CSP8).

There is therefore a strong case for arguing that the EU Common Position and the associated User's Guide be updated to include standards and guidance for the implementation of PSC measures.

### **The role of PSC in effective arms transfer control**

PSC encompass a range of control measures relevant to exports of conventional arms which can help reduce the scope for their diversion and misuse. These can serve as an important adjunct to pre-authorisation procedures involved in export licensing that include, for example: arms export risk assessment; documentary requirements and verification – including end-use(r) certificates (EUCs); non-re-export assurances; and customs controls. Decades of experience underline that in too many cases such pre-export measures, on their own, are insufficient to safeguard against diversion or misuse of conventional arms exports.

While preparations for PSC measures are made in the pre-licensing phase, they are put into operation once a shipment has cleared customs in, and departed the jurisdiction of, the exporting state. Such measures include, but are not limited to: using technology to track shipments; obtaining delivery verification certificates (DVCs); and undertaking on-site inspections in the recipient country.

DVCs are requested by some, but not all, arms exporting states. While the information they provide can help confirm the safe arrival of a consignment of arms, it provides little in the way of assurance that all or part of the shipment in question will not subsequently be re-exported, diverted to an unauthorised end-user in-country, or misused. The same can be said of the use of technology for tracking a shipment of exported arms until it arrives, either in the importing state or with the end-user.

On-site inspection of the location and assignment of an arms shipment weeks/months/years later represents the most unequivocal mechanism for verifying that exported arms have not been re-exported, diverted to an unauthorised end-user in-country, or misused. In order to facilitate a future on-site inspection, prior to authorising the shipment an exporting state should – as part of the relevant end-use undertakings – come to a detailed agreement with the importing authorities as to the legitimacy, scope, time-frame and modalities of such an exercise. For example, it is possible that on-site inspections may be carried out: i) in response to information suggesting that arms in a shipment have been diverted or re-exported (based on intelligence or open-source information); ii) as a routine measure in relation to exports of specific arms and/or to specific end-users; or iii) as part of a system of random checks on exports of specific arms and/or to specific end-users. These options are not mutually exclusive: routine or random checks can also be informed by relevant intelligence and information sources that point to the possible misappropriation or misuse of exported arms.

Arranging post-shipment inspections will require the agreement of the importing state,

which may not always be immediately forthcoming. It may therefore require negotiations between exporter and importer, but as more states apply PSC, the more it will become accepted practice. This can also deliver direct benefit for the importing state, for example, where appropriate, forming part of a wider effort to support physical security and stockpile management of weapons.

The scope of weapons to be covered in an on-site inspection regime varies among states – Germany has so far focused its inspections on exports of small arms and light weapons (SALW), while others have taken a broader approach. Ultimately, it is arguable that any system of on-site inspections should be set up with a view to covering a range of equipment exported to a range of end-users.

There is no suggestion that member states would carry out in-country inspection for all (or many) of their arms exports – in most cases there would be no need. Rather, decisions to inspect would be taken selectively on the basis of perceived risk.

Capacity constraints will be another limiting factor. It may be infeasible for some EU member states to send officials from their capital cities to carry out investigations, while several lack a global consular presence. They do, however, have options to help address this issue. Member states could pool their respective resources (for example, one member state with in-country representation could take on this task for another member state without); they could employ consultants (for example, retired officials) to carry out specific inspections; and/or EU delegations could provide support where necessary. It is worth noting that the experience of states that have adopted on-site inspections as a part of their PSC is overall a very positive one, suggesting that, if carried out openly and transparently on the basis of a pre-export agreement, such measures can also serve as a valuable confidence-building exercise between exporter and importer states.

### **Implications for the review of the EU Common Position**

The text of the EU Common Position on arms exports, as it currently stands, does not address the issue of PSC. However, given the increasing number of EU and other states

adopting PSC, there is a clear case for arguing that the Common Position should set the standard by incorporating a provision that reflects the current direction of travel. In practical terms, this could be done by integrating an additional paragraph on PSC into either Article 5 or Article 7 or by adding a separate Article 5 *bis* or an Article 7 *bis*.

Operationalisation of new references in the Common Position would inevitably require further elaboration in an updated version of the User's Guide, which currently has minimal references to PSC (under the heading of Post-shipment Verification). It could be expanded to contain much more detail, including, for example:

- the rationale for PSC/on-site inspections – such as to prevent re-export, diversion and/or misuse of exported arms
- the key principles of PSC/on-site inspections – including the need to obtain the willing consent of the importing state
- practical considerations relating to the planning and operationalisation of PSC/on-site inspections<sup>2</sup>

<sup>2</sup> See SIPRI (2022), '[Good Practice Guide on Post-shipment On-site Inspections of Military Materiel](#)', August

## Transparency and reporting

This briefing offers recommendations on how EU member states could improve their transparency and reporting with respect to arms exports. The previous review of the Common Position introduced a national deadline for reporting on the previous calendar year to the European External Action Service by 30 June, and a searchable online database with information on export licences, both of which were longstanding recommendations of civil society. There are, however, further important steps member states should take to deliver a properly transparent system of reporting on arms exports, including in light of new EU mechanisms such as the European Peace Facility (EPF).

### To this effect Saferworld recommends:

- an obligation in the Common Position on all member states to report the value of all actual delivered exports to each destination, broken down by Military List (ML) category
- the introduction of a distinct and consistent reporting process for all arms deliveries made under the EPF
- publication of additional information under the denial notification and consultation mechanism
- publication of information regarding the Working Party on Conventional Arms Exports' (COARM) deliberations

A longstanding weakness of EU-level reporting is the variability of national reporting. Not all members report on *deliveries*.<sup>3</sup> All members do report on *licences* granted, but apply widely variable licensing practices, meaning reports are not directly comparable. France, which issues licences at a far earlier, more 'speculative' stage than others, is the most obvious outlier.<sup>4</sup> Nor is it clear if there are arms exports that avoid the licensing process altogether, such as disposals of

military surplus, or government-to-government sales or gifts. Reporting on *all* actual *deliveries* would build a more complete and comparable picture of the EU and arms exports.

Common Position Article 8(1) currently requires only 'information ... on [each member state's] exports of military technology and equipment', without elaborating at all on what that information should comprise. The User's Guide to Council Common Position does state that 'each member state shall provide the ... value of actual exports to each destination', but with the caveat 'if available', and in any event the User's Guide is not legally binding.<sup>5</sup> Saferworld recommends amending the Common Position to require **all member states to report values of all delivered exports to each destination, broken down by ML category**, without exception, rather than just licences granted.

Member states must also address how to report on transfers arranged and/or delivered under the EPF, especially given the way it is now being used – as a means to supply large amounts of 'offensive' military equipment (described as 'lethal equipment') for use in conflict – which is very different to how the EPF was presented leading up to and at its adoption. It is therefore important that **member states establish distinct and consistent reporting for all arms deliveries made under the EPF**, providing information on all actual transfers of military equipment, including quantities, broken down by ML category, destination and end-user. It should also set out whether the relevant items are from new production or existing (potentially surplus) stocks, and clarify the financial flows relating to the transfer; for example, if member states are being reimbursed for transfers of surplus equipment. This should appear in the COARM online database and in narrative form.

If reporting on all actual deliveries of military equipment by member states overlaps with reporting on deliveries under the EPF, member states should develop a shared system for

<sup>3</sup> In 2021 and 2020, Belgium, Cyprus, Germany, Greece and Latvia did not report on the actual value of arms exports. Additionally, some of the countries that do report on the actual values of arms exports do not provide information for every ML category for some destination countries.

<sup>4</sup> In 2021, the value of licences issued by France was listed as €136,282,263,077 (more than 75 per cent of all licences issued by the listed EU member states), while the value of arms exports was €11,009,946,644 (or 8 per cent by value of the licences issued), which was approximately 44 per cent of all deliveries reported by EU member states. In 2020, the value of licences was €118,233,148,951 (more than 70 per cent compared to all EU member states), while the value of delivered exports was €4,243,000,000 (which was around only 3.6 per cent by value of the licences issued), around 27 per cent compared to all

EU member states. Similar trends were recorded in preceding years. See European Union External Action Service, '[Licences – Yearly Overview](#)'. Compounding this discrepancy is that not all EU states report on deliveries (see footnote 1 above). The inclusion of such speculative licences in the French data renders any attempt to gain an understanding of overall or comparative EU licensing practice and trends effectively meaningless.

<sup>5</sup> General Secretariat of the Council of the European Union (2019), 'User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment', 16 September, Chapter 3, Section 1.2(c), p 153.

distinguishing between EPF and other transfers and communicate clearly how this functions to avoid confusion or double counting.

Officials have often stressed that the denial notification and consultation mechanism is their most-valued element of the Common Position regime. Yet most member states publish little information on individual denials, while at the EU level the public online database includes only the total number of denials per ML category for each country of destination, and separately the number of denials under each of the Common Position criteria per ML category. The static EU Official Journal report consolidates this information; enhancing the COARM online system could allow for more streamlined and richer information on denials and consultations in a more user-friendly manner.

Saferworld notes that the Netherlands has for many years in its national annual reports produced a significant amount of information on each licence denied. In its latest annual report (covering 2021), this comprised: country of final destination; a brief description and the number of the items; the name of the recipient (for example, quoting at random from the report, DK Logistics Ltd, UAE Air Force, Plenty Shipbuilding Industry Co. Ltd, and many others); the end-user; the date of denial; and the reason or reasons (criteria) for the denial.<sup>6</sup> It is unclear why, if the Netherlands can publish this information, others cannot. Publishing more baseline information and detailed reasoning for denials would provide more clarity on the interpretation and application of the Common Position criteria. It follows that this information could then be accumulated and tabulated in the EU report. **Saferworld therefore urges that member states move towards the Dutch standard of reporting on denials, publishing more information regarding these mechanisms and their outcomes.**

Each year the combined EU report sets out the total number of consultations that each member state initiates and receives. It does not however include any information about the outcome of those consultations, that is, how often they result in an 'undercut', as opposed to how often a subsequent licence application for an 'essentially identical transaction' is denied by the second member state. This is the minimum requirement for external observers to judge how the consultation mechanism is functioning, and **we therefore urge the reviewed Common Position to include a requirement to share and publicly report this information.**

Saferworld also recommends that COARM's deliberations be, as a matter of routine, subject to greater scrutiny and accountability. **Good practice would hold that, at a minimum, the dates, agendas and summarised minutes of all COARM meetings should be in the public domain.**

Russia's invasion of Ukraine has seen some members limit their reporting on exports to Ukraine for perceived national security concerns. However, this shift has not been universal (see for example the level of reporting by the US), which raises doubts about its necessity. At the very least, member states should identify when and why information has been withheld, and reports should be updated to include this missing information as soon as possible.

The EU has historically been at the forefront of moves to improve arms export transparency and accountability, explicitly acknowledging the dangers of secrecy in this area and the value of openness. However, over the last decade or so, the EU has for the most part rested on its transparency laurels. Adopting the recommendations set out herein would see the EU and its member states once again promoting the principle that governments need to be properly accountable for their actions, while leading by example in the global arena

<sup>6</sup> Government of the Netherlands (2021), 'Dutch arms export policy in 2021', Annex 6: Licence application denials for military goods, p 60.