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Reviewing EU Common Position 2008/944/CFSP: Some food for thought

Current conflicts in the Middle East are exposing significant issues with respect to the arms export policies of a number of EU member states and with the cross-EU implementation of EU Common Position 2008/944/CFSP. The current review of the Common Position, as required by the Council of the EU conclusions of 20 July 2015, creates an opportunity to address these issues. But to do so, member states will need to take a long hard look at where and how things are going wrong, and then commit to making real, meaningful change.

Ironically, it was the problem of arms exports into the Middle East that was one of the main motivating factors behind the EU member states' decision in the early 1990s to agree a common regime. The three following paragraphs from the preamble to the Common Position sit at the heart of what member states were trying to achieve when they began the process of developing a shared approach to arms exports.

> (3) Member States are determined to set high common standards which shall be regarded as the minimum for the management of, and restraint in, transfers of military technology and equipment by all Member States, and to strengthen the exchange of relevant information with a view to achieving greater transparency.
>
> (4) Member States are determined to prevent the export of military technology and equipment which might be used for internal repression or international aggression or contribute to regional instability.
>
> (5) Member States intend to reinforce cooperation and to promote convergence in the field of exports of military technology and equipment within the framework of the Common Foreign and Security Policy (CFSP).[1]

Much of relevance has changed since then – technology, patterns of arms production and trade, the world in general and the EU and the relationships among its members more particularly – however, the relevance of these founding principles of the EU approach to arms transfers have never been more relevant.

[1] The corresponding paragraphs from the 1998 Code of Conduct on Arms Exports, which preceded the Common Position, are:

> DETERMINED to set high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers by all Member States, and to strengthen the exchange of relevant information with a view to achieving greater transparency,
> DETERMINED to prevent the export of equipment which might be used for internal repression or international aggression or contribute to regional instability,
> WISHING within the framework of the Common Foreign and Security Policy (CFSP) to reinforce cooperation and to promote convergence in the field of conventional arms exports.

However, certain recent practices by member states raise some fundamental questions about whether the goals as set out in the Common Position are being achieved. These include deliveries by some member states of military equipment into the conflict in Yemen and a willingness of some member states to supply equipment to declared 'end users' who are understood to be channelling at least some of that equipment to non-state actors fighting in Syria and Iraq, while others are prepared to do neither.

Criterion 2 of Article 2 of the Common Position requires member states to "deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law (IHL)". When considering the conduct of the Saudi-led coalition (SLC) in the Yemen conflict – e.g. through its air campaign and its blockading of Yemeni ports – by any ordinary understanding of this language, these risks are manifest. And yet some member states are exporting equipment they know is being used in the air campaign and the blockade, while claiming these transfers are fully consistent with the Common Position. Meanwhile, a number of other member states are making it clear that in many cases they will not authorise exports where the equipment might be used in the Yemen conflict, yet these often appear to be policy decisions taken outside or on top of Common Position rules.

Another defining factor of the international arms trade in conventional arms in the late 1980s/early 1990s was the use of bogus end-use documentation as cover for intensely problematic arms sales. This was most obviously with regard to transfers of small arms out of Central and Eastern Europe into African war zones. Much work has been done in the intervening period to improve end-use controls, including in the EU, to the point where some member states are now developing systems of post-delivery checks on arms exported. However, in the last few years we have seen from some other EU member states the revival of the old discredited practice of approving transfers on the basis of end-use certificates that are patently false. Most obviously, member states are authorising the transfer of Warsaw Pact-style small arms and ammunition for export to countries that do not use this type of equipment – such as Saudi Arabia and the US – and which will almost certainly be retransferred to non-state actors fighting in Iraq and Syria.

Both these cases effectively drive a coach and horses through Common Position preambular paragraphs 3 to 5 (quoted above). Importantly, the problems relate both to preventing transfers that would have negative consequences (paragraph 4) and to the idea of *common* standards and approaches, and the principles of reinforcing cooperation and promoting convergence (paragraphs 3 and 5).

These examples should not be taken to suggest that problems of this nature or magnitude exist in all contexts, but they support the argument that when the Common Position is placed under stress – even where the specific provisions would seem adequate – problems with national implementation result in it failing to deliver on its promise.

The mandate of the current Common Position review (CPR) as set out in the council conclusions is extremely open-ended: "The Council tasks the competent working group [Working Group on Conventional Arms (COARM)] to re-assess the implementation of Common Position 2008/944/CFSP and the fulfilment of its objectives in 2018."

In light of the above, it is critical that in implementing its mandate, COARM acknowledges the failings of the current regime and undertakes a serious effort to address those failings. At all points of the review, COARM should be referring back to the key preambular paragraphs of the Common Position, and assessing all proposed changes – or resistance to change – against them. Given the current problems, it is hard to see how this could be achieved without amending the text of the Common Position. In which case it makes sense to use the opportunity to consider the following fundamental questions:

1. Are the criteria clear and adequate so as to enable the Common Position to fulfil its goals?
2. Is the legal basis of the Common Position sufficient to ensure a common approach?
3. Are the accountability mechanisms of the Common Position sufficient to ensure a common approach?

It also provides for a space to carry out the updates necessary to keep abreast of external changes and a number of tweaks that might address what could be described as more technical glitches to the current text.

The sections that follow highlight a number of areas where change might be useful. They should be considered illustrative rather than exhaustive.

Definitions

There are a number of terms in the Common Position (and/or the User's Guide and the Arms Trade Treaty [ATT]) that are undefined or are relatively vague such that they allow differing interpretations or application. In some contexts, this appears to be undermining the Common Position's objectives relating to high common standards, cooperation and convergence and even the efficacy of and confidence in the regime as a whole.

These terms include:

- Clear risk
- Might (be used)
- Would use/provoke
- Serious violations
- Equipment which might be used for internal repression
- Take into account
- Facilitation

More precise definition or elaboration of these terms would give greater clarity for external observers and would help member states pursue the aforementioned objectives and more rigorous implementation.

Several of these terms appear in close proximity, and indeed it may make more sense to define or elaborate on them in relation to each other, rather than in isolation.

For example, criterion 2 (c) of the Common Position reads: "[Member States shall] deny an export licence if there is a **clear risk** that the military technology or equipment to be exported **might be used** in the commission of **serious violations** of international humanitarian law".

Criterion 3 states: "Member States shall deny an export licence for military technology or equipment which **would provoke** or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination."

These two formulations clearly set a different threshold for licence decision-making, yet the lack of clarity around these key operational terms means that it is unclear in each case where that threshold lies or how those two thresholds compare or relate to each other.

The lack of clarity of the phrase "equipment which might be used for internal repression" was brought into sharp relief by member states' export policies to Egypt subsequent to the August 2013 council conclusions on Egypt, paragraph 8 of which includes "Member States also agreed to suspend export licences to Egypt of any equipment which might be used for internal repression". Despite this clear instruction, some member states exported large quantities of small arms and ammunition shortly after, leaving external observers struggling to understand what could be meant by this phrase if it did not apply to these items

"Facilitation" is a term that does not appear in the Common Position, but it features repeatedly in the ATT article which deals with export assessments.

For example:

"[E]ach exporting State Party … shall … assess the potential that the conventional arms or items [to be exported] … could be used to:

(i) commit or facilitate a serious violation of international humanitarian law;
(ii) commit or facilitate a serious violation of international human rights law;"

All EU member states are parties to the ATT, and as such are legally obliged to apply all its articles and provisions. Reference is made to facilitation in the context of the ATT in the User's Guide, yet the meaning or impact of this term is not explained. It is clear, however, from the language of the ATT, which speaks of "commit *or* facilitate" that this creates an additional obligation on member states. 'Commit' in the ATT is the effective equivalent of 'use' in the Common Position. It has been obvious from previous conservations with officials from various member states that there is no common understanding of the term "facilitation" and that there is a need for clarification.

Common Position articles

A comprehensive review of the Common Position would include changes to many of its articles. These could be described as falling somewhere along a continuum, from purely technical or 'tidying' amendments at one end, to substantive improvements at the other.

The majority of the suggestions that appear in the following sections of this paper fall closer to the technical end of the continuum; however, in order to properly address some of the more systemic problems identified, there are also more significant changes proposed.

As before, what follows should be regarded as indicative rather than exhaustive.

Article 1

It would be useful to expand on this article as currently drafted to elaborate on some of the fundamental principles that should underpin any arms transfer control system. These should be relatively uncontroversial.

For example, the article should be explicit in ensuring that before any transfer of controlled items there must be a formal assessment process addressing the criteria set out in Common Position Article 2, including circumstances where a standard licence is not required. For example, under some jurisdictions governments do not license themselves, so licences might not be issued where items are being gifted by the Ministry of Defence, or where the transfers relate to government-to-government contracts. But in such circumstances a risk assessment against the criteria should still be carried out prior to any transfer decision.

It would also be useful to formally establish the principle of non-discrimination – i.e. the Common Position must be applied with full rigour regardless of the identity of the recipient or end-user of the items, as is required under the ATT.

Article 1 could also include specific reference to the need for member states to look both backwards and forwards in their risk assessments, and to clarify that while any such assessment should be looking at what has happened in the past as one indicator of what might happen in the future, behaviour does change and so risk assessment should not limit itself in this way.

Moreover, assessment should look as far forward as possible to consider possible future changes in circumstances, and not just look at the likelihood of future misuse on the assumption that the existing situation will continue indefinitely. An obvious example of this would be to consider the implication of a future change in government. Related to this would be an explicit statement to the effect that member states will follow a precautionary approach to arms transfer licensing – i.e. when in doubt, deny the licence.

It is critical that the Common Position is explicit in establishing that extant licences are able to be suspended or revoked should the initial exporting authority so decide. This is already the formal position in some member states and is identified as preferred practice in Article 6.7 of the ATT. However, there have been recent cases of member states announcing that while in certain contexts new licences might be put on hold, deliveries would still be permitted against existing licences. While acknowledging anxieties about security of supply, it is for recipient states to ensure this through compliance with international law and good practice, not for supplier states to guarantee continuation of supply regardless of respect for international law. Clarity on this point would be best guaranteed through explicit mention of this principle in the Common Position.

Article 2 – criteria

Given all the changes that have occurred in the last 25 years – to international relations and systems, to the EU and the relationships among its members, and to the arms technology and trade – it would be remarkable to expect a series of commitments made in the early 1990s by the then-member states of the EU regarding principles to be applied to conventional arms transfers to be as relevant and appropriate to the EU in 2019. The current Common Position criteria, however, are remarkably consistent with the seven criteria set out in the Declaration on non-proliferation and arms exports in the 1991 Luxembourg Council conclusions and the additional criterion set out in paragraph 15 of the 1992 Lisbon European Council Conclusions of the Presidency (paragraph 1). These were elaborated to a greater or lesser extent in the 1998 Code of Conduct on Arms Exports, with a slight further elaboration with the conversion of the Code of Conduct into the Common Position, but they have survived largely intact. It should therefore come as no surprise to think that at least most of them might be overdue for further amendment.

Criterion 1 – international obligations

This criterion sets out a number of international and regional agreements to which member states are committed and which they should therefore consider in their decision-making. Since the criterion was drafted, the ATT has been adopted and all member states have become States Parties. If the Common Position were to reference only one other instrument or agreement, it would now surely be the ATT. **In this case, the logic for amending Article 1 to include a reference to the ATT is compelling**.

Criterion 2 – human rights and IHL

The Code of Conduct made almost no mention of IHL.[2] Criterion 2 was cast entirely in terms of human rights and internal repression. This was acknowledged as a shortcoming and addressed with new language in the Common Position, such that criterion 2 now includes the usefully clear obligation on member states to "deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of [IHL]".

The language on human rights, by comparison, is not quite so 'usefully clear'. Instead, "[h]aving assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States shall deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression". This is followed by an illustrative list of acts constituting 'internal repression'.

The ATT, as mentioned above, introduces the concept of facilitation. As States Parties to the ATT, this is a legal obligation on all member states. In addition, the ATT requires States Parties to "take into account the risk of the conventional arms … being used to commit or facilitate serious acts of gender based violence (GBV)." Member states now have the opportunity to bring the EU's

[2] The only reference to IHL in the Code of Conduct was under criterion 6: "Member States will take into account *inter alia* the record of the buyer country with regard to … its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts".

fundamental instrument on arms transfer controls into sync with the global standard. **We therefore recommend changing criterion 2 to explicitly refer to facilitation, to include reference to GBV, and to use similar language for both IHL and international human rights law (IHRL).**

For example: "Member states shall 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 IHL or IHRL, with special account being taken of the risk that the technology or equipment might be used in or facilitate serious acts of GBV."

Criterion 5 – national security
Part (a) of this criterion appears to allow member states to prioritise "their defence and security interests as well as those of Member State [sic] and those of friendly and allied countries" over everything else covered in the criteria other than those "on respect for human rights and on regional peace, security and stability". The User's Guide helpfully elaborates on this by referring to criteria 2 and 4, thus avoiding an interpretation where "respect for human rights" would not be seen as encapsulating IHL.

However, the User's Guide does not carry the same force as the Common Position itself (see the section on Article 13 below), and this still leaves questions about the status of the other criteria. Is it therefore acceptable for member states to prioritise the security interests of friendly countries over, for example, obligations to enforce embargoes (criterion 1), or where the items in question would provoke armed conflicts (criterion 3) or be at risk of being diverted/re-exported under undesirable conditions (criterion 7)?

We therefore recommend amending criterion 5 so that it is no longer given priority over any of the other criteria of the Common Position.

Criterion 7 – diversion
The language of criterion 7 is puzzling. It is widely acknowledged that the diversion of controlled items is intensely problematic and that states (not just EU member states) should be doing all they can to prevent and combat it. The position of the EU and its member states during the ATT negotiations was that diversion risk should be regarded as grounds for refusing to authorise transfers. Yet, while describing various factors that might be relevant to determining the risk that items might be diverted, at no point does Common Position criterion 7 explain what member states should do where a risk is identified.

It would therefore seem uncontroversial to include a requirement in criterion 7 that "member states deny an export licence if there is a clear risk that the military technology or equipment to be exported might be diverted to an undesirable end-user or for an undesirable end use."

Criterion 8 – least diversion of resources/sustainable development
Arms sourced from EU member states have been used in Yemen by other states, most notably Saudi Arabia and the United Arab Emirates, with widespread and devastating environmental and developmental impacts. Indeed, this is probably the most egregious case of EU-authorised transfers contributing to developmental harm since the Common Position was agreed. Yet the criterion that

was conceived for the purpose of ensuring that arms transfers from the EU do not damage development is irrelevant in this context, primarily because it limits member states to consider the impact of arms transfers only in the country to which they are sold, and even then only in terms of the fiscal impact involved in the purchase and maintenance of the items. As these arms are being used and causing harm in another country, i.e. Yemen, this falls outside the scope of the criteria as it currently stands.

In essence, **there is a clear need for criterion 8 to expand from considering only fiscal implications in the country of receipt and purchase, but to consider also the developmental impact of the likely use of those arms, wherever that might be.**

Additional criteria
Member states could also give consideration to introducing new criteria. This could include, for example, criteria relating to corruption and to governance.

Corruption
The arms industry is generally held to be among the most corrupt across all industrial and commercial sectors. For an indicative list and description of major cases, see for example the compendium of arms trade corruption. Cases of large-scale corruption continue to be reported and recorded, and the problem is remarkably persistent despite repeated efforts to 'clean up'. A recent Corruption Watch UK report reveals extensive information about a series of cases involving sales by Leonardo SpA of helicopters to South Korea and to India, and of surveillance and other equipment to Panama.

In previous discussions about a corruption criterion member states have presented themselves as sympathetic in principle, but they have raised operational concerns. Corruption is extremely difficult to prove, and actionable information typically comes to light only after a deal is done.

However, the criteria of the Common Position are premised on calculations/estimations of risk, not on the basis of proof or on a criminal-guilt level of certainty. And while it is the case that information relevant to instances of corruption does tend to accumulate over time, there are still red flags that officials could usefully employ to identify risk factors right from the planning and tender/pre-award stages of deals. This does reinforce the need, however, for the Common Position (and member states individually) to be clear that extant licences can be suspended or revoked on the basis of new information or changed circumstances. It should also be noted that whereas anti-corruption legislation tends to deal with cases of provable corruption after the fact, a corruption criterion in the Common Position introduces an important preventive aspect. We therefore conclude **the addition of a corruption criterion to the Common Position would be both feasible and desirable**.

Governance
The events of the Arab Spring suggested that the Common Position criteria struggle to provide an appropriate frame for exports to authoritarian regimes where the actual use of force is scarce. In these cases it may be that the *threat* of use of force is effective in maintaining the *status quo*, suchthat actual use of force becomes unnecessary, particularly where internal security forces are ruthlessly effective in eliminating or at least minimising

any opposition to the incumbent regime.

Many EU member states appeared comfortable selling arms to a variety of states in the Middle East North Africa (MENA) region, only to see the wisdom of those decisions challenged by the rapidly-developing circumstances on the ground. Recipient states which, although authoritarian in nature, had appeared 'stable' were ultimately proved to be anything but and might have been better described as 'brittle'. The argument can be made that arms transfers from member states can help to create, maintain or strengthen the capacity of authoritarian but brittle regimes (which *inter alia* do not allow routine non-violent opposition to government rule) to suppress their populations. However, this should not be seen as a legitimate use of EU-sourced arms.

There is also a more operational question that thinking about governance brings to the fore: that is, how to make decisions when the short-term risk appears low but the longer-term outlook is more perilous and where, *if* something goes wrong, it could go very wrong. This is a critical question today, not least in the MENA region where old licensing practices appear to have reasserted themselves, but where risk of future trouble remains high.

The use of governance indicators would have functioned, and today could function, as red flags for situations in authoritarian countries.[3] Discussions with officials suggest that governance factors can be relevant and indeed that they are in some instances and in some jurisdictions already taken into account, but there is no consistency or EU-wide guidance as to how or when this should be operationalised. Member states are therefore encouraged to consider how to incorporate questions of governance into the risk assessment process – and there are reasons to favour this being through the development of a separate criterion.

Evaluation of risks attached to governance does not necessarily lend itself easily to a case-by-case approach in the same way as exists for many of the existing criteria. As implied above, isolating specific risks to specific transfers is not straightforward when applying a governance lens. The issue is more about whether a transfer is helping to create a general capacity to maintain order through authoritarian means. It also relates to the political signals that such decisions send to the regime, i.e. 'regardless of what might be said, not only do we not oppose your actions, we are willing to actively support them.' Arms supplies also send an important signal to those parts of civil society that wish to oppose the government, including by purely peaceful means: 'regardless of what might be said, we do not support you – indeed we materially support those who would violently suppress your opposition.'

More prosaically, there is no obvious, single criterion within which to locate questions about governance. Governance-related issues fall within at least criteria 1, 2, 3 and 8 of the existing criteria (and would also be relevant to a corruption criterion if agreed). And while theoretically it would be possible to disperse them among other criteria, it seems unlikely that this would provide for effective or efficient analysis.

[3] Examples of indicators and programmes that could be considered as information sources for a governance criterion include but are not limited to the Fragile States Index; Worldwide Governance Indicators; Democracy Index; Women, Peace, and Security Index; the Electoral Integrity Project *et al*.

This leads us to recommend that member states consider establishing a separate governance criterion. In essence, this would stipulate that if certain standards of governance are not met, a presumption of denial would be applied to all license applications. Thiswould in effect mean that a case-by-case approach would still be followed, but would involve starting from the opposite position – i.e. transfers would be refused *unless* recipients could demonstrate that the items concerned were appropriate for meeting a specific, legitimate defence or security need. As with all licence applications, all other criteria would apply as well so that even once a legitimate need is identified, if there were a clear risk that the items might be used to commit serious violations of IHL, the transfer would be denied.

The concept of presumption of denial is not widely used, but it is referred to within the Missile Technology Control Regime (MTCR); it may be that the MTCR has lessons that could be applied in this context. It has also been referred to recently by the Netherlands, in the context of selling arms to the Saudi-led coalition operating in the war in Yemen. **Further exploration of this concept as part of the EU arms transfer control system is highly recommended**.

Article 4 – denial notifications and consultations

The denial notification and consultation mechanism – where licence denials are circulated to all member states and where any member state assessing an 'essentially identical transaction' must consult with the initial denying state (or states) before it can itself award a licence – is regarded as one of the success stories of the EU transfer control system. Thought should be given to how to build upon this success.

Possibilities include:

1. Extending consultations to member states not directly involved – i.e. beyond those that have already denied a licence and those considering an application for an 'essentially identical transaction'. One approach could be that when a consultation is initiated it is circulated to all member states. They would then have the option to request to be copied into all correspondence or dialogue, and then to ask questions or provide input – though care would need to be taken to avoid overburdening the system and making it unwieldy.

2. No undercutting rule: This possibility was considered in the 1990s when the Code of Conduct was being negotiated, but at that point it was probably ahead of its time. However, relationships and dialogue among the member states are now far more developed than was then the case, and by all accounts the number of consultations that do end in an undercut (i.e. where the licence is issued despite the previous denial by another member state) is now much reduced. Note that while a no-undercut rule may appear to obviate the need for consultations, there is still considerable value in sharing information about the rationale for denials and the responses of recipient states that have been denied.

3. Publishing information on the outcome of consultations: Currently, the EU Consolidated Report provides information on the number of consultations initiated and received by each member state, as well as on the number of consultations per destination (in 2017, the last

year for which figures are available, there were 137 consultations[4]). But the result of consultations is not published. This would be useful information, as it may give some indication of the extent to which member states' approaches to transfer controls are converging. This would not be necessary if a no-undercut rule were introduced, as the results of all consultations would be the same.

4. Formally extending the use of the mechanism to include participation by non-EU member states that have aligned themselves to the Common Position and that wish to be included, on a case-by-case basis, dependent on the extent to which existing member states consider those states to be applying their national controls in compliance with the provisions of the Common Position.

The denial-notification and consultation mechanism has provided the basis for what is a growing and now online information-sharing database. Member states have commented frequently on the value of the database and the potential for its future growth and development. This potential needs to be embraced with far greater enthusiasm, however. **The Common Position review should set out an ambitious five-year plan for how the database will be developed.** Examples of additional information the database could share include:

- Enquiries from industry regarding possible contracts/exports which received a negative response from government at a pre-licensing stage (including the extremely early pre-licensing stage).
- Information on 'marginal' approvals – i.e. licences granted where the decision was 'difficult', to a level of detail similar to that currently provided on refusals.
- Information on licence suspensions, cancellations, revocations, etc.
- Risk analyses where it is thought these might be of value to other member states – e.g. regarding confirmed or suspected diversion.
- Explanations of (changes to) arms export policies in cases of, for example, high public interest.
- Problematic end-users and intermediaries.
- Prosecutions and penalties.
- One-off case-studies.
- Reporting on licences granted and deliveries made for inclusion in the EU annual report (for more on this, see the section on Article 8 below).

Thought should also be given to whether, when and how to make elements of the information-sharing database available to non-EU member states on a systematic or *ad hoc* basis.

Article 5 – end-use controls

Member state references to end-use management are relatively extensive. While there is little on this subject in Article 5 of the Common Position, chapter 1 of the User's Guide goes into some detail regarding "best practices in the area of end-user certificates" and "post shipment

[4] See 'Twentieth 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 (2018/C 453/01)', Official Journal of the EU, 14 December 2018, pp. 516-518, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2018:453:FULL&from=EN.

verification". Notwithstanding questions over the legal force or status of the User's Guide (for more on this see the section on Article 13 below), all of this detail is optional, with lists of measures that member states 'should' and 'might' take, and references to what member states 'can' do.

Meanwhile, actual practice among member states has been diverging. Germany and Sweden, for example, are now moving to a point of conducting post-shipment, on-site inspections. Other member states, by contrast, have recently been authorising exports which are likely to be retransferred to non-state armed groups involved in conflicts in the Middle East on the basis of end-user certificates – some containing end-use guarantees – which do not stand up to even minimal scrutiny.

This variety of practice falls far short of the stated goals of the Common Position to set high common standards, to reinforce cooperation and to promote convergence, while the willingness to ignore obvious end-use anomalies throws into question the commitment to prevent exports which might be used for internal repression or international aggression or contribute to regional instability.

Two main points arise from this situation. The first is that member states should seek to encourage greater take-up of best practice. This could be promoted by, for example, changing 'should' references in the relevant section of the User's Guide to 'shall', and 'might' and 'can' references to at least 'should'. The language around on-site inspections should be expanded and elaborated, taking a lead from German and Swedish experience. The greater the number of member states applying this best practice, the more 'normal' it becomes and therefore the more positively recipient states are likely to respond.

The other main point is more difficult. No matter how good the measures elaborated in the Common Position and User's Guide, they are only as good as their implementation. Recent experience at both EU and international levels suggests that in order to promote rigorous implementation by all relevant countries (be they States Parties to the ATT or member states of the EU), states need to be willing to ask questions of and to challenge each other. This could be done through formal mechanisms, such as a requirement that member states agree to share detailed information with each other about all licence applications received which meet specified conditions. Ultimately, it may prove useful for member states to develop joint positions on specific issues, and to communicate those positions publicly (for more on this see the sections on articles 8 and 9 below).

Article 8 – reporting

The Common Position requires each member state to provide information in confidence to each other, as well as into the public domain "on its *exports* of military technology and equipment" (emphasis added). They are also required to "provide information for the EU Annual Report on the implementation of this Common Position".

While the commitment to reporting is commendable, the timeliness (or lack thereof) of the publication of the EU Annual Report has long been acknowledged as problematic, including by member states themselves. The fact that information about licences granted or equipment delivered in one calendar year does not appear until after the end of the next undermines the value

of that information. **Therefore, the introduction of specific reporting deadlines in the Common Position report is recommended.** As mentioned above, inclusion of data on licences granted and on deliveries in the online information-sharing database, might be one way of speeding the reporting process.

There is also a fundamental problem with the lack of consistency of the nature of the data provided by member states, which seriously compromises the comparability of information and its analytical value. This is particularly the case with the provision of licensing data. This is partly due to member states having such different approaches to arms transfer licensing and to ways of reporting at the national level, and also with the use of open, global or general licensing, the use of which is expected to increase over time and which is difficult to report on in any meaningful quantitative way. What has become a mixture of over- and under-reporting of licences has reached the point where it is more misleading than revealing. The importance of reporting on licensing decisions should not be underestimated, as this is the information that says most about what governments are willing to approve. **We therefore recommend that member states continue to gather licensing data, report on them nationally, and provide information for inclusion in the EU Annual Report. However, in addition, it is recommended that the Common Position *oblige* all member states to report on *deliveries* of military list items during the calendar year, for the sake of consistency and comparability across the EU.**

More might also be done to encourage effective implementation of the Common Position and the achievement of its stated objectives by providing more information about "the implementation of this Common Position."

For example, there could be more transparency regarding the workings, deliberations and decisions of COARM. This could include the publication of agendas and the production of a summary of minutes of COARM meetings, public statements about specific issues of high salience, etc. And while these could be collated for inclusion in the Annual Report, they should appear on an ongoing, timely basis.

Article 9 – joint assessment

> "Member States shall, as appropriate, assess jointly through the CFSP framework the situation of potential or actual recipients of exports of military technology and equipment from Member States, in the light of the principles and criteria of this Common Position."

This article receives very little attention to the point where it would seem it is largely ignored – rhetorically and operationally – yet it is potentially one of the most powerful in the Common Position. The Common Position review should therefore make every effort to unpack this article and develop specific concrete measures that would allow for its more effective implementation.

While there are reasons to be cautious about the concept of joint assessment as a matter of routine, establishing processes for member states to identify (on a regularly-updated basis) and pay particular attention to high-profile, controversial, complicated, problematic or rapidly-changing contexts ('sensitive destinations') where these are relevant to arms transfer control policy and licensing decisions could be valuable. This attention would, however, need to extend beyond the *tours de table* in current use in COARM meetings. It is surely of direct relevance to the fulfilment of

the Common Position objectives with respect to setting high common standards, reinforcing cooperation and promoting convergence, and preventing exports which might be used for internal repression or international aggression or contribute to regional instability.

Member states could be required to follow certain additional procedures with regard to sensitive destinations. These could include setting out details of issues of concern that might be relevant to licence decision-making and sharing information on licences granted. This could in turn lead to the development of a shared analysis and specific detailed guidance, which could take the form of a 'statement of shared understanding.' It should not be forgotten, however, that as competence for licence decision-making is national, member states would be able to take decisions that might seem at odds with a 'shared understanding', or indeed could take issue with the statement itself – though they could then be required to provide an explanation for the contrary decisions taken or the reasons for them.

Alternatively, or in addition, member states could apply a presumption of denial for licence applications to 'sensitive destinations' (as described in the section on a possible governance criterion above).

A further useful step in this process would be for as much information as possible to be placed in the public domain. It is anticipated that at least some of this would take the form of summary data (some of it potentially as part of the EU Annual Report [see the section on Article 8 above], though where possible information should be made available in a more timely fashion). This could take a range of forms. For example:

- the contexts of concern raised under this article
- summaries of agreed positions, or advice of the situations raised where member states were unable to come to agreement
- the number of member states that found it necessary to give 'explanations' with regard to a particular context
- the number of occasions each member state gave 'explanations' over a given period.

The ideas above are presented as just a few suggestions as to how Article 9 could be better operationalised. There will no doubt be many others. Member states are encouraged to make this a focus of the review.

Article 13 – the User's Guide

The range of measures discussed above have for the most part been described in the context of amendments to the text of the Common Position. However, it is the substance of the changes rather than the document where they are described that is important. And while in some cases the logic for amending the Common Position itself is probably compelling, this is hardly always the case. It might therefore be decided that much of what appears above could be accommodated within the User's Guide.

The section on definitions at the beginning of this paper, for example, might in one respect most logically fall within a revised User's Guide, given that the Common Position does not define its terms – whereas there is a definitions section in the User's Guide (pp. 11-12).

However, this raises the issue of the status of the User's Guide in relation to the Common Position. It is our understanding that under EU law member states are legally required to be in full national compliance with all the obligations contained in a Common Position. The User's Guide, by comparison, is not binding on member states – if it is there for their use and guidance as they see fit, the corollary of this is that they are free to ignore it as they see fit.

Article 13 of the Common Position notes that "[t]he User's Guide to the European Code of Conduct on Exports of Military Equipment[5], which is regularly reviewed, shall serve as guidance for the implementation of this Common Position." While the explicit link between the Common Position and the User's Guide is welcome, a stronger and clearer statement of the force and status of the User's Guide would be welcome. This is not necessarily straightforward, however, as the sometimes discursive tone of the User's Guide does not always lend itself to providing specific instruction.

It would therefore be useful for member states to examine how Article 13 could be amended to ensure that the User's Guide has the necessary status to *oblige* member states to follow its instructions where appropriate. If the User's Guide is not given this status, then member states will need to ensure that any changes to the current regime which are intended to bind states are made in the Common Position or through some other means which guarantees their intended impact.

This ignores the larger and extremely important question of whether all member states are in all cases meeting their legal obligations under the Common Position, but it remains necessary in the first instance to have those clearly established obligations before one can consider their implementation. With regard to reinforcing the fact that the Common Position is legally-binding, member states could make this status more explicit in the text, for example by expanding the language at the bottom of the preamble to read, "has adopted this common position, all articles of which are binding upon member states".

Transferring production capacity

"Give a man a fish, and you feed him for a day. Teach a man to fish, and you feed him for a lifetime."

Of perhaps even greater strategic significance than the transfer of military items is the transfer of the capacity to produce military items. More and more countries are seeking to build their own capabilities to make their own equipment, and EU member states (among others) are frequently under pressure to transfer production capacity as part of any deal to supply equipment.

The additional challenges and potential problems created by the proliferation of arms-production know-how are obvious. Once a country has the capacity to produce military items, the capacity of

[5] Note the inconsistency here, where the Common Position refers to a guide to the now-defunct EU Code of Conduct, while the full title of the extant User's Guide is "User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment." On purely technical grounds, the Common Position would benefit from being amended to bring this up to date.

the original exporting country to restrict the quantity of production will be limited to a greater or lesser extent, and generally reduces over time.[6] The recipient country can also take the decision to export the military items it is newly manufacturing, and even to further proliferate the production technology.

All of these factors suggest that member states should be applying additional or tighter control on transferring production capacity than on transferring military items. Some member states do seem to have started following this approach, at least for some types of equipment (e.g. small arms). However, there is no guidance or direction on this at the EU level.

Instead, the only EU-level guidance that might be regarded as being relevant to this issue is included in 'Chapter 1 – Licensing Practices; Section 2: Assessment of applications for incorporation and re-export.'[7] This covers situations where member states are transferring components and parts with the knowledge that these will be incorporated into products for re-export. This, it should be noted, is not the same as transferring production capacity, though it may well be the case that such transfers are being made in support of off-shore production – the capacity for which has been transferred from the exporting member state.

The thrust of this guidance is to follow a less rigorous approach than to standard exports, notwithstanding the opening advice that "member states shall fully apply the Common Position to licence applications for goods where it is understood that the goods are to be incorporated into products for re-export".

Because, in addition, the guidance calls on member states to effectively defer to the export control system operating in, and to the overall defence and security relationship with, the country of incorporation. While these incorporation guidelines are not *directly* applicable to transferring production capacity, they do point to an attitude where member states might apply a lighter regulatory touch.

The logic of the case made above – i.e. that transferring production capacity carries much greater and longer-term risks than the transfer of finished military items – leads to the conclusion that member states should take the opposite approach. A list of possible steps is set out below (note that in some cases choosing one would be at the expense of others, whereas others are complementary):

- no transfer of production capacity into countries that are neither States Parties nor signatories to the ATT
- transfer of production capacity only into countries on a (strictly limited) 'white list'
- strict limits placed on quantities that may be produced in the overseas production facility

[6] Depending on the particular details of the technology being transferred, the original exporting state may be able to control the quantity of in-country production, but the same dynamic that created the new centre of production in the first place will tend to weaken this level of control over time.

[7] The diversion criterion could potentially be relevant, but for good reason applies only to movements of items where this is against the wishes of the original exporter. The concern here is about the intentional transfer of capacity.

- a time limit placed on the period the production agreement applies, with agreement to decommission the production facility at its conclusion
- transfer of production capacity only where the government in the recipient country agrees that any subsequent exports will be subject to the agreement of both states
- imports of arms production capacity require the formal permission of the national government in the recipient country
- in the country of import of the production capacity, arms manufacture requires authorisation by the national government
- all arms exports from the country of import of production capacity must require a licence from the national government.

We note that where import and export permissions are granted by governments but where all the principals are companies, the contractual arrangements may be relatively complex. However, if the last two points in the list above apply, these complexities should be manageable.

Conclusion

The wide range of possible changes to the extant EU arms transfer control system set out above is not intended to be comprehensive or exhaustive. It does suggest that there is a great deal that can be done to improve the Common Position and its implementation, if member states are willing to roll their sleeves up and attack the review with ambition. We sincerely hope that this is the approach taken.