

STUDY

Requested by the SEDE subcommittee



The further development of the Common Position 944/2008/CFSP on arms exports control



Policy Department for External Relations
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WORKSHOP REPORT

The further development of the Common Position 944/2008/CFSP on arms exports control

ABSTRACT

In view of the upcoming review of the EU Common Position 944/2008/CFSP on arms exports, the aim of the workshop was to provide an overview of the context in which this process will take place together with a set of possible outcomes the review could produce. The speakers from the Stockholm International Peace Research Institute (SIPRI), first defined the context by describing how, since the EU Common Position was adopted in 2008, EU member states performed in terms of military expenditure, arms production and arms transfers. Recent measures adopted at the EU level to boost defence industrial cooperation were also indicated as part of this framework. The speakers also highlighted the divergences in member states' export policies which emerged in the last decade, most recently during the conflict in Yemen. They then provided a number of options that could be taken into consideration during the 2018 review, covering both adjustments to the language of the criteria and the user's guide and measures to improve the implementation of the EU Common Position, the quality of reporting and to increase coherence and coordination of the EU export control regime.

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WORKSHOP

POLICY DEPARTMENT, DG EXPO
FOR THE SUBCOMMITTEE ON SECURITY
AND DEFENCE (SEDE)



Tuesday 19.06.2018 – **09:30-10:30**
PAUL-HENRI SPAAK BUILDING – ROOM **P5B001**

CONTACTS AND REGISTRATION: poldep-expo@europarl.europa.eu

THE FURTHER DEVELOPMENT OF THE COMMON POSITION 2008/944/CFSP ON ARMS EXPORTS CONTROL



Chair: Anna FOTYGA

Programme of the Workshop

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



For the Sub-Committee on Security and Defence (SEDE)

WORKSHOP

The further development of the Common Position 2008/944/CFSP on arms export control

Tuesday, 19 June 2018
Brussels, **Paul-Henri Spaak building, Room P5B001**
09.30-10.30

PROGRAMME

9.30-9.35 Welcome and introductory remarks by

- **Ms Anna FOTYGA**, Chair of the Sub-Committee on Security and Defence (SEDE)

9.35-10.05 The further development of Common Position 2008/944/CFSP on Arms Export Control

- **Dr Sibylle BAUER**, Director of Studies, Armament and Disarmament at the Stockholm International Peace Research Institute (SIPRI)
- **Giovanna MALETTA**, Research Assistant in the Dual-Use and Arms Trade Control Programme of SIPRI.

10.05-10.25 Q&A

10.25-10.30 Concluding remarks by

- **Ms Anna FOTYGA**, Chair of the Sub-Committee on Security and Defence (SEDE)

Biographical summaries of the speakers and contributors to this report

Dr. Sibylle Bauer (Germany) is the Director of Studies, Armament and Disarmament at the Stockholm International Peace Research Institute (SIPRI). She was until 2017 also SIPRI's Programme Director for Dual-use and Arms Trade Control. She holds a PhD in Political Science jointly from the Free University of Brussels (ULB) and the Free University of Berlin. Her PhD thesis was on the Europeanisation of Arms Export Policies and its Impact on Democratic Accountability. Dr Bauer has published widely on dual-use and arms trade control-related issues and been a frequent speaker on these topics in Asia, Europe and North America. Since 2005 she has spent much of her time on capacity-building to enhance transit, transshipment, brokering and export controls for arms and dual-use items.

Mark Bromley (United Kingdom) is SIPRI's Programme Director for Dual-use and Arms Trade Control. Mark's work at SIPRI focuses on research and capacity-building on issues relating to national, regional and international efforts to regulate the international trade in arms and dual-use goods. Before joining SIPRI in 2003 Mark worked as a policy analyst for the British American Security Information Council (BASIC). His recent publications include 'Export controls, human security and cyber-surveillance technology: Examining the proposed changes to the EU Dual-use Regulation', SIPRI, (SIPRI Report, Dec. 2017), 'Challenges and good practices in the implementation of the EU's arms and dual-use export controls: A cross-sector analysis', SIPRI, (co-author, SIPRI Report, July 2017).

Giovanna Maletta (Italy) is a Research Assistant in SIPRI's Dual-use and Arms Trade Control Programme. She also works with activities related to SIPRI's role in the EU Non-proliferation and Disarmament Consortium. Her recent publications include 'The conflict in Yemen and EU's arms export controls: Highlighting the flaws in the current regime' (co-author, SIPRI Essay, March 2018) and 'The Challenge of Software and Technology Transfers to Non-proliferation Efforts: Implementing and Complying with Export Controls' (SIPRI, April 2018, co-author). Prior to joining SIPRI, Giovanna worked as a Blue Book Trainee in the Disarmament, Non-proliferation and Arms Export Control Division of the European External Action Service (EEAS) in Brussels.

PART I: Contributions of the speakers

1 Introduction

Ms Clare Moody (S&D), Vice-Chair of the Sub-Committee on Security and Defence (SEDE), opened the meeting by introducing the first agenda item of the day, the Workshop on 'The further development of the Common Position 2008/944/CFSP on arms exports controls'. Ms Moody stressed the importance of having this workshop as every year the European Parliament addresses the issue of arms export in SEDE through this committee's own initiative report, whose new rapporteur is Ms Sabine Lösing (GUE/NGL). The Vice-Chair then introduced the two speakers from the Stockholm International Peace Research Institute (SIPRI), Dr. Sibylle Bauer, Director of Studies of Armament and Disarmament, and Ms Giovanna Maletta, Research Assistant in the Dual-use and Arms Trade Control Programme.

Dr. Sibylle Bauer (SIPRI) thanked the Vice-Chair and Committee for inviting SIPRI once again to give a briefing on the further developments of the EU Common Position on arms exports. She then recalled that this is an issue on which the European Parliament have been focusing for 20 years, playing a very important role in developing this instrument and monitoring its implementation. Before going into the details of the presentation, Dr. Bauer also briefly introduced SIPRI for those in the audience not familiar with the work of the Institute and stressed its strong connection with Parliamentary bodies. SIPRI was established by a decision of the Swedish Parliament in 1966 to commemorate 150 years of unbroken peace in Sweden and given the mandate to provide facts and to explore conditions for stable peace. This is a very challenging and broad mandate on which SIPRI have been working for over 50 years. In addition, SIPRI has been broadening the scope of its work not only in the area of Armament and Disarmament, but also Conflict and Peace, and Peace and Development, which comprises also work on climate change and security sector reform. SIPRI, therefore, is looking at issues related to peace and security from a very broad perspective.

Dr. Bauer then introduced the outline of SIPRI's presentation which touched upon the following points:

- Setting the scene: trends in EU Member States' military spending, arms production and arms transfers;
- Recent EU initiatives to strengthen defence cooperation;
- EU Member States' policies and practices in arms export controls;
- Options for the review of the Common Position.

2 Setting the scene: trends in EU Member States' military spending, arms production and arms transfers

Ms Giovanna Maletta (SIPRI) opened the presentation by giving details of EU member states' military expenditure, arms production and arms transfers during the previous decade. According to data retrieved from the SIPRI Military Expenditure Database, in the period 2008-2017 EU member states' military expenditure has fallen.¹ More specifically, defence spending by EU member states decreased from EUR 240 billion in 2008 to EUR 229.5 billion in 2017. In the same period, EU member states' share of global military spending fell from 17 % to 15 %. At the same time, these data reveal that this trend is changing and that already in the period between 2013-2017 EU member states' military spending increased by 7 %. In addition, in 2017 the largest spenders in the EU (France, Germany, Italy and the United Kingdom) were among the 15 list countries with the largest military expenditure in the world, accounting for 10 % of the global total. Nonetheless, the speaker also highlighted the presence of a considerable gap between the

¹ SIPRI Military Expenditure Database, <https://www.sipri.org/databases/milex>.

biggest EU countries spenders and those countries and the largest spenders (United States, China, Saudi Arabia, Russia and India), which all allocated more than EUR 54 billion in 2017.

In order to understand the context in which the review of the Common Position will take place, the speaker also gave an overview of how the EU defence industry performed in recent years. According to data provided by the European Commission, the EU defence industry registered a EUR 97.3 billion turnover in 2014 and employed 500 000 people.² In terms of structure and composition, the defence industry is dominated by a group of leading companies, followed by a larger group of about 1350 Small-Medium Enterprises (SMEs). These companies are dispersed throughout the EU but are mostly concentrated in France, Germany, Italy, Spain, Sweden and United Kingdom. According to the SIPRI Arms Industry Database, between 2008-2016 an average of 25 EU-based defence companies were among the 100 largest defence companies in terms of total arms sales.³ They were mostly based in France, Germany, Italy and United Kingdom. The EU-based companies that are among the 100 largest defence companies have seen their share of global arms sales fall from almost 31 % in 2008 to 24 % in 2016. Nevertheless, EU member states continued to be major players in the field of global arms export. According to the SIPRI Arms Transfer Database in the period going from 2008 (since the EU Common Position was adopted) to 2017, EU Member States accounted for an average of 28 % of the global volume of arms transfers.⁴ Also in this case a group of leading countries (France, Germany, Italy, Spain and United Kingdom) particularly contributed to this trend and accounted for about 23 % of the global total since 2008.

3 Recent EU initiatives to strengthen defence cooperation

As part of the description of this wider context, Ms Maletta also gave a brief overview of some of the initiatives that have been taken in the past year to strengthen defence cooperation within the EU, and adopted both at the Commission and the intergovernmental levels. In 2017, the Commission adopted an EU Defence Action Plan which served as the basis for the launch of the European Defence Fund (EDF) in the same year. Therefore, while arms exports and arms production are outside the treaty provisions, the Commission is nevertheless seeking to have a role in this field by using its competences in the areas of free movement of goods and industrial competition, which explains this comprehensive defence package. The goal of these measures is to increase cooperation in the field of defence by strengthening the EU's defence industrial base. In particular, through the EU Defence Fund for the first time the EU budget will be used to finance cooperative military research projects and joint production and development of defence capabilities. Finally, at the inter-governmental level, in December 2017 PESCO was launched, allowing member states willing to do so to deepen their cooperation in the field of defence. The overall goals of these measures are several: to reach strategic autonomy; to reinforce the single market for defence; to allocate defence spending more efficiently; and to address security threats in the EU Neighbourhood. Nevertheless, as highlighted by the speaker, there are a series of challenges ahead, mostly related to the prerogatives that EU member states will retain in certain areas. These include decisions on PESCO projects, defence procurement, priorities of the EDF, and issuing arms export licences.

² European Commission, 'Defence Industries', *Website of DG Growth*, http://ec.europa.eu/growth/sectors/defence_en; accessed on 30 May 2018.

³ SIPRI Arms Industry Database, <https://www.sipri.org/databases/armsindustry>.

⁴ SIPRI Arms Transfer Database, <https://www.sipri.org/databases/armstransfers>. Figures are SIPRI Trend Indicator Values (TIVs) expressed in millions. The TIV is a measure of the volume of international transfers of major weapons. For the method used to calculate the SIPRI TIV see <http://www.sipri.org/databases/armstransfers/sources-and-methods/>.

4 EU Member States policies and practices in arms export controls

The last part of the presentation focused on the divergences that have emerged over the last decade in EU member states' arms export policies. Ms Maletta first recalled how EU member states are ultimately responsible for the implementation of the EU Common Position in their national systems, an instrument they are now called on to review after 10 years. The speaker then briefly outlined the main elements of the EU arms export control regime: while the EU Common Position represents the corner stone of this system, there are also other instruments in place such as arms embargoes and the Intra-Community Transfers directive (ICT Directive). On the other side of the spectrum there are controls on the trade in dual-use items and goods that can be used for torture purposes. Focusing on the EU Common Position, the speaker gave a quick overview of the historical developments of this instrument: from the harmonization process started in 1991, to the adoption of the Code of Conduct on Arms Exports in 1998 and the adoption of the EU Common Position in 2008. In spite of these efforts, in the last ten years there have been cases in which EU member states' arms export policies diverged. This happened very clearly in situations of crisis such as the Arab spring, the conflict in Syria, and most recently the conflict in Yemen. Mounting allegations that the Saudi-led coalition might have violated international humanitarian law (IHL) in the conduct of hostilities in Yemen, raised doubts on the effectiveness of the EU Common Position and whether EU member states' arms exports to the most active members of this coalition, i.e. Saudi Arabia and United Arab Emirates (UAE), were conducted in coherence with its criteria. According to the SIPRI Arms Transfer Database, between 2013-2017 Saudi Arabia and UAE increased their arms imports by 225 % and 51 % respectively, and some EU member states (France, Italy and United Kingdom) were among their major suppliers. At the same time, concern about the conduct of the war in Yemen has triggered a wider debate in EU member states about the legitimacy of these exports based on the Common Position. In some cases, these debates and the public pressures led some of them to suspend or to halt exports to these countries (as in the case of the Netherlands, the Walloon Region of Belgium and potentially Germany). The latest EU annual report - the 19th, covering 2016 - shows that there has been an increase in the number of denials towards Saudi Arabia and the UAE, mostly based on concerns that IHL might have been violated or risks of diversion (criteria 2 and 7). At the same time, resistance to public pressure in other countries, notably France, Italy and the UK, prompted a series of civil society initiatives aimed at challenging the governments in court to try and force a change in policy with regards to the conduct in arms exports.

The speaker concluded that the issues highlighted are some of those on which the review of the EU Common Position could focus. More specifically, this process should take into account how divergences in member states' arms exports policies are also likely to challenge the European Commission's efforts to further strengthen defence cooperation at the EU level and eventually also the role of the EU as a credible foreign policy actor able to act as a mediator in both the conflict in Yemen and elsewhere.

5 Options for the review of the Common Position 2008/944/CFSP

The second part of the presentation, given by Dr. Bauer, provided an overview of some of the possible outcomes of the review process of the EU Common Position. The speaker started by emphasizing how important it was to have a certain level of ambition considering that the last review of the EU Common Position produced very limited concrete results. Furthermore, it will also be very important, considering the number of players (parliaments, civil society, different governments and other actors) which expressed an interest and active engagement with the topic, that this process is conducted in an inclusive and transparent manner so that each one of them can voice their positions and proposals. The speaker then outlined and elaborated on the possible options for review of the EU Common Position.

5.1 Peer review process

According to Dr. Bauer, the first concrete outcome of this review could be a peer review process. She recalled that a peer review process had already taken place in the context of dual-use trade controls which had led to very concrete results. In a context where areas of divergence emerge clearly, it would be helpful to have a forum to explore the reasons for such inconsistencies and to discuss ways in which harmonization can be achieved. Looking at the way the EU Common Position is implemented by member states one can notice differences not only in the outcome of licences decisions but also in terms of procedures. This includes how the criteria are translated into national laws, guidance documents, legal references or in some cases in no legal document at all. It also refers to which ministries are involved into the decision-making process, and whether they have a consultation, co-decision role or veto role. The way these systems are operated within EU member states can differ very strongly. This in turn can also have an impact on what is decided at the end and how criteria are assessed. Furthermore, the methods used for the assessment can vary and affect policy outcomes. Therefore, while the overall question is about overarching policy, the speaker suggested that by looking at the details of methods and procedures a lot of interesting ideas can emerge on how harmonization can be achieved. Hence, what a peer review process could create is a natural forum for informal exchanges as, apart from the COARM meetings, there are not so many venues where licensing or enforcement officers can share information.

5.2 Production of a more comprehensive EU annual report on arms exports and improvement of EU member states' national reports.

Dr. Bauer also provided a few suggestions on how the EU annual report could be improved. She first stressed how the way reporting is being done hugely differs across the EU. She then recalled a 2004 SIPRI study which compared how data were collected and compiled by EU member states for national reports: 14 years later some of these issues have been addressed but others still need to be improved.⁵ As a matter of fact, not all EU member states make full submissions to the EU annual report and there is still a lot of scope for improvement of the quantity and the quality of data submitted. What is striking is that even some of the biggest EU member states still do not provide comprehensive data on actual arms export while there are different ways this could be done, for example by putting together information companies and customs collect. The speaker also pointed out how the timeliness of the report also represents an issue: for example, the report covering 2016 was only published in February 2018. Furthermore, additional information could be potentially included in the report, for example on the type of end-users and quantity of weapons exported. Dr. Bauer also noted how the quality of national reports produced by member states could be improved. The Common Position requires them to produce such documents but there are still considerable differences among them in terms of comprehensiveness and timeliness. Also in the case of national reports, the quality and the quantity of data could be further improved.

5.3 Further improve information-exchange mechanisms

The review of the Common Position, according to Dr. Bauer, could also lead to improved information sharing mechanisms among EU member states. Some developments in this area were achieved as a result of the previous review through the launch on an online system where member states can exchange information. Nonetheless, further information which could be useful in informing the licensing processes could also be shared through this system. These could include information on previous cases of diversion and on companies involved in illicit activities. All this information would be very helpful to both licensing and enforcement authorities.

⁵ Bauer, S. and Bromley, M., 'The European Union Code of Conduct on Arms Exports: Improving the Annual Report', *SIPRI Policy Paper* No. 8, SIPRI, Stockholm, 2004

5.4 Broader review of 8 Criteria and User's Guide.

Given that the 8 criteria were drawn up almost 30 years ago, that the Code of Conduct was adopted 20 years ago, and the EU Common Position is now 10 years old, Dr. Bauer suggested that this might be a good opportunity to take a more comprehensive and broader look at the criteria to see if they are still fit for purpose or if they should be amended and subject to further elaboration. The same should be done for the User's Guide which has been a very useful tool, but which could also be turned into a more up-to-date user-friendly instrument with links to additional sources of information. What this review should aim at is not just minimalistic improvements and we should rather ask ourselves if the EU Common Position would be what we would design now if we started from scratch. In this context, Dr. Bauer suggested that improvements could be made in the language of the criteria. One of the issues raised by the European Parliament in this regard, and with particular reference to human rights and IHL, is whether there is a potential need to shift towards the adoption of a principled approach, where one takes into account the human rights situation in a country, and away from the current functional approach, where the focus is on the potential link between a particular weapon system and a human right or IHL violation. This is a point that could be reviewed. In addition, criterion 7 (diversion) could also be amended and become one of those criteria which also entails a licence denial in case of risk.

5.5 Additional options

Additional options for review outlined by the speaker included:

Reduce procedural and enforcement divergences, where appropriate. According to Dr. Bauer, this could be done by drawing on the dual-use area, where there have been a number of studies regarding the different procedures of enforcement and administrative and criminal penalties for violations. It would be interesting, therefore, to do the same in the field of arms export as there are enormous differences which have an impact on companies and individuals involved.

Allocate appropriate resources for effective implementation and enforcement. The speaker pointed out how the level of available resources can also have an impact on the effective implementation of the Common Position. Also in this case, work done on collecting how many licensing and enforcement officers are working in dual-use export controls across the EU could be used as an example of how to get an overview of staff resources in this area. When SIPRI compiled these data for the dual-use sector during a previous study, the results were quite striking, and it was interesting to find out that licensing and enforcement officers identified lack of resources as the main challenge to effective implementation.

Encourage a stronger involvement of EU institutions in providing and verifying information. This is also something which comes down to the resource issue especially for smaller EU member states which do not have a wider network of embassies abroad that are available to help in gathering information. In this regard, EU Delegations may be able to provide support and input into this process.

Creating closer connections with other parts of EU export control regime. As mentioned in the first part of the presentation, the EU export control regime is highly fragmented between and within different EU institutions. As highlighted by Dr. Bauer, it would be helpful to create closer connection between them and to have a more coherent approach in the field of export controls. This would be desirable also to the extent that in EU countries there is much more coherence in this area and these different issues are often covered by the same entity.

PART II: Discussion

Following the presentation delivered by SIPRI, the Chair opened the discussion giving first the floor to the rapporteur, Ms Lösing (GUE/NGL).

Ms Sabine Lösing (GUE/NGL) opened her intervention by pointing out how some of these issues have been highlighted last year already⁶ but not many of the basic problems have changed or improved. She focused on the part of the presentation calling for a complete review of certain areas of the EU Common Position. This is something heard often in European Parliament and this is quite worrisome to the extent the focus seems not to be on increasing effectiveness in implementation but rather softening the approach by reconsidering the criteria afresh. According to Ms Lösing, one should be very careful when looking at the substance of the EU Common Position and putting it out for debate. She continued by stating that the presentation led her to interpret that it should be about a better and stricter implementation of the instrument and that for this purpose certain criteria need to be defined to make them more effective. Therefore, she asked how we can avoid a situation in which a debate on the wording of the EU Common Position might lead to certain criteria, e.g. criterion 8 on economic development, being dropped. Ms Lösing continued her intervention by mentioning the increasing importance of the dual-use sector. In this regard she asked if there were other areas in which further improvements could be achieved, especially in terms of EU internal institutional structure. She then highlighted the problem of resources, which is mostly related to the political willingness of EU member states to apply the EU Common Position. Ms Lösing also asked whether there was some minimal wording which could be suggested and included in the national reports so as not to have 27 different ones. She also called for any other specific idea on possible amendments to legal aspects of implementation. Finally, she drew attention to a point which was not mentioned, i.e. the challenge represented by the launch of a new arms programme within the EU. In particular the conditions foreseen in the new peace facility would envisage having weapons systems in partner countries which pose questions on the final and end-user of these systems.

Ms Bodil Valero (Greens/EFA) took the floor stating that Sweden is very proud to have contributed to the creation of SIPRI and glad that other countries can benefit from its work. She also expressed interest in the presentation which could be very useful for SEDE discussions. Ms Valero then raised the point of harmonization, which was needed to have basic standards and good starting points. As often there are different levels, it is very important to make sure that there are standardized points at the EU level. Ms Valero also stressed the importance of bearing in mind the main approach, and she also expressed herself in favour of working in this direction. On the other hand, she also pointed out how taking collective decisions could lead to the risk of having harmonization right down to the tiniest details. In Sweden, stakeholders expressed a preference for codification of practices, which meant to review the legislation making sure practices are considered. Therefore, in Sweden, it was not about opening up too much but about bearing in mind practices in order to improve the situation. As when a new legislative text is introduced the goal is to improve the situation, Ms Valero asked if it would be risky to open up the criteria and amend them. In particular, she asked if such amendments would bear in mind the actual context. Finally, with reference to the issue of resources, she stated that EU member states should be prepared to pay for end-use checks on the ground: it is not very useful if there is a fantastic document saying that EU member states are not allowed to sell weapons to certain countries but at the end of the day we find out that Daesh and others still have European weapons in their hands. Therefore, she stressed the importance to carry out inspections and the need to work on this as well. Finally, Ms Valero raised the issue of EU member states that keep granting new licences to countries which are still involved in Middle East wars.

⁶ Bauer, S., Bromley, M. and Maletta, G., 'The implementation of the EU arms export control system', Workshop Summary Report, European Parliament Directorate General for External Policy, May 2017

She then asked what could be done about this situation as it seemed that EU Common Position was not enough to make sure that member states really respect what was decided together.

Mr Tunne KELAM (EPP) asked for ideas on how to prepare for the next crisis considering that the experience of current situations (like the conflict in Syria or Yemen) where the EU Common Position had been ignored or violated. He then focused on the issue of insufficient harmonization: a problem that had been faced over the years although no good solution had been found. Therefore, Mr Kelam stated that it all boils down to a more efficient control by the EU institutions and that there is no other alternative than the EU institutions exercising more efficient controls over national systems. He also recalled the problem of resources and fragmentation of the EU export control system, saying that the Parliament could provide support in this area. Finally, he asked for more ideas on measures on how to warn about companies which are involved in illicit activities.

Dr. Bauer took the floor once again thanking the audience for the very rich questions. On the risk of opening up the criteria for broader discussion, she stated that this danger is always there but that there are also risks related to the way these criteria are currently worded and implemented. A number of them, in particular, are phrased in such a broad way that they are not strictly violated but are able to be interpreted in different ways. Therefore, to tighten up the language would reduce these risks or would force member states to put on record why they made a certain interpretation instead of another. Therefore, according to Dr. Bauer, the initial distinction between what is to be taken into consideration and what needs to be strictly implemented is also worth to put on the table of this review. In certain cases, such as criterion 8, the issue was less about the wording of the criterion and more about ensuring that the assessment process happens in a clear and appropriate manner. If the development ministry could provide inputs for the assessment of licensing decisions then, by definition, criterion 8 would be given stronger consideration. Therefore, those governmental entities who participate can have a huge impact on assessment discussions and procedures. In addition, it is important to bear in mind the existence of the Arms Trade Treaty (ATT) which was not there when the Code of Conduct and the EU Common Position were adopted. The ATT ensures that there are minimum standards at the global level that the EU cannot just ignore.

In reply to the question on what could be done to be prepared in situations of crisis, the speaker recalled the emphasis the EU put on the importance of the ATT, promoting it all over the world through demarches and other tools. Therefore, if the EU does not take the criteria seriously it will not prove a credible actor internationally.

On the issue of resources, Dr. Bauer pointed out how not only national parliaments but also the European Parliament could play a role here. She also highlighted the irony, in both the arms and dual use export controls area, of the presence of substantial and well-funded capacity building programmes internationally but scarce resources to train export compliance officers within the EU: this is a budget line the European Parliament could create. In addition, language could be included in the review to oblige member states to invest sufficient resources to ensure the effective implementation of the criteria. The speaker also suggested to include in a possible peer review process a comparison of how many staff are employed: this would show that some countries are seriously under-staffed.

On the reporting, Dr. Bauer replied that it was not desirable to harmonize all the national reports, as this would risk losing some information. In addition, national parliaments may still want to ask specific questions on specific aspects of these document. Plus, there are complementary requirements and guidelines at the national level which are also reported upon. Nevertheless, the speaker stated that it would be an excellent idea to include minimum reporting elements in the EU Common Position, covering, for example, actual arms exports, licences, and quantities. It would also be helpful to think about what kind of information would be useful for parliaments and civil society to have in order to assess the implementation of the Common Position as often the information reported, e.g. about the value, is not indicative in this

sense. In this regard, the speaker stressed, information on end users, types of weapons, quantities, would be more helpful.

About end-use checks, Dr. Bauer explained how some member states actually made progress in this area by taking individual steps which were not uploaded to the EU level. In Germany, for example, an interesting system of end-use checks had been introduced. This process took some time due to the legal changes to be made (as when drawing up a contract with a country one has to be sure that the legal provisions that give the right to inspect where the weapons are, without violating the country's sovereignty, are included). Therefore, it would be interesting to see if this system could be put in place in other countries or encouraged explicitly through the EU Common Position. This latter point would also be a question of resources.

In terms of improvement in implementation and enforcement cooperation, the speaker stressed the importance of creating a forum where this type of information could be exchanged as there is very little opportunity for enforcement officers from customs, investigation and prosecution to meet with their EU counterparts. The speaker noted that the presence of such a forum to share information on these activities could lead to better informed licensing decisions and also better implementation of EU arms embargoes.

On the possible effects of recent developments in the field of defence cooperation on arms export control policies, **Ms Maletta** noted that this was an interesting but still open question. What we witness at the moment is the existence of two divergent but still parallel trends where on the one hand we have efforts to put together resources for joint projects in the field of military research and to jointly produce and develop defence capabilities, while on the other hand EU member states will remain competent to issue export licences and we see evident divergences on how they apply the EU Common Position. There is at the moment an open call to set up a Committee of experts tasked with the ethical assessment of any new armaments projects and this could potentially look at questions about their eventual export but at this stage it does not seem any have been appointed yet. This could possibly look like other committees the Commission set up in the past in the framework of other projects (e.g. H2020). Nevertheless, the speaker pointed out that it may still be a bit early to judge how this process will affect licensing at the member states level. On the points raised on Yemen, the speaker stated that looking at recent data and past cases, it is evident that situations like this one are not new in EU history and that when there is a crisis the coherent application of the EU Common Position is put under strain. In this regard, EU member states could possibly implement more long-term risk assessments when they decide on licences and draw from lessons learnt in the recent past (Libya, Syria, and the Arab Spring). They should also consider those reasons for which, early in the 1990s, they agreed to make their policies in the field more uniform in the first place, such as troubling arms exports to the Middle East.

ANNEX I:

The further development of the Common Position 2008/944/CFSP on arms exports⁷

1 Introduction

Under the 2008 EU Common Position on arms exports (hereafter referred to as the EU Common Position) EU member states have committed themselves to setting ‘high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers’ and ‘to reinforce cooperation and to promote convergence in the field of conventional arms exports’ within the framework of the Common Foreign and Security Policy (CFSP).⁸ In 2018, and thus 10 years after its adoption, the European External Action Service (EEAS) and EU member states are to reassess ‘the implementation’ of the EU Common Position and ‘the fulfilment of its objectives’.⁹ This is the second review of the EU Common Position. The first one began in 2011 and was completed in 2015. While the text of the instrument itself was not changed after the first review, several sections of the accompanying User’s guide were revised and improvements in the exchange of information between EU member states were implemented, including the development of a digital platform allowing EU member states to share information on export licence denials more efficiently and rapidly.¹⁰

Recent developments in European defence policy and industrial cooperation, such as the launch of the European Defence Fund (EDF) and the establishment of the Permanent Structured Cooperation (PESCO), define the current context in which this review will take place.¹¹ At the same time, the review is also an opportunity for the EU and its member states to try to resolve the flaws in the EU’s arms export control regime that have emerged over the past few years. EU member states’ divergent policies and practices in arms export controls make harmonization in this field a difficult goal to achieve, hampering the EU from acting as a uniform and credible foreign policy actor and possibly undermining its efforts in strengthening its Common Security and Defence Policy (CSDP). Controversies surrounding exports of arms by EU member states to countries engaged in armed conflicts or with a poor human rights record continue to surface when major crises break out. In addition, slow and incomplete reporting and the legislative and institutional fragmentation of the EU export control regime are areas in need of major improvement. Finally, the deteriorating security environment in the European Neighbourhood and the growing awareness that the EU will progressively need to provide for its own security are also likely to be taken into account during the EU Common Position review process.

These and other considerations, together with a non-comprehensive list of desirable possible outcomes of the review process, are the focus of this document. **Section II** first provides an overview of EU member states’ military spending, arms production and arms transfers since the adoption of the EU Common Position in 2008. It also briefly describes recent initiatives to strengthen cooperation in the EU arms

⁷ By Sibylle Bauer, Mark Bromley and Giovanna Maletta.

⁸ Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment’, *OJ L 335*, 13.12.2008, p. 99–103.

⁹ Council of the European Union, ‘Council conclusions relating to the review of Common Position 2008/944/CFSP on arms exports and the implementation of the Arms Trade treaty (ATT)’, Brussels, 20 July 2015.

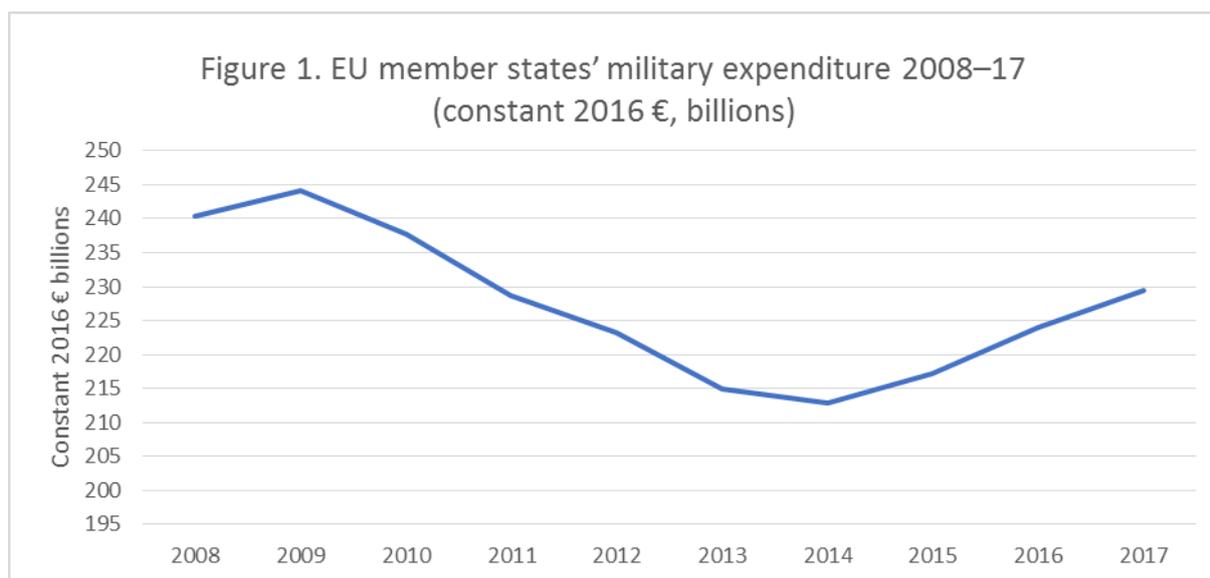
¹⁰ Council of the European Union, ‘User’s Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment’, Brussels, 20 July 2015.

¹¹ European Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Launching the European Defence Fund’, COM(2017) 295 final, Brussels, 7 June 2017; Council of the European Union, ‘Council Decision establishing Permanent Structured Cooperation (PESCO) and determining the list of participating member states’, 14866/17, 8 Dec. 2017; Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community Lisbon, *OJ C 306*, 17.12.2007, p. 1–271.

industry. **Section III** focuses on the EU member states' policies and practices in arms export controls: it first provides an outline of the historical developments and functioning of the EU export control regime and then highlights cases where divergent arms exports practices emerged, despite the existence of this system. **Section IV** focuses on those features of the EU Common Position that could be subject to improvement, putting forward a number of proposals for addressing weaknesses and what could be considered as desirable outcomes of this review process.

2 Military spending, arms production and arms transfers of EU Member States

Since 2008, EU member states' military spending and their share of global military spending have fallen. Between 2008 and 2017, EU member states' military spending decreased from EUR 240 billion to EUR 229.5 billion and their share of global military spending fell from 17 per cent to 15 per cent (see figures 1 and 2).¹² Nonetheless, in 2017 France, Germany, Italy and the United Kingdom ranked among the top 15 countries with the highest military expenditure, accounting for 10 % of global spending, and there are clear signs that the fall in overall EU spending is being reversed.¹³ EU member states' military spending rose by 7 per cent between 2013 and 2017, and a range of pressures—particularly the commitment of EU member states that are part of the North Atlantic Treaty Organization (NATO) to have military spending that is equivalent to at least 2 % of gross domestic product (GDP)—are likely to drive further increases. Still, there remains a significant gap between the states with the largest military budgets (i.e. the United States, China, Saudi Arabia, Russia and India—in order of size of spending), which each spent more than EUR 54 billion in 2017, and the EU member states among the top 15 spenders, which, with the exception of France, allocated less than EUR 45 billion.¹⁴

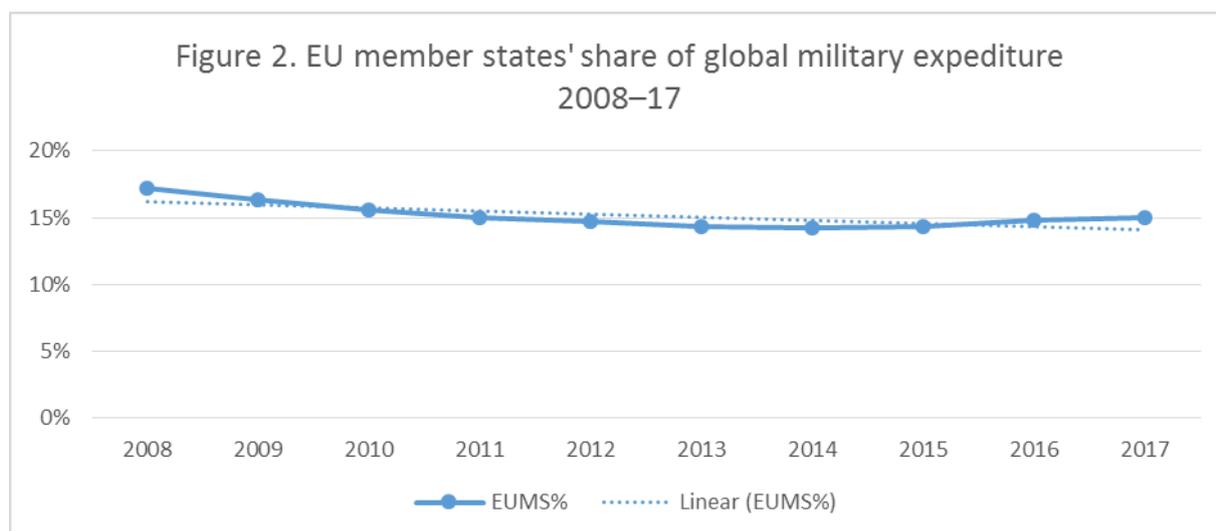


Source: SIPRI Military Expenditure Database.

¹² SIPRI Military Expenditure Database, <https://www.sipri.org/databases/milex>, accessed on 30 May 2018.

¹³ Tian, N. et al., 'Trends in world military expenditure, 2017', *SIPRI Factsheet*, May 2018, https://www.sipri.org/sites/default/files/2018-04/sipri_fs_1805_milex_2017.pdf.

¹⁴ Tian, N. et al. (note 13).



Source: SIPRI Military Expenditure Database.

The EU's defence industry recorded a turnover of EUR 97.3 billion in 2014 and directly employs 500 000 people.¹⁵ According to the SIPRI Arms Industry Database, an average of 25 EU-based firms were among the world's 100 largest arms-producing and military services companies between 2008 and 2016.¹⁶ The EU's defence industry is dominated by a small group of larger companies followed by about 1 350 small and medium-sized enterprises (SMEs). These companies are dispersed throughout the EU, but are mostly concentrated in France, Germany, Italy, Spain, Sweden and the UK.¹⁷ EU-based firms' share of the world's 100 largest arms-producing and military services companies' total arms sales fell from almost 31 % in 2008 to 24 % in 2016 (see figure 3). Nonetheless, EU member states remain major players in the global export of arms and they accounted for an average of 28 % of the world total in the period 2008–17 (see figure 4).¹⁸ A majority of these exports came from a small number of EU member states, with UK, France, Italy, Germany and Spain accounting for an average of 23 % per cent of arms exports from the EU during the period 2008–17.

Since the 1980s the EU's defence industry has been consolidating through the establishment of several large companies whose branches and production facilities are based in more than one EU country. Despite this consolidation, the EU's defence industry and national defence procurement processes remain fragmented in many key areas. Both the EU (under the rubric of 'pooling and sharing') and NATO (under the rubric of 'smart defence') have attempted to encourage the common development and procurement of weapon systems. However, these efforts have so far generated only limited returns, with EU member states continuing to favour national solutions over shared projects.¹⁹ In addition, efforts to further consolidate the EU's largest arms manufacturers have stalled in recent years.²⁰

¹⁵ European Parliament, '[Defence Industry](#)', *Factsheets on the European Union*, Feb. 2018; Roth, A., '[The size and the location of Europe's defence industry](#)', Blog post, Bruegel, 22 June 2017.

¹⁶ SIPRI Arms Industry Database, <https://www.sipri.org/databases/armsindustry>. Companies are ranked according to the value of their arms sales at the end of their financial year considered by SIPRI. The figures considered also include trans-European companies, i.e. companies whose ownership and control structures are located in more than one European country.

¹⁷ European Commission, 'Defence Industries', *Website of DG Growth*, http://ec.europa.eu/growth/sectors/defence_en; accessed on 30 May 2018.

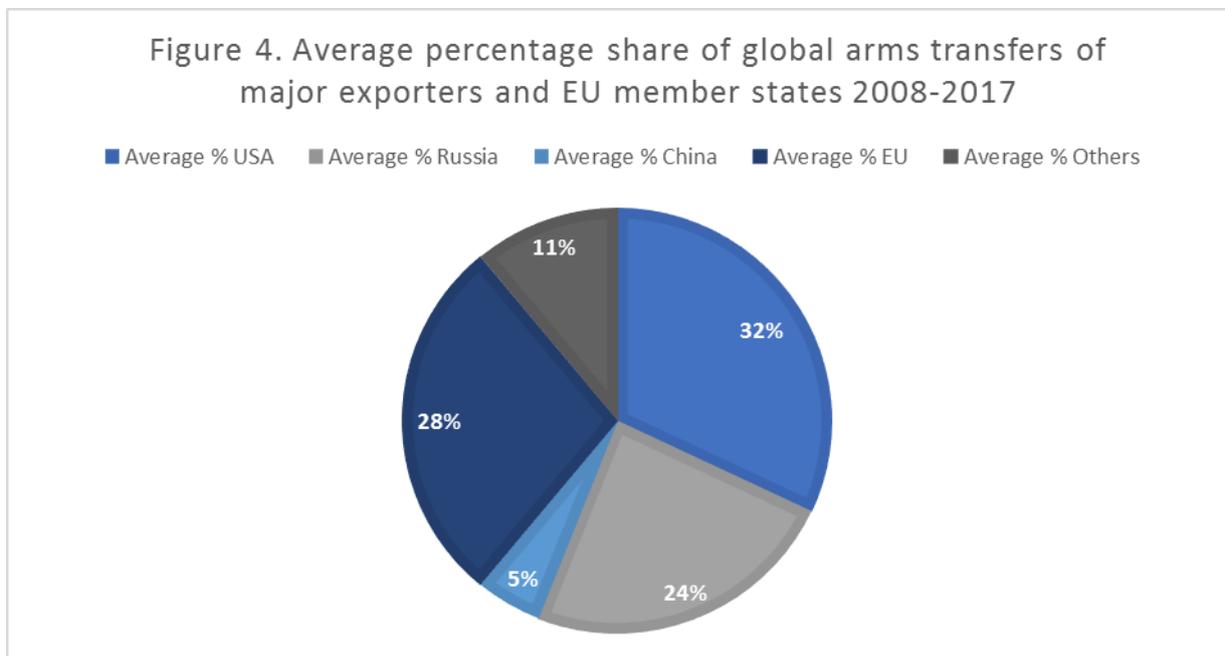
¹⁸ SIPRI Arms Transfer Database, <https://www.sipri.org/databases/armstransfers>. Figures are SIPRI Trend Indicator Values (TIVs) expressed in millions. The TIV is a measure of the volume of international transfers of major weapons. For the method used to calculate the SIPRI TIV see <http://www.sipri.org/databases/armstransfers/sources-and-methods/>.

¹⁹ Mölling, C., 'State of Play of the Implementation of EDA's Pooling and Sharing Initiatives and its Impact on the European Defence Industry', *European Parliament, DG for External Policies - Policy Department*, Brussels, June 2015.

²⁰ Jackson, S. T., 'Key developments in the main arms-producing countries, 2011–12', in *SIPRI Yearbook 2013*, Oxford University Press, Oxford, 2013, pp. 205–17.



Source: SIPRI Arms Industry Database.



Source: SIPRI Arms Transfer Database.

Formally, the European Commission has no powers in the areas of defence production and arms trade and acquisitions. Article 346 of the 2009 Treaty on European Union (TEU) exempts ‘the production or trade in arms, munitions and war material’ from EU treaty provisions. This article has existed and remained unchanged (except for renumbering due to the various treaty revisions) since 1957. In practice, however,

the European Commission has sought to increase its role in these areas since at least the early 1990s, based on its competence in the areas of competition and the free movement of goods.²¹

While the EU launched a strategy for a European Defence Technological and Industrial Base (EDTIB) in 2007, a more comprehensive defence package emerged only recently.²² Following the adoption of the EU Global Strategy (EUGS) in June 2016, an EU Defence Action Plan was launched in June 2017. It seeks to create the conditions for more effective defence cooperation, first through the creation of the EDF, and also by fostering investment in the supply chains and reinforcing the single market for defence.²³ The EDF is the first mechanism to be financed by the EU budget for the purpose of cooperative military research projects as well as joint development and joint acquisition of defence capabilities.²⁴ As pressure on national budgets remains high, the EDF aims to enhance the efficiency of military spending by pooling resources for procurement and research.

The cornerstone of these efforts is PESCO, which implements Article 42(6) of the TEU, and provides like-minded states with the tools to deepen cooperation on defence.²⁵ Although the TEU envisaged this type of cooperation for those member states 'whose military capabilities fulfil higher criteria', PESCO now includes 25 EU member states regardless of their military capabilities.²⁶ This intergovernmental process is being complemented by the initiatives promoted by the European Commission and is aimed at strengthening the EU defence industry and, eventually, creating the conditions to meet the goals set by the EUGS in terms of strategic autonomy.²⁷ Effective cooperation, however, may encounter a number of challenges as the EU member states will retain their prerogatives on certain issues, such as (a) proposing and deciding on PESCO projects, (b) deciding on matters of defence procurement, (c) defining the needs and priorities of the EDF itself and, (d) issuing arms export licences.

3 Policies and practices in arms export controls

Since the 1957 Treaty of Rome, arms exports, along with other defence- and security-related issues, have been largely exempted from European Community (EC) and EU rules. EU member states traditionally pursued widely divergent arms export policies and, with the exception of multilateral arms embargoes, were reluctant to give up any element of national control in this area.²⁸ However, since the early 1990s there have been ongoing efforts at the EU level to increase coordination and convergence in the field of arms export controls.²⁹ This process has taken place under both the Common Foreign and Security Policy (CFSP) and the EC 'pillars' of the EU—as conceived by the 1992 Maastricht Treaty—as well as the areas of 'exclusive' and 'shared' EU competences—as introduced by the 2009 Treaty of Lisbon.

²¹ Bauer, S., 'The Europeanisation of arms export policies and its impact on democratic accountability', PhD thesis, July 2003, Université libre de Bruxelles.

²² European Defence Agency, 'The strategy for a European Defence Technological and Industrial Base', 14 May 2007, Brussels.

²³ European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: European Defence Action Plan', COM(2016) 950 final, Brussels, 30 June 2016.

²⁴ European Commission, (note 11)

²⁵ Council of the EU (note 11)

²⁶ The participating member states are: Austria, Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, Spain and Sweden.

²⁷ European Union External Action Service (EEAS), Shared Vision, Common Action: A Stronger Europe, A Global Strategy for the European Union's Foreign and Security Policy, Brussels, June 2016.

²⁸ Davis, I., *The Regulation of Arms and Dual-Use Exports: Germany, Sweden and the United Kingdom*, SIPRI, Oxford University Press, Oxford, 2002.

²⁹ Bromley, M., 'The Impact on Domestic Policy of the EU Code of Conduct on Arms Exports: The Czech Republic, the Netherlands and Spain', *SIPRI Policy Paper* no. 21, SIPRI, Stockholm, May 2008; Bauer, 2003 (note 21).

Currently, the EU arms export control regime consists of three main instruments that play a direct role in establishing the norms and structures of EU member states' national systems: (a) the EU Common Position, which sets standards for controlling exports of military goods; (b) the 2014 ICT (intra-Community transfer) Directive, which establishes simplified procedures for the transfer of military goods to other EU member states; and (c) EU arms embargoes, which either implement United Nations arms embargoes, expand upon them, or are autonomous (as in the case of EU sanctions on Russia, Syria and Venezuela).³⁰ This system is complemented by the Council Joint Actions on Small Arms and Light Weapons (SALW) of December 1998 and July 2002 and the Council Common Position on arms brokering of June 2003.³¹

The EU has also established two separate legal instruments that regulate the internal market for, and international trade in, civilian firearms (namely the 2009 Firearms Regulation and the 1991 Firearms Directive, as amended in 2008).³² In addition, for items with both military and civilian application, so-called dual-use goods, the EU has established Council Regulation 428/2009 (Dual-use Regulation) which oversees trade in this area.³³ Finally, the EU has also introduced a regulation covering the trade in certain goods that could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (2005 anti-Torture Regulation).³⁴

The EU promotes its standards in the field of arms export controls through common positions at international forums and EU-funded capacity-building programmes for third countries, e.g. the Partner-to-Partner (P2P) Export Control Programme.³⁵ The EU has also invested significant resources in supporting the negotiation, adoption, universalization and implementation of the Arms Trade Treaty (ATT). The ATT entered into force in 2014 and, in terms of its aims and content, strongly reflects many of the standards and principles of the EU Common Position.³⁶

Responsibility for overseeing these various instruments lies with different EU institutions and, in certain cases, different sections within them: (a) the EEAS oversees the implementation of the EU Common Position; (b) the European Commission's Service for Foreign Policy Instruments (FPI) oversees the implementation of EU arms embargoes and the anti-Torture Regulation; (c) the European Commission's Directorate General for Trade (DG Trade) is responsible for the implementation of the Dual-use Regulation; and (d) the European Commission's Directorate General for Internal Market, Industry, Entrepreneurship and SMEs (DG Growth) oversees the implementation of the ICT Directive. By contrast, in a majority of member states many aspects of policy implementation are consolidated. For example, while controls on the trade

³⁰ Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community, *OJ L 146*, 10.6.2009, p. 1–36; Service for Foreign Policy Instruments of the EU Commission (FPI), 'Sanctions', *FPI Website*, http://ec.europa.eu/dgs/fpi/what-we-do/sanctions_en.htm.

³¹ Council of the European Union, 'Joint Action of 17 December 1998 adopted by the Council on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons', *OJ L 9*, 15.1.1999, p. 1–5; Council of the European Union, 'Council Joint Action of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP', *OJ L 191*, 19.7.2002, p. 1–4; and Council of the European Union, 'Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering', *OJ L 156*, 25.6.2003, p. 79–80.

³² Directive 91/477/EEC on the control of the acquisition and possession of weapons as amended by Directive 2008/51/EC (EU Firearms Directive) *OJ L 179*, 8.7.2008, p. 5–11; and Regulation No. 258/2012 of the European Parliament and of the Council of 14 March 2012 implementing Article 10 of the United Nations Protocol against the illicit manufacturing of and trafficking in firearms (EU Firearms Regulation), *OJ L 94*, 30.3.2012, p. 1–15.

³³ Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, *OJ L 134*, 29.5.2009, p. 1–269.

³⁴ Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, *OJ L 200*, 30.7.2005, p. 1–19.

³⁵ 'EU P2P – Export Control Programme', <https://export-control.jrc.ec.europa.eu/>, accessed on 28 June 2018.

³⁶ Council of the European Union, 'Council Decision 2013/768/CFSP of 16 December 2013 on EU activities in support of the implementation of the Arms Trade Treaty, in the framework of the European Security Strategy', *OJ L 341*, 18.12.2013, p. 56–67.

in dual-use goods and arms are legally distinct at the EU level, they are often implemented by the same laws, regulations and government agencies at the national level.³⁷

The process of establishing the EU Common Position began in March 1991, when the Council of the EU established the Working Group on Conventional Arms Exports (COARM) to compare national practices in this area and discuss the potential for harmonization. The same year, EU member states agreed on seven criteria reflecting considerations, including human rights, regional stability and the risk of diversion, that member states should take into account when assessing arms exports. An additional eighth criterion, relating to economic development, was added in 1992.

In June 1998, EU member states adopted the EU Code of Conduct on Arms Exports (EU Code of Conduct). The EU Code of Conduct further elaborated the eight criteria agreed upon in 1991–92. In particular, EU member states agreed to deny an export licence if the transfer was deemed to conflict with criteria 1–4 and to ‘take into account’ the factors listed in criteria 5–8 when considering a licence application. EU member states also agreed to exchange confidential information on their denials of arms export licences and to consult when considering approving a licence that was ‘essentially identical’ to one previously denied by another state. In addition, they started to exchange information on their export licence approvals and their actual exports, which was compiled into an EU annual report on arms exports, initially by the EU Council Secretariat and later the EEAS. Officials from EU member states also met regularly in COARM to exchange views on individual recipient countries and discuss the interpretation and implementation of the criteria of the Code of Conduct.³⁸ In 2008 the Code of Conduct was transformed into the current legally binding EU Common Position. The EU Common Position’s Article 1 formally outlined for the first time the activities that EU member states should include in their arms export licensing systems, such as ‘licensed production; brokering; transit and transshipment; and intangible transfers of software and technology’. Other notable changes included additional language on international humanitarian law (IHL) in criterion 2 and additional language on diversion in criterion 7. The EU Common Position also introduced the obligation for EU countries to produce a national report on arms exports.³⁹

Since all aspects of policy implementation in the field of arms exports remained in the hands of EU member states, EU governments had and continue to have a certain leeway on how they interpret the criteria of the EU Common Position. Measuring the impact of the EU’s export control regime on the outcomes of member states’ policies is difficult, however, particularly given limitations in the available data. A number of studies, using a variety of methodologies, have analysed the outcomes of EU member states’ arms export policies since 1998 and assessed the impact of the EU Code of Conduct and EU Common Position on the policy outcomes of EU member states. For the most part, they have questioned the impact of these instruments and highlighted examples of lax and conflicting interpretations of the criteria by EU member states.⁴⁰

³⁷ Of the 27 EU member states that are also Wassenaar Arrangement participating states, 21 name a single government agency as being responsible for both arms and dual-use export controls. The exceptions are Austria, Czech Republic, France, Italy, Portugal, and Slovenia. Cyprus is not a Wassenaar Arrangement participating state. See ‘Participating States’, Wassenaar Arrangement, 7 July 2016, <http://www.wassenaar.org/participating-states/>.

³⁸ Bauer, S. and Bromley, M., ‘The European Union Code of Conduct on Arms Exports: Improving the Annual Report’, *SIPRI Policy Paper* No. 8, SIPRI, Stockholm, 2004.

³⁹ Bromley, M., ‘The review of the EU common position on arms exports: prospects for strengthened controls’, *EU Non-proliferation Paper* no. 7, SIPRI, Stockholm, 2012.

⁴⁰ For example, Amnesty International, ‘Undermining global security: The European Union arms exports’, Feb. 2004; Thurin, A., Marsh, N. and Jackson, T., ‘The efficacy of EU export control measures concerning small arms and light weapons’, UNIDIR, *Small Arms and Light Weapons Transfers*, 2005, pp. 53–78; Cooper, N., ‘What’s the point of arms transfer controls?’, *Contemporary Security Policy*, vol. 27, no. 1., 2006, pp.118–137; Saferworld, ‘Good conduct? Ten years of the EU Code of Conduct on Arms Exports’, June 2008; and ‘Lessons from MENA: Appraising EU transfers of military and security equipment to the Middle East and North Africa’, *Academia Press*, Nov. 2011; Bromley, M. and Brzoska, M., ‘Towards a common, restrictive EU arms export policy? The EU Code of Conduct on major conventional arms exports’, *European Foreign Affairs Review*, vol. 13, no. 2, 2008; Erickson, J. L., ‘Market Imperative

What is clear is that there continue to be cases where EU member states' foreign and security policy interests, or their historical ties to particular recipients, make them more or less likely to authorize certain exports. In 2013, for example, EU member states strongly disagreed about whether it was permissible to supply arms to opponents of President Bashar al-Assad in Syria, with France and the UK arguing in favour, and Austria and others arguing against.⁴¹ In 2014 the British Government indicated that it was prepared to block the export of Gripen combat aircraft from Sweden to Argentina by denying permission for the re-export of components manufactured in the UK.⁴² Finally, a 2015 study on the implementation of the 1989 EU arms embargo on China showed that despite almost three decades of implementation, there were still clear differences in the way it was interpreted and applied at the national level.⁴³

The lack of harmonization in EU member states' arms export policies was also visible in the policies implemented on the licensing of arms exports to states later affected by the Arab Spring uprisings, which started to gain momentum at the end of 2010. For example, EU member states showed divergent licensing patterns during 2006–10 with regard to exports of arms to Libya, with countries such as Belgium, France, Italy and the UK issuing licences for millions of euros, while others denied authorizations because of concerns about human rights or the risk of diversion.⁴⁴ Contrasting policies continue to be visible when it comes to the issuing of licences for the export of arms to states in the Saudi Arabia-led coalition engaged in the conflict in Yemen since 2015.⁴⁵ The SIPRI Arms Transfers Database shows that Saudi Arabia and the United Arab Emirates (UAE) have increased their arms imports in recent years and that some EU member states (France, Italy and the UK) remain among their largest suppliers.⁴⁶ Mounting allegations that IHL might have been violated by members of the Saudi Arabia-led coalition have triggered public and parliamentary debates throughout the EU on whether these exports have been conducted in line with the eight criteria of the Common Position. In some EU member states (Germany, Netherlands, Walloon Region of Belgium) this led to the decision to suspend or halt certain exports to Saudi Arabia and the UAE.⁴⁷ The latest EU annual report on arms exports, which covers the calendar year 2016, reveals that the total number of export licence denials issued to Saudi Arabia and the UAE has increased.⁴⁸ In other cases, resistance to public pressure resulted in the launching of legal challenges with the aim of demonstrating that national decision-making on arms exports to the Saudi Arabia-led coalition are not in line with national and European laws and regulations.⁴⁹

Reinforcing cooperation and promoting convergence are explicitly defined as common goals in the EU Common Position, and EU member states also acknowledged that 'the strengthening of a European defence technological and industrial base' should be accompanied by such convergence.⁵⁰ However, the ability and willingness to further consolidate the EU defence industry by means of enhanced cooperation

Meets Normative Power: Human Rights and European Arms Transfer Policy', *European Journal of International Relations*, vol. 19, no. 2, pp. 208–33.

⁴¹ Borger, J., 'Austria says UK push to arm Syrian rebels would violate international law', *The Guardian*, 14 May 2013.

⁴² Chuter, A., 'Argentina Buying Gripens? Brits Say 'No Way'', *Defence News*, 8 Nov. 2014.

⁴³ See Bräuner, O., Bromley, M., and Duchâtel, D., 'Western Arms Exports to China', *SIPRI Policy Paper*, SIPRI, Stockholm, Jan. 2015.

⁴⁴ Duquet, N., 'Business as usual? Assessing the impact of the Arab Spring on European arms export control policies', Flemish Peace Institute, March 2014.

⁴⁵ The Saudi Arabia-led coalition consists of Bahrain, Egypt, Jordan, Kuwait, Morocco, Senegal, Sudan, the United Arab Emirates (UAE) and, until June 2017, Qatar.

⁴⁶ SIPRI Arms Transfer Database (note 18)

⁴⁷ Bromley M. and Maletta, G., '[The conflict in Yemen and EU's arms export controls: Highlighting the flaws in the current regime](#)', *SIPRI Essay*, 16 Mar. 2018

⁴⁸ European External Action Service (EEAS), 'EU Annual Reports on Arms Exports, *EEAS Website*, https://eeas.europa.eu/headquarters/headquarters-homepage/8472/arms-export-control_en, accessed on 1 June 2018.

⁴⁹ Reuters, 'French government faces legal pressure over arms sales to Saudi, UAE', 6 May 2018; Campaign Against Arms Trade (CAAT), 'Saudi Arabia—legal challenge', <https://www.caat.org.uk/resources/countries/saudi-arabia/legal-2016>; MacAskill, E., 'Italian officials and German firm face legal action over Saudi arms sales', *The Guardian*, 18 Apr. 2018.

⁵⁰ Council of the European Union (note 8).

within the EU may clash with the divergent approaches that its member states adopt when issuing arms export licences. The review of the EU Common Position represents an opportunity to reflect on this issue and on whether changes in the EU defence production and institutional landscape may affect national prerogatives on export licensing. Since one rationale of the EDF is to develop joint capabilities to cope collectively with increasing instability in the European Neighbourhood and emerging threats, it is worth raising the question to what extent EU member states currently share threat perceptions and are comprehensively considering the consequences on regional stability that their export decisions may trigger in certain areas of the world. With reference to the specific case of Yemen, the European Parliament has called, more than once, for an arms embargo against members of the Saudi Arabia-led coalition, but neither the EEAS nor EU member states themselves have taken the initiative to adopt a coordinated response.⁵¹ However, the UK's decision to leave the EU (commonly known as Brexit) and the recent increased attention being paid to the consolidation of the EU defence industry, may create favourable conditions for more far-reaching positions.

4 Options for the review of the EU Common Position

Although EU member states decided to retain their prerogatives over every aspect of the implementation of their arms export policies, through the adoption of the EU Common Position they have committed 'to promote convergence' in this field.⁵² Nevertheless, evidence suggests that major improvements are needed to achieve this goal. As highlighted above, the fact that EU member states retained a high level of autonomy with regard to arms export decision making has resulted in considerable diversity of export control procedures, policy outcomes and complementary national laws and guidance documents. There are a number of options available to the EU institutions and member states when considering how to address these issues during the current review of the EU Common Position but, perhaps the most important, is that the review process is conducted in a clear and transparent manner that enables all relevant stakeholders to engage effectively. Such an approach could take into account the following proposals and suggested outcomes.

1. Peer review: National interpretations and applications of the EU Common Position continue to diverge, as has been made particularly obvious in the licensing policies vis-à-vis the Saudi Arabian-led coalition operating in Yemen. This gap could potentially be reduced through a peer-review process that would (a) identify areas of divergence, (b) explore the reasons behind them, and (c) discuss ways to enhance harmonization and common views. This could involve comparing how the EU Common Position is implemented in national laws and regulations as well as the methods and procedures used to assess licence applications. This in turn requires a comparison of sources, complementary criteria used and the types and roles of government agencies and ministries involved (e.g. who has a consulting, co-decision or veto role). Other areas that the peer-review process could explore are national practices in end-use controls. Since 2011 a number of EU member states have made significant changes in this area.⁵³ However, in contrast to previous practice, there does not appear to have been any attempt to upload these policy changes to the EU level. The review process could allow for these national changes to be analysed and assessed, and to determine which of them present areas of good practice that could be translated into EU-wide standards.

⁵¹ European Parliament resolution of 25 February 2016 on the humanitarian situation in Yemen ([2016/2515\(RSP\)](#)); European Parliament resolution of 30 November 2017 on the situation in Yemen ([2017/2849\(RSP\)](#));

⁵² Council of the European Union (note 8).

⁵³ 'Gabriel: Strengere Regelungen für den Export von Kleinwaffen [Gabriel: Stricter rules for the export of small arms]', Bundesministerium für Wirtschaft und Energie, 22 June 2015, <http://www.bmwi.de/DE/Presse/pressemitteilungen,did=706094.html>.

2. *A more comprehensive EU annual report on arms exports:* The European Parliament has already requested improvements to the quality, quantity, accessibility and user-friendliness of information in the EU annual report.⁵⁴ The amount of detail in the EU annual report has risen steadily since the instrument was created. However, there are signs that the dynamic of ever-increasing transparency at the EU level may be losing its momentum. The number of states making full submissions to the EU annual report—data on arms exports licensed and actual exports broken down by destination and common military list categories—fell from 21 for the report covering 2014 to 19 for the reports covering 2015 and 2016.⁵⁵ A key barrier to producing a more complete EU annual report is that a number of states—including France, Germany and the UK, the EU’s three largest arms exporters—do not have systems for collecting and reporting data on actual arms exports, and they appear unwilling to put such systems in place. The report could be turned into a more effective oversight tool by ensuring that all EU member states submit the data that is required in a standardized manner and by improving its timeliness. Establishing mechanisms through which member states share best practices on how to collect and present this data might be an option to be considered during the review. The significant delay in publishing the report could also be addressed by setting earlier deadlines for submission from EU member states. Further improvements could be achieved by increasing the level of detail in the data that states are asked to submit. Such data would include, for example, information on the type of end-user and the quantity of weapons exported.

3. *Improved national reports:* The EU Common Position obliges states to publish annual national reports on arms exports. As of June 2018, 22 of the 28 member states had produced at least one national annual report on arms exports, compared with 6 of the 15 in 1997, a year before the introduction of the EU Code of Conduct.⁵⁶ The content of these national reports has gradually increased over the years and several EU member states now make significant amounts of information available at the national level.⁵⁷ In 2012 the Netherlands began issuing publicly accessible notifications to parliament about any export licence granted for transfers of military items to a non-NATO state worth more than EUR 2 million.⁵⁸ In 2014 Germany began issuing publicly accessible notifications to the parliament about arms export approvals by the Bundessicherheitsrat (Federal German Security Council).⁵⁹ However, reports issued by many EU member states remain limited in detail. More work could be done to achieve common standards in the level of detail in EU member states’ national reports and to promote the wider adoption of best practice from states with high levels of transparency in this area.

4. *Further improvement of information-exchange mechanisms:* One of the main outcomes of the previous review of the EU Common Position, which concluded in 2015, was the improvement of mechanisms for intergovernmental information sharing, including the development of an online platform to use for this purpose.⁶⁰ While the development of such a tool represents an important step forward, there is scope for

⁵⁴ European Parliament resolution of 13 September 2017 on arms export: implementation of Common Position 2008/944/CFSP, 2017/2029(INI), Brussels, 13 Sep.2017.

⁵⁵ Council of the European Union, ‘Sixteenth Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment’, *OJ C 103*, 27.3.2015, p. 1–539; Council of the European Union, ‘Eighteenth Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment’, *OJ C 153*, 16.5.2017, p. 1–519; Council of the European Union, ‘Nineteenth Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment’, *OJ C 56*, 14.2.2018, p. 1–559.

⁵⁶ All national reports on arms exports are available at

http://www.sipri.org/research/armaments/transfers/transparency/national_reports/sipri-national-reports-database.

⁵⁷ Weber, H. and Bromley, M., ‘National reports on arms exports’, *SIPRI Factsheet*, Mar. 2011.

⁵⁸ Dutch Estates General, Second Chamber, ‘Brief van de staatssecretaris van economische zaken, landbouw en innovatie’ [Letter from the secretary of state for economic affairs, agriculture and innovation], Arms Export Control Policy no. 192, The Hague, 12 April 2012, <https://zoek.officielebekendmakingen.nl/kst-22054-192.html>.

⁵⁹ ‘Rules of Procedure of the Federal Security Council January 27, 1959 as amended on June 4, 2014’, <http://dip21.bundestag.de/dip21/btd/18/016/1801626.pdf>.

⁶⁰ Council of the European Union, (note 9).

further improvement. For example, it would be useful for EU member states to use this online tool to share past cases of diversion and warn other member states about companies involved in illicit activities.

5. Broader review of the eight criteria and user's guide: The review could examine whether the criteria in the EU Common Position and the content and format of the user's guide remain fit for purpose. This could entail adjusting the language of the EU Common Position, for example in criteria 2 (respect for human rights and IHL) and 7 (risk of diversion). In the first case, as previously noted by the European Parliament, in addition to assessing whether specific military technology might be used for internal repression or other undesired ends (functional approach), the exporting country could also assess risks in the light of the overall situation in the country of destination (principled approach).⁶¹ Furthermore, the language on diversion could be strengthened by requiring EU member states to deny licences when there is a risk that it might occur. Currently, the risk of diversion is something that EU member states are only required to consider as part of their licensing process. Finally, the user's guide could be turned into a more dynamic and regularly updated online resource. This could include links to publicly available information that could inform export licensing decisions.

6. Reduce procedural and enforcement divergences, where appropriate: A wide range of suggestions for how the EU Common Position could be strengthened have been made by think tanks, non-governmental organizations (NGOs) and the European Parliament. Many of these focused on the different reasons behind divergences in implementation, such as differences in EU member states' procedures and broader national policy priorities and choices. In addition, other divergences relate not to licensing decisions, but enforcement, notably the prosecution of violations. Here, a comparison between administrative and criminal sanctions could be conducted, as has been done in the dual-use area.⁶² The areas of divergence could be explored through the peer review discussed above.

7. Allocate appropriate resources for effective implementation and enforcement: Another factor that impacts licensing decisions and their enforcement, as well as the enforcement of EU and UN arms embargoes, is the allocation of resources for licensing authorities and ministries or other bodies involved in the process, which may include detection, investigation and prosecution authorities.⁶³ The level of resources allocated by EU member states could also be compared, as has been done in the dual-use context.⁶⁴ Investing resources in building capacity within the EU member states and EU institutions and making more efficient use of the tools and expertise already available to collect information and conduct verification are crucial to an effective arms export control system.

8. Stronger involvement of EU institutions in providing and verifying information: EU resources, such as its delegations abroad, could be used to assist EU member states with conducting risk assessments, end-user checks and post-shipment verification. Many smaller EU member states struggle with the complexities involved in accurately assessing the risks associated with arms exports.

9. Creating closer connections with other parts of the EU export control regime: As described before, the EU export control regime is fragmented into several legislative tools which are monitored by different entities within the EU institutional system. A more systematic way of ensuring coordination among the different parts of the EU export control regime could be explored through the review of the EU Common Position. These instruments often affect the same community of stakeholders and are often implemented by the

⁶¹ European Parliament (note 54).

⁶² Bauer, S., 'WMD-related dual-use trade control offences in the European Union: penalties and prosecutions', *EU Non-proliferation papers* no. 30, SIPRI, Stockholm, July 2013; Wetter, A., 'Enforcing European Union Law on Exports of Dual-use Goods', *SIPRI Research Reports*, Oxford, Oxford University Press, 2009.

⁶³ Bauer, S., Bromley, M. and Maletta, G., 'The implementation of the EU arms export control system', Workshop Summary Report, European Parliament Directorate General for External Policy, May 2017.

⁶⁴ SIPRI and ECORYS, 'Data and information collection for EU dual-use export control policy review: Final Report', Nov. 2015, <https://www.sipri.org/sites/default/files/final-report-eu-dualuse-review.pdf>.

same agency within EU member states. The ongoing re-cast of the EU Dual-use Regulation may also offer a valuable opportunity to reflect on the overall architecture of the EU export control system.

Given the challenges the EU is facing and the array of initiatives it is undertaking, it may be difficult to generate the attention necessary to prompt real change in the EU Common Position. However, many of these challenges and initiatives—particularly Brexit and the current renewed interest in consolidating the EU defence industry—may also serve to remove some of the obstacles that have previously blocked the adoption of more far-reaching proposals. Experience shows that lack of ambition, as evident in the previous review that concluded in 2015 and which failed to produce fundamental changes, may lead to further questioning of the effectiveness of the EU Common Position.⁶⁵ The 2018 review presents an opportunity to address weaknesses in the EU arms export control regime that have emerged in the light of recent events (e.g. the conflict in Yemen) or were not addressed in the first review process. More broadly, EU member states should bear in mind that divergence in this policy area could impact on their ability to act as a reliable foreign policy actor and affect the outcome of ongoing international and regional crises. The ultimate outcome of this review will rely on the level of political commitment and engagement the EU member states will decide to invest.

Box 1. The criteria of the EU Common Position on arms exports

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

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

⁶⁵ Bromley M. and Maletta, G., (note 47)

ANNEX II: Presentation Slides

The further development of the Common Position 2008/944/CFSP on arms exports

Dr. Sibylle Bauer and Giovanna Maletta

European Parliament, 19 June 2018, Brussels

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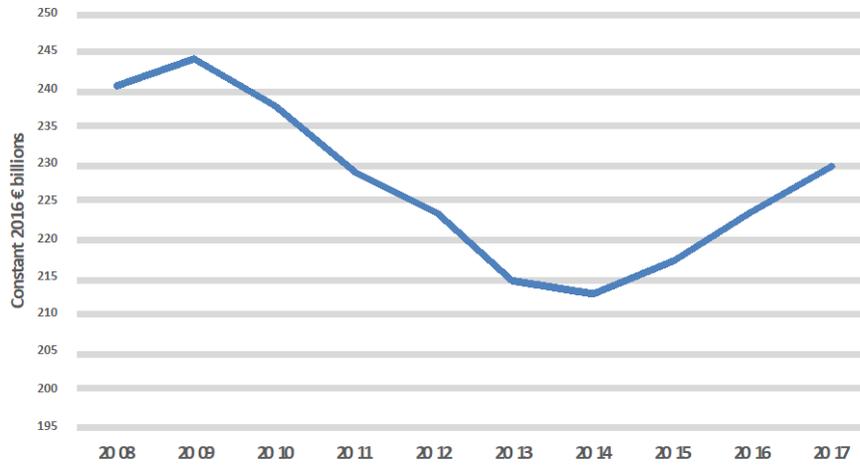
Outline

- Setting the scene: trends in EU Member States' military spending, arms production and arms transfers
- Recent EU initiatives to strengthen defence cooperation
- EU Member States policies and practices in arms export controls
- Options for the review of the Common Position

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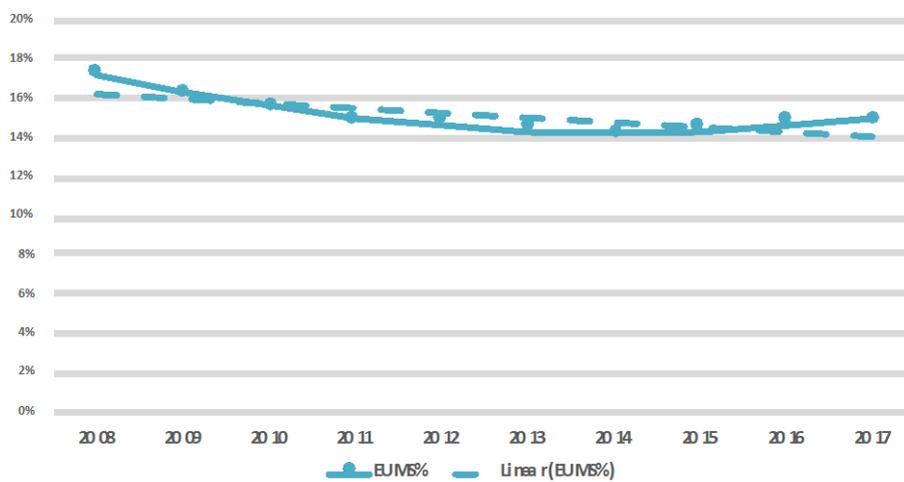
19/06/2018

EU Member States' military expenditure 2008-17



Source: SIPRI Military Expenditure Database

EU member states' share of global military expenditure 2008-17

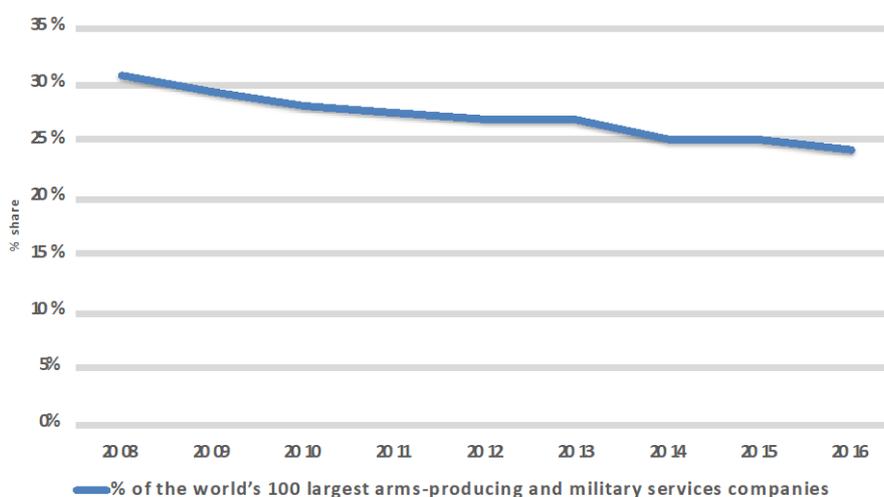


Source: SIPRI Military Expenditure Database

EU Member States' military expenditure 2008-17

- Since 2008 EUMS military expenditure has fallen
- In the period 2008-2017:
 - i. Military spending decreased from €240 billion to €229.5 billion
 - ii. EUMS' share of global military spending fell from 17% to 15%
- This trend is reversing:
 - i. In 2013-2017: EUMS millex rose by 7%
 - ii. 2017: UK, France, Germany, Italy in the top 15 of world's largest spenders (10% of the global total)

EU-based firms' share of the global arms sales 2008-16



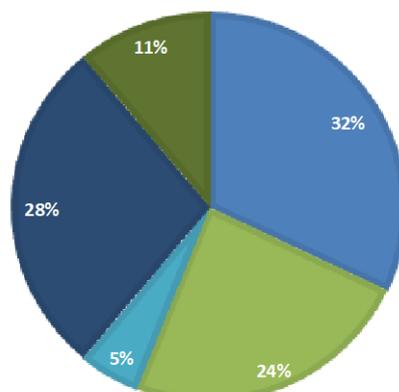
Source: SIPRI Arms Industry Database

The EU defence industry

- €97.3 billion turnover in 2014 and 500 000 employees
- Structure: small group of large companies plus 1350 SMEs concentrated in UK, FR, DE, IT, ES, SE
- An average of 25 EU-based firms among the world's 100 largest companies in 2008-2016
- These firms' share of the world's 100 largest companies' total arms sales fell from almost 31% in 2008 to 24% in 2016

EU Member States' share of global arms transfers 2008-17

■ Average % USA ■ Average % Russia ■ Average % China ■ Average % EU ■ Average % Others



Source: SIPRI Arms Transfer Database

Recent EU initiatives to strengthen defence cooperation

- EU Defence Action Plan (June 2017);
- European Defence Fund (EDF) (June 2017)
- Permanent Structured Cooperation on defence (PESCO) (December 2017)

Overall goals: *strategic autonomy; reinforcing single market for defence; allocate defence spending more efficiently; addressing security threats in the neighborhood.*

Challenges: *EUMS' prerogatives on (a) PESCO projects, (b) defence procurement, (c) EDF priorities (d) issuing arms export licences.*

Policies and practices in arms export controls

- Overview of the EU dual-use and arms export control instruments and responsible agencies
- Historical developments of the EU arms export control regime: from the Code of Conduct to the 2008 Common Position
- The Common Position at its 10th anniversary: lack of harmonization and divergent interpretation of the criteria in crisis situations (Syria, Arab spring, Yemen)

Divergent arms export policies and defence cooperation

- EU Common Position: ‘the strengthening of a European defence technological and industrial base’ should be accompanied by convergence in EUMS arms export policies
- Efforts to strengthen EU Defence Cooperation challenged by lack of harmonization in this field
- EUMS arms exports to certain destinations also clashing with goal of addressing instability in the EU neighborhood
- Lack of harmonization weakens EU role as foreign policy actor

The 2018 Review of the Common Position represents the occasion to address these issues.

Possible outcomes of the Review I

- **Peer review process of EUMS implementation of the Common Position to:**
 - i. Identify areas of divergence
 - ii. Explore the reasons behind them
 - iii. Discuss ways to enhance harmonization

This process could envisage:

- i. Comparing: how the EUCP is implemented in national legal systems; methods used to assess licence applications; agencies and resources involved
- ii. Sharing best practices

Possible outcomes of the Review II

- **Production of a more comprehensive EU annual report on arms exports through:**
 - i. Improve accessibility and user-friendliness
 - ii. Incentivise all EUMS to make full submission
 - iii. Increase quality of information reported by including data on actual arms exports
 - iv. Increase quantity of information reported by including information on end-users and quantity of weapons exported
 - v. Improve the timeliness of report publication

Possible outcomes of Review III

- **Improve national reports by EUMS by increasing level of details included in the report**
- **Further improve information-exchange mechanisms** by:
 - i. Sharing past cases of diversion
 - ii. Warning other EU MS about companies involved in illicit activities
 - iii. Informing about suspended or revoked licences

Possible outcomes of the Review IV

- **Broader review of 8 Criteria and User's Guide**

Revision of language of the criteria:

- i. Criterion 2 (respect for human rights and IHL): adoption of 'principled' in addition to 'functional approach'
- ii. Criterion 7 (diversion): EU MS could be required to deny licences when there is a risk that diversion might occur

Enhance user-friendliness of User's guide by including links to publicly available information that could inform export licensing decisions.

Possible outcomes of the Review V

- **Reduce procedural and enforcement divergences, where appropriate**

- **Allocate appropriate resources for effective implementation and enforcement:**

- i. By investing in building capacity within EU MS and EU institutions;
- ii. By making more efficient use of tools and expertise already available to collect information and conduct verification.

Possible outcomes of the Review VI

- **Stronger involvement of EU institutions in providing and verifying information:**

For example by using EU delegations abroad to assist EU MS with conducting risk assessments, end-user checks and post-shipment verification

- **Creating closer connections with other parts of EU export control regime.**

Recent SIPRI publications

- Wezeman , P.D. et al., '[Trends in international arms transfers, 2017](#)', SIPRI, March 2018;
- Tian, N. et al., '[Trends in world military expenditure, 2017](#)', SIPRI, May 2018;
- Fleurant, A. et al., '[The SIPRI Top 100 arms-producing and military services companies, 2016](#)', SIPRI, December 2017;
- Bromley, M., Maletta. G., '[The conflict in Yemen and EU's arms export controls: Highlighting the flaws in the current regime](#)', SIPRI Essay, March 2018

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