

## EU Common Position review: Possible changes to the EU Common Position criteria

This briefing offers recommendations on the issue of changes to the Common Position Article 2 (criteria) as a contribution to the current ongoing review of European Union (EU) [Common Position 2008/944/CFSP](#) as amended by Council Decision (CFSP) 2019/1560.

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](#)

