

EU Common Position review: Export control of jointly funded and produced products to non-EU countries

This briefing offers recommendations on how to manage the onward export of commonly funded and produced military equipment, as a contribution to the current review of European Union (EU) [Common Position 2008/944/CFSP](#) as amended by Council Decision (CFSP) 2019/1560.

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 minimus* 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 minimus* 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