

Good conduct?

Ten years of the EU Code of Conduct on Arms Exports



This report is by several European Union non-governmental organisations

June 2008



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JUNE 2008

Acknowledgements

This report is by the following organisations:

- Campagne tegen Wapenhandel, the Netherlands
- Caritas, France
- ControllARMI: Rete Italiana per il Disarmo (Italian Network on Disarmament), Italy
- Groupe de recherche et d'information sur la paix et la sécurité (GRIP), Belgium
- Saferworld, UK
- School for a Culture of Peace, Spain
- Swedish Peace and Arbitration Society (SPAS), Sweden
- Transparency International, UK

This report was written by Helen Close and by Roy Isbister of Saferworld. Constructive contributions were received from Laetitia Cohendet, Andrea Huber, Rolf Lindahl, Robert Lindner, Jacqueline Macalesher, Katherine Nightingale, Robert Parker, Joe Roeber, Dominic Scott and Frank Slijper. The report is published by Saferworld.

This report was made possible by the generous support of the Joseph Rowntree Charitable Trust, the Network for Social Change and the Polden-Puckham Charitable Foundation.

Acronyms

ALH	Advanced Light Helicopter
ANC	African National Congress
ATC	Air Traffic Control
COARM	EU Council Working Group on Conventional Arms
COTS	Commercial off-the-shelf goods and technologies
EU	European Union
H&K	Heckler and Koch
ICAO	International Civil Aviation Organisation
IHL	International Humanitarian Law
ML	Military List
NATO	North Atlantic Treaty Organisation
NGO	non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
US	United States



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Executive summary

THE EU CODE OF CONDUCT ON ARMS EXPORTS (EU Code)ⁱ, the foundation-stone of the EU international conventional arms transfer control regime, is ten years old. When first adopted it was both an unprecedented step for major arms exporting states to take and a product of its time. In negotiating and adopting the EU Code, Member States acknowledged that the old way of managing arms exports, with each country following its own largely secretive path, was no longer good enough. Revelations of bad practice in the 1980s, most notably with regard to some Member States arming both protagonists of the Iran-Iraq war and Iraq in the lead-up to the first Gulf War, prompted public outcry and a review of transfer control policy. Something had to be done to get the EU's house in order, and thus, on 8 June 1998, the EU Code was born.

The stated purpose of the EU Code is:

*to set high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers by all Member States; ... to prevent the export of equipment which might be used for internal repression or international aggression or contribute to regional instability; [and] ... to reinforce cooperation and to promote convergence in the field of conventional arms exports.*ⁱⁱ

It consists of eight criteria designed to prevent arms transfers from the EU *inter alia* contributing to human rights abuses or internal repression, or undermining international peace and security or sustainable development. It also contains a set of operative provisions intended to assist implementation by Member States and develop co-operation between them.

Development of the EU Code and its operative provisions has not been static. In the ten years since its adoption, an ever-developing infrastructure designed to improve implementation, increase inter-Member State coherence and respond to changes in the arms trade has built up around the EU Code. For example, Member States have agreed a Common Military List of equipment covered by the EU Codeⁱⁱⁱ, a Common Position on Arms Brokering^{iv}, and an EU Code User's Guide to assist implementation^v. This ability and willingness to update the regime is one of its main strengths, and one that bodes well for maintaining relevance in future.

ⁱ EU Code of Conduct on Arms Exports (EU Code), 8 June 2008, <http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf>.

ⁱⁱ *Ibid.*, preamble.

ⁱⁱⁱ Common Military List of the EU (2007/197/CFSP), last updated 19 March 2007, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/L_088/L_08820070329en00580089.pdf.

^{iv} Council Common Position on the Control of Arms Brokering (2003/468/CFSP), 23 June 2003, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/L_088/L_08820070329en00580089.pdf.

^v User's Guide to the EU Code of Conduct on Arms Exports, last updated 22 February 2008, <http://register.consilium.europa.eu/pdf/en/08/st07/st07486.en08.pdf>.

Assessing the precise impact of the EU Code is very difficult. In the years preceding its adoption, information on arms transfers from the EU was extremely hard to come by. Transparency has since improved markedly, with most Member States publishing annual national reports on transfer licensing, and an EU Consolidated report collating and publishing national figures on an annual basis. However, despite this progress towards a more open system, there is still not enough information publicly available for observers to properly assess licensing decisions against the EU Code criteria, especially on borderline or ‘difficult’ cases. More information is needed on the precise nature of items to be transferred and in what quantities, and detailed information about ultimate end-users and the proposed end-use of goods being transferred is also necessary for an accurate assessment of the licensing decision to be made. Nevertheless, it does seem that we are unlikely to see a return to the secretive practices of previous decades and that the limits of acceptability are now more tightly drawn.

Yet the picture is far from perfect. Despite the positive developments and achievements of the EU Code, Member States continue to approve transfers that appear to contravene the EU Code criteria. The size and value of particular deals, and the powerful status of some recipients of EU transfers seem to be contributing factors to Member States’ decisions which on occasion override concerns raised by the EU Code. Member States also sometimes undermine each other’s licensing decisions by picking up deals which have previously been turned down by another Member State. The EU Code allows too much ‘wiggle room’, both in terms of the vagueness of its language and because its politically-binding status does not provide appropriate space for legal challenge. Three years ago, however, officials finalised a draft text for a legally-binding Common Position, which would replace the EU Code and go some way to mitigating these problems. However, the EU has still not taken the decision at the political level to adopt this new instrument. Failure to complete this process is increasingly bringing the will of Member States to fulfil the originally stated purpose of the EU Code into question.

Furthermore, the phenomenon of globalisation has significantly changed the old understanding of national arms industries as independent, stand-alone enterprises. Rising numbers of joint-ventures between states (both EU and non-EU), the transfer of production capacity to non-EU states, the increasing importance of non-military items in military production and the re-transfer of EU-sourced items by non-EU states are challenges to which Member States have been slow to rise.

To their credit EU Member States are working with other states to build shared understandings of how to manage the arms trade in future, notably through their support for an international Arms Trade Treaty. But as a regional bloc, the EU should be doing more to build on the relative successes of ten years of the EU Code, and to maintain control of its defence technology and equipment, including after it has left EU territory, if the EU Code is to fulfil its original stated purpose.

This report seeks to take stock after ten years of EU Code operation. While recognising the progress that has been made in many areas, it seeks to identify steps which Member States should consider over the coming months and years to address the gaps and shortcomings which prevent the EU Code from fulfilling its stated purpose. It argues that the transformation of the EU Code into a legally-binding Common Position must be completed immediately. However this alone will not address the key challenges confronting the EU, in particular:

- the need for actual implementation of the criteria to reflect the spirit and intent of the EU Code and for fewer contradictions in implementation among Member States
- the need for Member States to do more to address the consequences of globalisation and the changing nature of the arms trade.

This report, after a very brief look at the origins of the EU Code, examines these issues in more detail and proposes a number of changes to the current regime that would

make for a more responsible and effective system of arms transfer controls as we move into the next ten years.

This report then considers a number of other arms transfer issues – arms brokering, corruption and transparency – that require further attention, however given that the report is intended to be selective rather than comprehensive, these are addressed with relative brevity. This is not, however, an indication of their relative importance.

Key recommendations

The following is a summary of the key recommendations contained in the report; recommendations are also included at the end of each section, and a full list can be found in Annex 1.

EU Member States should:

- **transform the EU Code into a Common Position** at the earliest opportunity
- **amend the language of the criteria** or **produce new guidance** on criteria implementation which reduces the current excessive room for Member States to make decisions contrary to the spirit and intent of the EU Code and reduces the incidence of Member States making contradictory and contrary decisions
- do more to control transfers that take place under the effective control of EU-based entities or that involve the use of EU-sourced goods and technology where the items are being transferred from non-EU territory
- **tighten controls on the transfer of components**, including in circumstances where the items to be transferred are not normally subject to licensing control but are known to be for a use which would otherwise be proscribed by the EU Code
- **introduce re-export controls** as standard in all licences, and reserve the right to carry out post-export end-use monitoring checks where there is a suspicion or significant risk that end-use guarantees are being broken
- **comply fully with the EU Common Position on the Control of Arms Brokering**
- extend mandatory rules on controlling ‘third-country’ arms brokering to cover all brokering activities of EU nationals, regardless of where these activities are carried out
- **introduce new measures to reduce the risk of corruption** in arms transfer deals, for example by requiring companies to identify a named executive to take personal responsibility for ensuring contracts are free from corruption
- agree in principle and then **work towards adopting best practices in national reporting** from around the EU.

1

Introduction

THE EU CODE OF CONDUCT ON ARMS EXPORTS (EU Code)¹, the foundation-stone of the EU international conventional arms transfer control regime, is ten years old. When first adopted it was both an unprecedented step for major arms exporting states to take and a product of its time. In negotiating and adopting the EU Code, Member States acknowledged that the old way of managing arms exports, with each country following its own largely secretive path, was no longer good enough. Revelations of bad practice in the 1980s, most notably with regard to some Member States arming both protagonists of the Iran-Iraq war and Iraq in the lead-up to the first Gulf War, prompted public outcry and a review of transfer control policy. Something had to be done to get the EU's house in order, and thus, on 8 June 1998, the EU Code was born.

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This report seeks to take stock after ten years of EU Code operation. While recognising the progress that has been made in many areas, it seeks to identify steps which Member States should consider over the coming months and years to address the gaps and shortcomings which prevent the EU Code from fulfilling its stated purpose. It argues that the transformation of the EU Code into a legally-binding Common Position must be completed immediately. However this alone will not address the key challenges confronting the EU, in particular:

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¹ EU Code of Conduct on Arms Exports (EU Code), 8 June 2008, www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf.

² *Ibid.*, preamble.

2

The origins of the EU Code

AS MENTIONED ABOVE, a key driver for changing the way EU arms transfer controls worked was the revelation of the involvement of EU Member States in arming both sides in the Iran-Iraq war, and then Iraq ahead of the first Gulf War. This resulted in an acknowledgement by Member States that things had to change, and by summer 1992 Member States had agreed in two Declarations a set of eight criteria that were to guide their decision-making.³ An initial assessment by a small group of non-governmental organisations (NGOs) – Amnesty International, Campaign Against Arms Trade, Saferworld and the World Development Movement – suggested that the impact of the proposed criteria was likely to be insignificant. These NGOs then set out their own vision for an EU Code. Much work was done by the NGO community to promote the idea, but the tipping point was reached in 1997 when a government supportive of developing an EU Code was elected in the UK. Then with France throwing its support behind the concept, it became a matter of when, not if, an agreement would be finalised.

Since the EU Code was adopted, Member States have agreed a variety of additional instruments, elaborations and policy developments that build upon and further improve the EU Code. Member States have agreed *inter alia*:

- a Common Military List of equipment to which the EU Code applies⁴
- a regime for controlling the transfer of dual-use items (items that can have either a military or civil use)⁵
- controls on arms brokering⁶
- controls on the transfer of equipment for use in torture or capital punishment⁷

³ Declaration on Non-proliferation and Arms Exports, European Council, Luxembourg, June 1991 and, Additional Criteria, European Council, Lisbon, June 1992.

⁴ Council Declaration issued on the occasion of the adoption of the common list of military equipment covered by the European Union Code of Conduct on Arms Exports (2000/C 191/01), 13 June 2000, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:191:0001:0019:EN:PDF>.

⁵ Council Regulation (EC) setting up a Community regime for the control of exports of dual-use items and technology (No 1334/2000), 22 June 2000, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/L_159/L_15920000630en00010215.pdf.

⁶ Council Common Position on the Control of Arms Brokering (2003/468/CFSP), 23 June 2003, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/L_088/L_08820070329en00580089.pdf.

⁷ Council Regulation (EC) concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (No 1236/2005), June 2005, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:200:0001:0019:EN:PDF>.

- a Joint Action on EU Code outreach⁸
- a User's Guide to the EU Code, regularly updated, which summarises agreed guidance for the interpretation of EU Code criteria and implementation of its operative provisions⁹
- to support calls for an international conventional Arms Trade Treaty¹⁰.

There have, however, been disappointments as well. In 2004 new guidelines were introduced that in some cases effectively absolved Member States of the responsibility to consider the risks associated with the ultimate end-use or end-user of items exported for incorporation into products for subsequent re-export. Instead, if the incorporating country is regarded as having an effective transfer control system in place, it is left to the state of incorporation to take account of those risks.¹¹

From 2004 to 2007 Member States set out in greater detail the factors to be considered and the best practices used across the EU when assessing licence applications under each of the EU Code criteria.¹² However, the exercise simply clarified existing practice, rather than attempting to improve it, and as such was a missed opportunity and ultimately failed to meet expectations.

Furthermore, there are other proposals made but not yet agreed which are of fundamental importance to the future operation of the EU regime. In addition to the possible transformation of the politically-binding EU Code into a legally-binding Common Position (see chapter 3 below); the European Commission is leading on proposals to relax regulations on intra-community transfers for both dual-use and military goods.¹³

⁸ Council Joint Action on support for EU activities in order to promote the control of arms exports and the principles and criteria of the EU Code of Conduct on Arms Exports among third countries (2008/230/CFSP), 17 March 2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:075:0081:0085:EN:PDF>.

⁹ User's Guide to the EU Code of Conduct on Arms Exports, last updated 29 February 2008, <http://register.consilium.europa.eu/pdf/en/08/st07/st07486.en08.pdf>.

¹⁰ See "Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms", UN General Assembly Resolution 61/89, 18 December 2006, http://disarmament.un.org/cab/ATT/Resolution_61_89.pdf.

¹¹ "Assessment of applications for 'incorporation' and re-export", User's Guide, chapter 2, section 2, p. 20.

¹² "Criteria guidance", User's Guide, chapter 3, pp. 24–96.

¹³ See 'Proposal for a directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community', 2007, http://ec.europa.eu/enterprise/defence/defence_docs/Defence_Directive_EN.pdf; and 'Proposal for a Council Regulation setting up a Community regime for the control of exports of dual-use items and technology', December 2006, <http://register.consilium.europa.eu/pdf/en/06/st16/st16989.en06.pdf>.

3

Transforming the EU Code

IN 2003, Member States began a review of the text of the EU Code. The review was in effect completed in less than two years, with a draft ‘Common Position Defining Common Rules Governing the Control of the Exports of Military Technology and Equipment’ produced in June 2005.¹⁴ The fact that the new text was to be a Common Position was of itself significant; the EU Code is a political document, and as such is not legally binding. In contrast, Member States are legally obliged to ensure that their national legislation is consistent with a Common Position. Such a change, which was not expected when the review began, was broadly and warmly welcomed by Member States and civil society alike.

Three years on from a draft text being agreed by officials, the Common Position has still not been adopted. This is primarily due to opposition from France, which has been using this as a bargaining chip in its efforts to lift the EU arms embargo on China.¹⁵ Since the end of 2006 France has in effect been isolated in its opposition. However, as adoption of the Common Position is by consensus, France is able to frustrate the will of the rest of the Member States.

The Common Position as currently drafted is a far from perfect document, and in fact in many ways is simply a reproduction of the EU Code, with the same arrangement of criteria and operative provisions. However it does contain some real improvements. These include:

- A recommendation that where licences are required for *inter alia* foreign licensed production, arms brokering and transit and transshipment, the criteria shall be applied.
- An explicit reference in criterion 2 of the need to “deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law [IHL]” – IHL is a key issue when considering licensing decisions but current language on IHL in the EU Code is weak.

¹⁴ Draft ‘Common Position Defining Common Rules Governing the Control of the Exports of Military Technology and Equipment’, June 2005.

¹⁵ Discussions with Government officials; ‘France blocking plan for EU code on arms exports’, *EUobserver.com*, 18 January 2007, <http://euobserver.com/9/23296>.

- A requirement that an EU Report will be published.
- A requirement that Member States will publish national reports.

Unfortunately, some of these improvements are weakened by caveats. For example, deciding when licences are actually required and what the content of national reports should be is left to national discretion. And a major weakness of the draft text is that while still promoting the concept of convergence, it does nothing to reduce the space for criteria interpretation that Member States currently enjoy.

Ultimately, the two most significant improvements are the reference to IHL and the change in status of the document. By introducing the legal requirement that any licence applications must be assessed against the criteria, it would seem the draft Common Position promises an opportunity for transfer decisions to be challenged in a court of law. While the limitations this will place on Member States may at first be slight (not least due to the still-vague language of the criteria), any future changes to the regime should themselves fall within this legally-binding framework and will thus be subject to legal limitation.

A Common Position should also have implications for transfer controls beyond EU borders. It would oblige candidates for EU accession to ensure their own national law is in compliance with the Common Position, as this would become part of the EU *acquis communautaire*. Furthermore, the credibility of EU support for a legally-binding international Arms Trade Treaty is seriously undermined by the fact that to date the EU has proved unable to agree a legally-binding instrument among its own members.

Some states have already made changes to national legislation that reflect their EU commitments. Belgium has fully incorporated the EU Code into national legislation. Austria, Finland, Germany, Spain and the UK have all incorporated elements of the EU Code into their law.

Recommendation *Member States should replace the EU Code with the Common Position immediately.*

4

Implementing the current regime

AS OUTLINED IN ITS ORIGINAL OBJECTIVES, the EU Code is intended to set high common standards and promote convergence among Member States.¹⁶ The shared criteria set the standards, while a range of operative provisions are designed to boost harmonisation. These include a denial notification and consultation mechanism, a set of recommended best practices in the area of end-user certificates, and the EU Consolidated Report which collates and publishes national figures on arms exports on an annual basis.

These objectives should manifest themselves in two ways. First, transfers should not be authorised that contravene the EU Code criteria, and second, Member States should largely agree on the EU Code's application. However, evidence suggests that states are on occasion failing to measure up on both counts, and that therefore the overarching instrument governing EU arms transfers, be it the EU Code or a Common Position, needs to be strengthened.

Decision-making against the EU Code criteria

Most transfers authorised by Member States are not problematic under the EU Code criteria and it is certainly possible to identify other states whose practice gives greater cause for concern. However the EU's performance should not be measured by comparing it to that of others, but rather against the commitments publicly made by its members. Despite claims to the contrary by Member States, there are numerous examples, some of which are set out below, where there would seem to be a very strong case for saying those commitments have not been met.

EU arms transfers and human rights/internal repression

Criterion 2 of the EU Code requires that Member States will not issue an export licence if there is a clear risk that the proposed export might be used for internal repression. Nevertheless, every year licences are authorised for transfers of particularly sensitive equipment to countries that are widely regarded as having serious human rights

¹⁶ This language occurs in both the preamble to, and operative provision 7, of the EU Code.

problems (for more information about the human rights situation in the countries mentioned in this section, see the Amnesty International Annual Reports and the US State Department Country Reports on Human Rights Practices for the relevant years¹⁷), and where it is arguable that a 'clear risk' exists.

For example, according to customs data, in 2005 the Czech Republic and Slovakia together exported to Colombia 7,459 pistols/revolvers and over €50,000 worth of parts and accessories for pistols/revolvers¹⁸; Poland and Slovakia exported 2,177 pistols/revolvers and €1.3 million worth of parts/accessories for pistols/revolvers respectively to Israel.¹⁹

Also in 2005, Italy exported over 16,000 pistols/revolvers to Pakistan.²⁰ In 2006 the UK authorised the transfer of 1,007 sniper rifles to the same country, as well as 5,367 sniper rifles, components for sniper rifles, stun grenades, armoured all-wheel-drive vehicles and components for air-to-air and air-to-surface missiles to Turkey.²¹

EU transfers to Saudi Arabia raise questions under several of the criteria, including criterion 2. In October 2007 Belgium refused a licence on human rights grounds to transfer components for armoured vehicles to Saudi Arabia via BAE Systems in the UK. Then, in December 2007, the new Flemish Economy Minister, Patricia Ceysens, overturned that decision and issued the licence (which was valued at €56 million). She argued there were no legal or technical reasons preventing a licence being granted.²² Meanwhile, in 2006, Germany and the UK were granting licences for transfers to Saudi Arabia of a range of small arms, with the UK also approving a licence for the transfer of armoured all-wheel-drive vehicles.²³ In 2007, the UK licensed the export of armoured all-wheel-drive vehicles and 625 heavy machine guns.²⁴

EU arms transfers and regional peace, security and stability

Under criterion 4, Member States are required not to issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim.

There are, however, at least three regional potential flash-points where EU Member States are particularly active as exporters – China-Taiwan, the Middle East and South Asia – to the point where it would appear problematic under EU rules.

China

China regards Taiwan as a renegade province and reserves the right to assert this territorial claim by force, despite a US commitment to directly intervene were Taiwan to be attacked by China. This is widely regarded as a real threat to regional stability. There are other threats as well, for example, Chinese claims to resources and territory in the East China Sea are contested by Japan and Taiwan, and China's military spending is rising fast. Yet despite all this and the existence of an EU arms embargo on China, between 2002 and 2006 ten EU Member States – Austria, the Czech Republic, France, Germany, Italy, Latvia, Netherlands, Slovakia, Slovenia, and the UK – either exported

¹⁷ 'Amnesty International Annual Reports: The State of the World's Human Rights', Amnesty International, <http://thereport.amnesty.org/eng/Homepage>; 'Country Reports on Human Rights Practices', US State Department, <http://www.state.gov/g/drl/rls/hrpt>.

¹⁸ UN Comtrade data is customs data released by individual states for collation in the UN. However not all states release information to Comtrade, and there is a lack of consistency regarding the exact information provided by those that do. For example, the UK does not release information on exports of military weapons or pistols/revolvers. Also, as Comtrade uses customs data, the transfers captured may be re-transfers or equipment to peacekeeping operations. Comtrade figures cited here and elsewhere in this report have been converted from \$ to € according to historical exchange rates, see <http://www.oanda.com/convert/fxhistory>. For this information the Comtrade data was accessed from NISAT database on 18 and 24 April 2008.

¹⁹ NISAT database, accessed on 24 April 2008.

²⁰ NISAT database, accessed on 24 April 2008.

²¹ UK Strategic Export Controls: Annual Report 2006, p. 129, Foreign and Commonwealth Office. For all UK Strategic Export Controls Annual Reports see <http://www.fco.gov.uk/en/about-the-fco/publications/publications/annual-reports/export-controls>.

²² 'Flemish foreign arms trade and trade in dual-use goods in 2007', *Flemish Peace Institute*, 2008.

²³ *Bericht der Bundesregierung über ihre Exportpolitik für konventionelle Rüstungsgüter im Jahre 2006* Rüstungsexportbericht 2006, p. 122; UK Strategic Export Controls: Annual Report 2006, Foreign and Commonwealth Office, 2007.

²⁴ See UK Strategic Export Controls: Quarterly Reports 2007.

Military List items or granted export licences to China. Particularly notable were France, with licences granted to a value of approximately €850 million over the five years, and UK with licences valued at just over €450 million during the same period.²⁵ The UK authorises the transfer of equipment and technology for use in China's own defence production, while France, according to UN Comtrade data, exported €2.17 million worth of "bombs, grenades, ammunition, mines and other" to China in 2005, and over €1.24 million worth of the same equipment in 2004.²⁶ The French national report on arms transfers records that the French exported *inter alia* €69.1 million of electrical equipment designed for military end-use in 2005.²⁷

South Asia (India-Pakistan):

Tensions between India and Pakistan over and around the line of control in Kashmir have ebbed and flowed for more than fifty years, with three wars fought during this period. With both parties now nuclear armed, the potential consequences of a fourth war are catastrophic. States should therefore exercise extreme care under criterion 4 of the EU Code when assessing licence applications for transfers to India or Pakistan, and should be particularly wary of assuming that a short-term easing of tension represents permanent change.

Yet both countries, especially India, are vibrant markets for EU defence companies. Licences granted by France, Germany and the UK for transfers to India during the period 2003–06 were valued at more than €3 billion, with over €2 billion by France alone. Equipment from virtually every Military List category was available for sale, with only ML20 (cryogenic and 'superconductive' equipment and related equipment) not represented.²⁸

Some of the deals to supply India with aircraft are particularly worrying. France sold India 10 Mirage fighter aircraft in 2000 while the UK sold 40 Jaguar fighter-bombers in 1999; these are both capable of delivering nuclear weapons with little or no modification.²⁹ The UK followed this up in 2004 by approving a deal for 66 Hawk advanced jet trainers and related systems, which are likely to be used to train the pilots who might one day fly Indian nuclear-armed aircraft. The Hawks can also be refitted for combat (they have been used offensively elsewhere) and are ideally suited to navigating Kashmir's mountainous terrain. The Head of the Indian Airforce Training Command stated the Hawks might be used in combat "should an operational scenario present itself."³⁰ At around the same time, France was concluding a €2.4 billion deal for 6 Scorpene submarines³¹, which will be capable of delivering cruise missiles.³²

During the same period, France, Germany and the UK approved more than €1.75 billion worth of arms transfers to Pakistan. France was again by far the most prominent, with almost €1.4 billion worth of deals, while Germany licensed items from almost every category of Military List goods.³³

Middle East

Arms sales into the Middle East through the 1980s were a key factor in the decision to establish the EU Code. Yet this region is still one where EU arms transfer decisions give greatest cause for concern. The sheer scale of some of the deals on offer appears

²⁵ Fifth, Sixth, Seventh, Eighth and Ninth annual report according to operative provision 8 of the EU Code of Conduct on Arms Exports (EU Consolidated report). All the EU Consolidated Reports can be found via http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=408&lang=en&mode=g#exp1.

²⁶ NISAT database, accessed on 24 April 2008.

²⁷ Rapport au Parlement sur les exportations d'armement 2005, Department of Defence, September 2006, Annex 7, http://www.defense.gouv.fr/defense/layout/set/popup/content/download/48052/476764/file/annexe_7_pages_de_rapport_parlementaire_de_l_armement_sept_2006_annexe7_.pdf.

²⁸ Sixth, Seventh, Eighth and Ninth EU Consolidated Reports.

²⁹ 'Nuclear diplomacy returns to South Asian security agenda', *Jane's Intelligence Review*, 1 May 2002; and SIPRI database on arms transfers, accessed 16 April 2008.

³⁰ *Times of India*, 26 May 2005, cited in CAAT news August/September 2005, p. 5.

³¹ SIPRI database on arms transfers, accessed 16 April 2008.

³² 'India to get Scorpene by 2012', *Times of India*, http://timesofindia.indiatimes.com/India/India_to_get_Scorpene_by_2012/articleshow/2790300.cms.

³³ Sixth, Seventh, Eighth and Ninth EU Consolidated Reports.

enough to have some Member States suspend their better judgement, while in other cases an active involvement in conflict would seem to encourage excessive EU supply.

Saudi Arabia

Saudi Arabia is considered by many to be a politically-fragile country. There are fears that were the current regime to crumble, its replacement could be fundamentally opposed to Western interests in the region. Yet EU Member States are fighting each other (and others) for a chance to be involved in massive, lucrative Saudi arms purchases. The value of licences issued by Member States for exports of military goods (not including dual-use goods) to Saudi Arabia for the period 2003–06 was around €6.7 billion, of which France (with licences valued at over €4 billion), Belgium (almost €400 million) and Germany (over €150 million) have been the chief beneficiaries. The only categories of military equipment not licensed for sale to Saudi Arabia by France and Germany were ML12 (high velocity kinetic energy weapon systems and related equipment), ML19 (directed energy weapon systems and related equipment) and ML20 (cryogenic and ‘superconductive’ equipment and related equipment).³⁴

Yet these figures are dwarfed by the UK – Saudi Arabia ‘Al Yamamah’ contract, the UK’s largest ever defence sale. Under this deal – originally signed in the mid-1980s – BAE Systems has earned revenues of more than €50 billion (at current exchange rates) through the supply and maintenance of Tornado jet aircraft and other military equipment.³⁵ A further deal for 72 Eurofighter Typhoon jets, named al-Salam and expected to be worth €25 billion over the next 20 years, is currently being finalised. One of the UK’s chief competitors for this deal has been France’s Rafale fighter, for which the French Government, including even the then President Chirac, lobbied intensively.³⁶

Iraq

EU Member States have been involved in supplying arms to the new regime in Iraq. This, given the support of some EU States for the 2003 invasion, may come as no surprise, but it is unclear how much thought has been given to the longer-term consequences of such decisions. During the period 2003–2006, UK licences were valued at almost €190 million and Polish licences at over €140 million.³⁷ Both states are recorded as licensing equipment from the Military List categories covering items such as small arms, military vehicles and their components, and aircraft and related equipment and components. For Poland this included more than 50,000 small arms exported to the Iraqi Government in 2005–06³⁸; while the UK authorised the transfer of approximately 20,000 pistols in 2006.³⁹ Austria has also been active, supplying the Iraqi police with over 200,000 Glock pistols.⁴⁰ There are serious concerns that at least some of the small arms transferred may have been diverted to elements opposed to the current Iraqi regime (for more on this, see Chapter 6 below).

Israel

Despite ongoing concerns about Israeli tactics in the Occupied Territories and the more general Arab-Israeli tensions that flow from the Israel-Palestine question, Member States are remarkably sanguine about supplying Israel with military equipment. During 2002–2006, Member States licensed the transfer of almost €900 million worth of military items to Israel. The only category of military equipment not licensed for sale to Israel was ML19 (directed energy weapon systems and related equipment).⁴¹

³⁴ Sixth, Seventh, Eighth and Ninth EU Consolidated reports. Note that Belgium entry in the EU Consolidated Report does not include a breakdown of licences issued by Military List category.

³⁵ This deal does not appear in the Consolidated Reports because the principals were the UK and Saudi Governments. Therefore no commercial transfer licences have been required, despite the fact that BAE Systems is the prime contractor.

³⁶ James Boxell, ‘Dassault’s multi-role fighter is losing out in sales dogfights’, *Financial Times*, 17 July 2006.

³⁷ Sixth, Seventh, Eighth and Ninth EU Consolidated Reports.

³⁸ UN Register of Conventional Arms: Poland 2005 and 2006, http://disarmament.un.org/UN_REGISTER.nsf.

³⁹ ‘Inquiry into secret guns-for-Iraq deal’ *The Times*, 1 April 2006, <http://www.timesonline.co.uk/tol/news/world/iraq/article700737.ece>.

⁴⁰ File on Four, ‘Iraqi Guns’, *BBC Radio 4*, 23 May 2006, http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/06_06_06_iraqi_guns.pdf; Peter Pilz, ‘Wirbel um Pistolen aus Österreich’, *Der Standard*, 22 February 2006.

⁴¹ Fifth, Sixth, Seventh, Eighth and Ninth EU Consolidated reports.

EU States have tended toward supplying components rather than complete systems; however this fits with a general trend in the international arms trade, and the supply of components will typically be critical to the effective functioning of a modern military and security sector. Beyond direct transfers, there is also the problem of EU Member States, for example, Ireland, the Netherlands and the UK, authorising the transfer of components to the US, for ‘incorporation’ into attack helicopters and fighter aircraft for onward sale to Israel (for more on this see Chapter 5 below).

EU arms transfers and sustainable development

Criterion 8 – the ‘sustainable development’ criterion – considers the compatibility of arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources. The following cases highlight ways in which some Member States appear to have undermined the principle that arms transfers should not hamper sustainable development.

South Africa

In November 1999, South Africa signed procurement contracts worth ZAR30 billion (approximately €4.5 billion) for 28 Gripen combat aircraft from Sweden, 24 Hawk jet trainers from the UK, 3 corvettes (warships) and 4 submarines from Germany, and 40 light helicopters from Italy. The deal was criticised by the South African Defence Department’s chief director of acquisitions, Major General Otto Schür for ignoring South Africa’s real military needs⁴² and widely criticised for diverting desperately needed money away from socially productive areas such as education, health and sanitation. In 2000, South Africa’s Human Development Index as compiled by the UN Development Programme (UNDP) was 0.707; by 2005 it had dropped to 0.674.⁴³

Tanzania

In 2001 the UK agreed to license the export of a military air traffic control (ATC) system to Tanzania for €45 million. The system was described in a World Bank commissioned investigation by the International Civil Aviation Organisation (ICAO) as a “waste of money” that used “outdated technology”. The ICAO reported that a perfectly good civil aviation ATC system could have been had for a ninth of the price. The approval came just after Gordon Brown, the then UK Chancellor, had written off Tanzania’s debt “in a deal that insisted the country should not then engage on expensive military and civil projects.”⁴⁴ In 2001, Tanzania was ranked 140 out of 162 on the UNDP Human Development Index.⁴⁵ The UK defended its decision on the grounds that it was not for it to judge whether the transfer represented value for money.

Pakistan

In 2006 Pakistan signed a contract with Swedish company Saab for the Erieye military radar system.⁴⁶ The cost of this deal, at €900 million, is 12 times the annual Pakistan budget for water and sanitation. Every year in Pakistan 118,000 people die of diarrhoea.⁴⁷ In 2006 Pakistan was ranked 134 out of 177 on the UNDP Human Development Index⁴⁸, while adult literacy rates (for 1995–2005) were 49.9 percent.⁴⁹

⁴² Linda Ensor, ‘SA’s R13.7bn fighter jets turn into an expensive folly’, *Business Day*, 12 March 2007, <http://www.armsdeal-vpo.co.za/articles10/expensive.html>.

⁴³ Human Development Report 2007/2008, ‘Human Development Index rankings’, UN Development Programme, p. 236.

⁴⁴ David Hencke, ‘Tanzania wants new deal on air system’, *The Guardian*, 15 June 2002, <http://www.guardian.co.uk/tanzania/story/0,,737902,00.html>.

⁴⁵ Human Development Report 2001, ‘Human Development Index rankings’, UN Development Programme, p. 143, <http://hdr.undp.org/en/media/completenew1.pdf>.

⁴⁶ ‘Sweden, Pakistan Erieye deal reaches final hurdle’ *Jane’s Defence Industry*, 1 July 2006.

⁴⁷ Statistics, Water Aid, http://www.wateraid.org/uk/what_we_do/statistics/default.asp.

⁴⁸ Human Development Report 2006, p. 285, <http://hdr.undp.org/en/media/hdr06-complete.pdf>.

⁴⁹ Human Development Report 2007/2008, ‘Literacy and enrolment’, <http://hdrstats.undp.org/indicators/110.html>.

There are also worrying signs of a lack of coherence among Member States' attitudes toward international arms transfers and their broader development policy. In some cases EU governments are matching defence exports with development aid. This could be interpreted as subsidising the defence sector through the aid budget, which would clearly be problematic. For example, French bilateral aid to Egypt totalled €64.5m in 2005⁵⁰; in the same year France delivered military equipment worth €62.5 million.⁵¹ The UK donated at least €142 million in bilateral aid to Pakistan in 2005–06⁵², while over the same period the UK issued arms export licences worth at least €118 million.⁵³

Convergence of practice across the EU

Decisions about arms transfers are the responsibility of individual Member States, and licensing decisions do require judgement. It is therefore inevitable that there will be discrepancies in the way that different Member States implement the EU Code. However, the interests of responsible control are best served by Member States working to develop common understandings and to avoid contrary decisions that undermine the EU Code criteria. The rules under which Member States operate are the same; we should therefore expect similar outcomes, particularly given that the EU Code has greater convergence as one of its aims.

Converging 'up', not down

The EU Code commits itself to “not infringing on the right of Member States to operate more restrictive national policies.”⁵⁴ When combined with the goal of high common standards, this should direct Member States to use the EU Code as a way of spreading best practice. This can be seen at work in the way the decision of the Netherlands to publish a national report on arms transfers was apparently directly influenced by Sweden having already done so⁵⁵, and more generally in the steady, if slow, improvements in national reporting that have taken place across the EU over the last decade.

However, this goal of convergence can also have the opposite result. It can drive Member States to relax more stringent national controls and practices in line with weaker practice in other Member States. For example, when Dutch attempts to have the EU adopt its policy of potentially refusing a licence based on the recipient state's record of reporting to the UN Register of Conventional Arms failed, national policy was changed so that lack of participation in the Register could no longer be the sole grounds for a Dutch denial. A Dutch official noted that “we were out of line with the rest of Europe and [changed our policy].”⁵⁶ Also, a policy introduced nationally in 1998 in response to nuclear weapon tests by India and Pakistan to ban arms exports to both countries was eventually reversed when other Member States failed to follow the Dutch lead.⁵⁷

The 2003 Swedish review of their national arms transfer control laws presents another example of the risk that convergence can actually lower standards. The review proposed to reverse a Swedish policy (first introduced in 1993) whereby the human rights situation in the recipient state is always a factor in licensing decisions, even where the specific items to be transferred would clearly not be used to violate human rights. Instead, Sweden would adopt the EU Code approach, that is, licences would be

50 'Les notes du jeudi', *Direction generale de la cooperation internationale et du developpement*, 18 January 2007, http://www.diplomatie.gouv.fr/fr/IMG/pdf/Note_68.pdf.

51 Annex 15, *Rapport au parlement sur les exportations d'armement de la France en 2005*, Ministry of Defence, 2006, http://www.defense.gouv.fr/defense/layout/set/popup/content/download/48030/476555/file/annexe_15_-_partie_4_pages_de_rapport_parlementaire_de_l_armement_sept_2006_annexe15_partie4_.pdf.

52 'Top 20 recipients of bilateral aid', DFID, <http://www.dfid.gov.uk/pubs/files/sid2006/Table-7.xls>.

53 UK Strategic Export Controls Annual Reports 2005 and 2006, Foreign and Commonwealth Office.

54 EU Code, operative provision 2.

55 Mark Bromley, 'The Impact on Domestic Policy of the EU Code of Conduct on Arms Exports: The Czech Republic, the Netherlands and Spain', *SIPRI Policy Paper 21*, May 2008, p. 34.

56 *Ibid.*, pp. 32–33.

57 *Ibid.*, p. 33.

assessed against the risk that the particular equipment might be used in human rights abuses. The review also decided against introducing a ‘democracy’ criterion into national law, on the grounds that no other EU Member State followed such practice.⁵⁸ (Note that although completed in 2005, the review has not as yet led to changes in the law – the Swedish authorities are waiting for the draft Common Position to be agreed, to be sure the new national law is consistent with it). Pressures to lower standards to EU levels where national controls are more stringent should be resisted.

Indications of a lack of convergence

Due to the partial level of transparency among Member States (see chapter 7 below), it is difficult to judge the extent of convergence at the level of individual licensing decisions. There are, however, indications that not only are Member States in many cases not ‘converging up’, they are having trouble agreeing common cause at a lower level. Defence industry representatives regularly comment that the licensing playing field is not level across the EU. For example, Richard Hlavatý, Managing Director of the Association of the Defence Industry of the Czech Republic (Asociace Obranneho Prumyslu), has claimed that the Czech Government interprets the EU Code more rigidly than do neighbouring countries.⁵⁹ The Chief Executive Officer of Thales Netherlands commented in 2003 that the Dutch Government was applying the EU Code “more strictly than other EU members” to the extent that their “competitiveness [was] being eroded”.⁶⁰

Convergence around criterion 8

The interpretation of criterion 8 in particular appears to vary widely among Member States, despite the fact that the User’s Guide contains a seven-page elaboration of how it should be implemented.⁶¹ During 2004–2006, France refused 60 licences on this basis.⁶² The UK, the only EU member comparable to France in terms of scale of transfers, has its own methodology for assessing criterion 8 issues; over the same period the UK refused no licences on this basis. Sweden does not even have in place a methodology for making assessments of risk under criterion 8 and will not refuse a transfer solely on the grounds that it is going to a poor country.⁶³

Information about bilateral consultations

It would be helpful if information were published about the result of consultations between Member States on individual licence applications (a Member State, receiving a licence application for a transfer ‘essentially identical’ to one for which a licence has already been refused by another Member State, must consult with that state before approving the licence), but little is publicly available. However, in 2004, giving evidence to a parliamentary committee, the then UK Foreign Secretary Jack Straw reported that the UK “consulted other member states 20 times [in 2003] and undercut 5 times”⁶⁴ (an undercut is where the second state, after consulting with the state that has already refused a licence, decides to proceed with the transfer). A Foreign Office official further noted that there were approximately 15 undercuts across the EU as a whole in 2003.⁶⁵ At around 100 consultations in total for that year⁶⁶ this works out at an undercut rate of about 15 percent, which would seem unfortunately high. It would be useful if figures were available for other years in order to assess developments over

⁵⁸ KRUT-Reformrat regelverk för handel med försvarsmateriel, SOU 2005:9, <http://www.regeringen.se/sb/d/108/a/38919>.

⁵⁹ Cited in Mark Bromley, ‘The Impact on Domestic Policy of the EU Code of Conduct on Arms Exports’, p. 28.

⁶⁰ ‘Dutch industry in danger of withering away’, *Jane’s Defence Weekly*, 7 May 2003.

⁶¹ ‘Best practices for interpretation of Criterion 8 (“Sustainable development”)’, User’s Guide, chapter 3, section 8, pp. 90–96.

⁶² Seventh, Eighth and Ninth EU Consolidated Reports.

⁶³ Interview with Swedish official, November 2007.

⁶⁴ UK Quadripartite Select Committee, First Joint Report of Session 2003–04, Ev. 5, Qu. 23, 25 February 2004.

⁶⁵ *Ibid.*, Qu. 22.

⁶⁶ Sixth EU Consolidated Report (2004/C 316/01), 21 December 2004, Table B: Total number of consultations initiated and total number of consultations received by each member state in 2003, p. 111, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:316:0001:0215:EN:PDF>.

time; unfortunately no such data has been made public. Certainly more thought needs to be given to how the consultation mechanism could be used more proactively to encourage greater convergence.

Contradictory decision-making

Specific examples where convergence has been conspicuous by its absence do occasionally come to light. For example, in 2002 Germany refused a licence for the transfer of automatic weapons to Nepal. However, at the same time the UK and Belgium approved licences for a similar transaction.⁶⁷ In the Belgian case, the sale of over 5000 FN Herstal light machine guns was approved by the Belgian Government after Germany refused an export licence for a similar transaction (on the basis of instability and widespread violations of human rights).⁶⁸ Belgium ignored the requirements of the EU Code consultation mechanism and failed to discuss the transaction with Germany before issuing the licence. When this came to light it caused considerable controversy in Belgium; in part as a consequence, Belgium enshrined the EU Code into domestic legislation the following year.⁶⁹

Another specific example of where Member States have appeared to be working at cross-purposes is the decision in 2004 by Austria to export 800 sniper rifles (with a range of 1.5 km and able to penetrate body armour and armoured personnel carriers) to Iran, ostensibly for border patrol and against drug trafficking.⁷⁰ Both the British and US Embassies in Vienna demarched the Austrian authorities, highlighting in particular the risk of diversion.⁷¹ Austria did eventually revoke the licence, however some of the rifles had already been transferred.⁷²

Recommendations

In order to improve convergence of practice across the EU, Member States should:

- *recommit to using the EU regime as a means of spreading best practice, rather than as a way of reducing EU behaviour to that of the lowest common denominator*
- *increase transparency with regard to the details about individual licensing decisions and in particular about the denial notification and consultation mechanisms*
- *revise the consultation mechanism to develop a system of peer review in the case of possible 'undercuts' (that is, where one Member State intends to approve a transfer previously refused by another)*
- *amend the language of the criteria or produce new guidance on criteria implementation to reduce the current excessive room for Member States to make contradictory and contrary decisions*
- *improve the quality of information-sharing regarding marginal cases (for both approved and refused transactions) to provide a bank of relevant information for reference in future difficult cases.*

⁶⁷ For information on the UK case, see Berliner Zeitung, 8 May 2002 and 'Undermining global security: European arms exports', Amnesty International, March 2004, <http://www.amnesty.org/en/library/asset/ACT30/003/2004/en/t7XIEYsEtE0J>.

⁶⁸ 'Belgium defends arms sales to Nepal', *BBC News*, 26 August 2002, http://news.bbc.co.uk/1/hi/world/south_asia/2216446.stm.

⁶⁹ 'Loi introduisant en droit belge le Code de conduite européen sur les exportations d'armes (Law introducing into Belgian law the EU Code of Conduct on Arms Export)', 26 March 2003, <http://www.grip.org/bdg/g2072.html>.

⁷⁰ 'Austrian arms manufacturer sold 800 rifles to Iran', *AFP*, 9 February 2005.

⁷¹ Further letter to the Chairman of the Committee from Dr Kim Howells MP, Minister of State, UK Foreign and Commonwealth Office, Select Committee on Foreign Affairs: minutes of evidence, 13 December 2007, http://www.publications.parliament.uk/cgi-bin/newhtml_hl?DB=semukparl&STEMMER=en&WORDS=steyr%20iran&ALL=steyr%20iran&ANY=&PHRASE=&CATEGORIES=&SIMPLE=&SPEAKER=&COLOUR=red&STYLE=s&ANCHOR=muscat_highlighter_first_match&URL=/pa/cm200708/cmselect/cmcaff/142/7112814.htm#muscat_highlighter_first_match.

⁷² *Ibid.*

5

Gaps in the current regime: addressing globalisation

IT IS ONE THING TO ENFORCE THE EU CODE CRITERIA MORE RIGOROUSLY in the case of straightforward licence applications that involve the transfer of readily identifiable military equipment from an EU Member State directly to a final destination. It is another thing entirely to maintain effective control over complicated supply chains that may involve serial movements of components and sub-assemblies from a wide range of suppliers from all over the globe, with final assembly of the finished product potentially taking place in a non-EU state. Unfortunately, the EU Code was designed to deal with the more straightforward cases. To date, Member States have proved less capable and less willing to deal with the implications of the more complicated aspects of the modern arms trade, but the ongoing globalisation of the defence sector is making it increasingly important that they do so.

Meanwhile, defence companies are not waiting for Member States to act. Unsurprisingly, they are using the tools of globalisation to maximise profits and gain better access to overseas markets. This can involve a range of measures such as buying components from offshore, buying foreign companies outright, or setting up foreign licensed production facilities, subsidiaries, joint ventures or mergers. Buyers now frequently insist on inward investment (offsets) as a condition of sale; this will typically involve *direct* offsets, which involve at least part of the production of the equipment being bought taking place inside the country of purchase (*indirect* offsets relate to inward investment unrelated to the actual military sale). Defence companies have been quick to exploit the way production in-country can improve prospects for making subsequent sales in that country, be it in India, South Africa or the US.

There is a need to recognise that the current trend of shifting and dispersing production offshore creates *greater* proliferation risks than does exporting finished products, yet levels of control are *lower*. Any EU activity that transfers responsibility for export licensing to non-EU states that may have a very different attitude toward transfer controls should be subject to the most careful consideration and risk assessment. The EU transfer control regime needs to shift gears to reflect this strategic reality.

The sections that follow highlight some of the different ways globalisation is impacting upon the arms trade, and draws attention to the type of issues Member States will need to tackle to ensure the EU control regime maintains its relevance and increases its effectiveness.

Moving production offshore

There will frequently be advantages to shifting production offshore. These could include better access to the in-country market, cheaper production costs (especially in low-wage economies), and access to new downstream export markets (especially where the local arms transfer control regime reflects different objectives or values to those of EU Member States). It should come as no surprise that EU-based defence companies are seeking to take advantage.

Moving 'home'

BAE Systems, headquartered in the UK, now describes itself as having six 'home' markets – Australia, Saudi Arabia, South Africa, Sweden, the UK and the US. These together account for 85 percent of its sales.⁷³ While some of these states might be described as relatively 'like-minded' in terms of transfer controls, each market will operate somewhat differently and each may offer different export potential. In South Africa, for example, BAE Systems holds a 75 percent share in armoured-vehicles-maker Land Systems OMC, which has exported more than 1,000 vehicles deployed in over 40 countries around the world⁷⁴, including Guinea, India (for use in Kashmir), Indonesia, the Ivory Coast, Nepal, Rwanda, Serbia and Uganda.⁷⁵ There are serious doubts that the UK would have permitted these exports direct from UK territory in all cases.

BAE Systems is looking to make India its seventh home market. To this end, it has formed joint ventures to develop flight control systems and an Indian armoured vehicle.⁷⁶ Of the 66 Hawk advanced jet trainers BAE is currently under contract to supply to India (see chapter 4 above), only 24 are to be manufactured in the UK, with the other 42 to be produced in India.⁷⁷ According to the *International Business Times*, BAE Systems is now in talks with Indian aircraft maker Hindustan Aeronautics Ltd to jointly make Hawks in India for the global market.⁷⁸ There are obvious risks that Hawks could be transferred from India to those whom the UK Government would regard as inappropriate, given the differences between Indian and UK foreign and defence policy priorities.

Foreign licensed production

A number of EU-based companies have in the past sought to establish foreign licensed production of their products. That is, their products are produced by another company in another country, using their intellectual property. This arrangement could also involve some level of physical support (for example, training, supply of components or production equipment). The risk is that without adequate provisions to control levels of production and onward export, the EU quickly loses control over the downstream proliferation that can occur once the foreign production is up and running.

⁷³ 'Chief Executive's review: other home markets', BAE Systems Annual Report 2007, <http://production.investis.com/annualreport07/business/chiefexec/ohmarkets/>; 'Chief Executive's review: delivering global growth', BAE Systems Annual Report 2007, <http://production.investis.com/annualreport07/business/chiefexec/>.

⁷⁴ See BAE Systems website, Land Systems OMC, <http://www.baesystems.com/WorldwideLocations/SouthAfrica/LandSystemsSouthAfricaLSSA/LandSystemsOMC/index.htm>.

⁷⁵ See South Africa's submissions to the UN Register of Conventional Arms, 2001–06, http://disarmament.un.org/UN_REGISTER.nsf.

⁷⁶ 'India to snub German-led EADS as BAE eyes \$10bn fighter jet deal', *The Times*, 22 February 2008, http://business.timesonline.co.uk/tol/business/industry_sectors/engineering/article3412685.ece.

⁷⁷ Christine Buckley and David Robertson, 'BAE Systems cuts 600 jobs as orders for Red Arrows aircraft dry up', *The Times*, 4 April 2008, http://business.timesonline.co.uk/tol/business/industry_sectors/engineering/article3677921.ece.

⁷⁸ 'UK's BAE, India's HAL may form aircraft joint venture', *International Business Times*, 1 January 2008, <http://in.ibtimes.com/articles/20080101/bae-systems-hal-air-force-aircraft.htm>.

Austrian company Glock announced in 2005 that it intended to establish a licensed production facility in Dubai to produce Glock pistols for the regional market, with expected regional demand of 30–40,000 pistols per year.⁷⁹ The deal was never approved, however it was then reported that Glock planned to establish a similar facility in Brazil with the aim of exporting to Latin America, Africa and parts of Asia (especially China), and to the Brazilian armed forces, police and private security guards.⁸⁰

At around the same time, Steyr Mannlicher, another Austrian company, was attempting to set up a licensed production facility in Malaysia to produce assault rifles.⁸¹ This deal eventually fell through; Steyr-Mannlicher was then reported to have entered into negotiations to establish a facility in India.⁸² The outcome of those negotiations is not known, however comments around the time from Steyr Mannlicher executives Andreas Phillip (“one has it so difficult in Austria as [an] arms manufacturer that parts of production have been transferred outside the country”⁸³), and Wolfgang Furlinger (“in Austria, there exists two realities: one legal and one political. As a weapons manufacturer, one is helplessly at the mercy of the second”⁸⁴), suggest two things. First, that Austria has been tightening its arms transfer control policies, which of course is welcome. Second, that moving production offshore is a way around the tighter controls.

Licensed production deals by German company Heckler and Koch (H&K) from the 1960s and 70s give an indication of the possible long-term implications of such arrangements. H&K established licensed production of assault rifles in both Iran and Pakistan, conditional on the weapons produced being only for domestic use by national armed forces. However, changing governments in these states did not regard themselves as bound by the original end-use guarantees. In 2001, Pakistan reportedly transferred domestically-produced H&K assault rifles to Sri Lanka.⁸⁵ Similarly, Iran is reputed to be a source of assault-rifle proliferation based on production capacities once imported from Germany.⁸⁶ In March 2003, the Serbian Prime Minister Zoran Djindjic was assassinated with a H&K sniper rifle. The analysis of the rifle by the German federal criminal police revealed that it had been pieced together from components produced in several countries abroad that previously imported German production capacity.⁸⁷

Supplying production technology

A simpler way of becoming involved in foreign production is to provide some (or all) of the equipment or technology required to produce the items in question. Arrangements of this type can again create risks which EU Member States must address.

For example, in the 1990s, Belgian company FN Herstal equipped the Kenyan Eldoret facility for the manufacture of military small arms ammunition. Although the Kenyan Government provided written assurances that production from this plant would not be exported to belligerent parties in the Great Lakes region, there have been repeated accusations that Eldoret ammunition has found its way onto illicit markets in the region.⁸⁸ Reported annual production capacity of 20 million rounds greatly exceeds the national defence requirements of the Kenyan armed forces (estimated at two to

⁷⁹ ‘Dubai likely to get pistol assembly line’, *Asia Africa Intelligence Wire*, 15 February 2005, http://www.accessmylibrary.com/coms2/summary_0286-18777807_ITM.

⁸⁰ ‘O duelo das pistolas’, *Terra*, 17 August 2005, http://www.terra.com.br/istoedinheiro/414/economia/duelo_pistolas.htm.

⁸¹ ‘Austria transfers rifle production to Malaysia’, Amnesty International, 4 April 2005, http://www.aimalaysia.org/index.php?option=com_content&task=view&id=86&Itemid=45.

⁸² Michael Nikbaksh, ‘Austrian arms manufacturer Steyr Mannlicher has troubles in Malaysia’, *Profil*, May 2005.

⁸³ ‘Lay down the weapons’, *Profil*, 12 June 2006.

⁸⁴ ‘Austrian arms manufacturer Steyr Mannlicher has troubles in Malaysia’, *Profil*, May 2005.

⁸⁵ See ‘Undermining Global Security’, p. 35f; Holgar Anders ‘Export controls on production capacities for military equipment: strengthening the EU approach’, *GRIP*, July 2004, http://www.grip.org/bdg/g4580.html#_ednref8.

⁸⁶ Interview with German arms export official, Federal Ministry of Economics, Berlin, June 2004, cited in ‘Export controls on production capacities for military equipment: Strengthening the EU approach’.

⁸⁷ Communication with German Federal Criminal Police, January 2004 cited in ‘Export controls on production capacities for military equipment: strengthening the EU approach’.

⁸⁸ See, for example, ‘Undermining Global Security’, *Amnesty International*, 2004, p. 35f.

three million rounds)⁸⁹, which, coupled with low levels of transparency in terms of production and the use to which this ammunition is put⁹⁰, exacerbates concerns about possible diversion.

It is quite likely that at least some of the cases above would have involved licensable transfers of technology or equipment from the EU-based (parent) company to enable the foreign production. However, it is difficult to judge how extensive the licensing obligations would be, and there is typically no way of knowing the conditions that might be attached to such licences (for example production ceilings; re-export prospects; monitoring arrangements). Moreover, by its very nature, this technology or equipment does not enjoy the high recognition factor of a finished military item; in many cases there is little public or parliamentary awareness of what is involved. As one of the greatest spurs to responsibility in government is transparency and public accountability, the dangers of this lack of awareness should be clear.

A further danger lies in the risk that as more of these arrangements are put in place, resulting in more associated facilities to draw on for intermediate supply, there will be increasing opportunities for companies to set up supply chains that bypass an EU connection completely.

Supplying components

It is now common for finished weapons platforms or systems to include components from many countries, including from EU Member States, with an increasing number of these components not subject to any form of transfer control.

For those components that are on the EU Military and Dual-Use Lists, there is a temptation to apply lower control standards than is the case for finished products, with pressure on licensing authorities not to refuse transfers where they will only make up a relatively small part of a complete item. It is argued that transfer control decisions should be left to the country of final assembly, and that to be seen as unduly pedantic when licensing the movement of components risks the country's reputation as a reliable supplier and thus may prevent companies' future involvement in the international supply chain. The temptation to authorise 'marginal' cases is probably multiplied by the fact that for external observers, keeping track of components licensed for transfer is extremely difficult, and less transparency tends to go hand-in-hand with looser decision-making. Member States must resist the temptation to apply lower licensing standards in these cases.

In addition, it seems components which do not appear on any control lists are more frequently being incorporated into equipment for conventional military, security and police end-use and end-users. The EU transfer control regime is powerless to intervene, except in some circumstances where a country is under embargo (and where the component is for incorporation into a product on the EU Military List).

The ways in which the defence industry and arms trade are developing suggests that the transfer of components, both listed and unlisted, will continue to grow in importance. Failing to treat components with due seriousness is likely, over time, to see a progressive worsening in the quality of transfer controls and an increasing gap between the actual operation of the EU Code and its stated objectives.

Exports for 'incorporation'

In 2004 new guidelines were introduced that lowered the standards of control applied to transfers of items – typically components or sub-assemblies – that were to be

⁸⁹ See 'Kenya Will Not Close Eldoret Bullet Factory, Says Murungaru', *East African*, 2003, <http://www.nationaudio.com/News/EastAfrican/20102003/Regional/Regional35.html>.

⁹⁰ For more on this case, see Holger Anders, 'Export controls on production capacities for military equipment: Strengthening the EU approach', *GRIP*, 19 July 2005, http://www.grip.org/bdgg/g4580.html#_edn7.

exported for incorporation into products for subsequent re-export.⁹¹ In effect, the new guidelines state that if the incorporating country has an effective transfer control system in place, Member States should leave any decisions about onward-export to that incorporating country. This runs counter to normal licensing assessments where the “risk that the equipment will be ... re-exported under undesirable conditions” is to be explicitly considered under criterion 7 of the EU Code. The genesis of these new guidelines can be traced to a decision two years previously by the UK to transfer Head-Up-Display Units for incorporation into F-16 fighter aircraft cockpits in the US for onward export to Israel. This came at a time when Israeli actions in the Occupied Territories (including the use of F-16s) were causing widespread international concern.⁹² The UK Government felt the need to introduce new national incorporation guidance (which was the model for the EU guidelines of 2004) at the same time as it awarded this licence.⁹³ This suggests a lack of confidence that the transfer would have complied with the EU Code criteria without this new dispensation.

Similar exports take place from other Member States. The US company Data Device Corporation manufactures a crucial electronic component in Ireland – the MIL-STD-1553 Data Bus – used in a large number of military aircraft, including the F-16 Fighting Falcon jet fighter, the C-130 Hercules transport plane, the AH-64 Apache attack helicopter and the B-1 bomber.⁹⁴ It is likely that Apaches shipped from the USA to Israel contained these Irish-made components: “[t]he spokesman said it would be merely a matter of ‘chance’ if no Israeli Apaches contained Irish-made components.”⁹⁵ In the Netherlands, electronics company Philips advised on its website that it exported components – cockpit displays – for Israel-bound Apaches.⁹⁶

Looking to the future, as the defence production sector internationalises further, licences for incorporation can be expected to take up a larger proportion of all licences issued, with the negative impact of the incorporation guidelines likely to increase. Member States should therefore revoke these guidelines and treat licences for incorporation with the same rigour as exports of finished items.

Reverse engineering

Criterion 5 of the EU Code directs Member States to consider the risk of reverse engineering (that is, studying a purchased item in order to learn details of design, construction and operation, for the purpose of indigenous production). This applies particularly to the transfer of components or sub-assemblies, as buyers can concentrate their attention on the elements of a product that they are finding most difficult to produce with indigenous technology. This is perhaps most obvious in a nuclear weapons programme, where certain key technologies will in the first instance be pursued in the international market. However, it is also relevant for conventional defence equipment.

The consequences of reverse engineering can be demonstrated by the case of production of engines by German company Deutz in China. Since the late 1970s, an estimated 100,000 engines designed by Deutz have been delivered to China or built there under licence using original components. One of Deutz’s business partners in China is the defence-industrial company, Norinco. Under the arrangement with Deutz, Norinco is not authorised to use engines built from original Deutz parts for any but civilian uses.

But according to information provided by Deutz⁹⁷, Norinco has acquired the technical

⁹¹ Assessment of applications for ‘incorporation’ and re-export, User’s Guide, chapter 2, section 2, p. 20.

⁹² ‘Cabinet in arms to Israel’, *The Observer*, 7 July 2002, <http://www.guardian.co.uk/politics/2002/jul/07/israel.foreignpolicy>.

⁹³ UK House of Commons Hansard, Parliamentary Questions, 8 July 2002, col. 650W.

⁹⁴ ‘Controlling the Deadly Trade’, Amnesty International Irish Section, 2007, http://www.amnesty.ie/amnesty/upload/images/amnesty_ie/campaigns/controlarms/Controlling%20a%20Deadly%20Trade.pdf.

⁹⁵ Colin Murphy, ‘State-funded company supplies parts for Israeli war helicopters’, *The Village*, 10 August 2006, http://www.villagetest.com/Ireland/Society_&_Justice/State-funded_company_supplies_parts_for_Israeli_war_helicopters.

⁹⁶ ‘Sustainability & Ethical Issues-Military & Defense Contracts’, Philips website accessed 3 March 2004 (link no longer active).

⁹⁷ Letter from Deutz AG to Oxfam Deutschland e.V. and Amnesty International Deutschland, 14 September 2006, cited in ‘Arms without Borders’, *Control Arms*, 2 October 2006, http://www.controlarms.org/documents/Arms%20Without%20Borders_Final_21Sept06.pdf.

capability to copy Deutz engines, using local parts instead of original components. These reverse-engineered engines have apparently been fitted into Norinco's series of armoured personnel carriers, manufactured for both domestic and export markets. For example, the older Type-63 vehicle was produced in large numbers and has been exported to numerous countries, including the Democratic Republic of Congo, Iraq, North Korea, Sudan and others. Other Chinese armoured personnel carriers fitted with Deutz-copied engines include the Type 85,⁹⁸ the Type 90⁹⁹ and the new WZ551B¹⁰⁰. China is reported to have a history of supplying armoured vehicles, including the Type 85, to the military regime in Myanmar (Burma).¹⁰¹ Defence Industries Organisation of Iran has reportedly used the layout of the Chinese Type 90 for building its own variant, the 'Boraq', also powered by an engine based on a design by Deutz.¹⁰² According to *Jane's Defence Weekly*, the Boraq is marketed to a number of countries in Africa and the Middle East: "regional defence sources indicate that at least one country may have already taken delivery of a quantity of Boraq vehicles."¹⁰³

Once an item has been reverse-engineered there is no going back in that particular case. However, where this is known it should be taken into account in all subsequent licensing decisions, not only by the Member State concerned but through the sharing of appropriate information by all Member States.

No licence required

Deciding precisely what components and items should be on control lists is becoming more difficult. Items originally designed for civilian use are being used more commonly in military, security or police settings, for example in the context of information and communication technologies. Increasing use is being made of commercial off-the-shelf goods and technologies (COTS) which are non-military and therefore non-licensable. They tend to be cheaper and more quickly available than military-specification items, and as they do not go through the licensing process there is no risk that access to them will be denied. In this context the reliance on preset lists of items for which transfer licences are required as the basis for effective transfer control becomes increasingly problematic, with the consequences of sticking rigidly to a list-based approach potentially extreme.

For example, in May 2005, Uzbek security forces killed hundreds of mostly unarmed protesters in what became known as the Andijan massacre.¹⁰⁴ Six months later the EU imposed an arms embargo on Uzbekistan in response to the massacre.¹⁰⁵ Yet the Uzbek security forces involved in the massacre were using Land Rover Defender 110 military vehicles, almost certainly produced under licence from the UK by the Turkish company Otokar and then transferred to the Uzbek Government. The Turkish Government lists the Otokar-produced Land Rover 110 military utility vehicles as being fitted with rifle mounts, a two-way black-out lighting system and a NATO-type towing hook, which would make them subject to export control licences under EU Military List category 6. But although 70 percent of these vehicles are made from components exported in kit-form from the UK, no transfer licence was required. This is because the components are not themselves classified as controlled goods.¹⁰⁶

⁹⁸ Army Guide Website, 'YW 534 Tracked Armoured Personnel Carrier', <http://www.army-guide.com/eng/product.php?prodID=983H>, cited in *Arms Without Borders*.

⁹⁹ 'Norinco Type 90 APC Family', *Jane's Armour and Artillery 2004-2005*, 2004, pp. 288-90.

¹⁰⁰ 'More roles for Chinese APC', *Jane's Defence Weekly*, 24 June 2004.

¹⁰¹ 'The Burmese Army', *Jane's Intelligence Review*, 1 November 1995.

¹⁰² 'Iran releases more details of Boragh APC', *Jane's Defence Weekly*, 8 January 2003.

¹⁰³ C. Foss, 'Iran reveals up-armoured Boraq carrier', *Jane's Defence Weekly*, 9 April 2003, p. 20.

¹⁰⁴ Galima Bukharbaeva, 'I see troops fire on unarmed protesters', *The Observer*, 15 May 2005, <http://www.guardian.co.uk/world/2005/may/15/theobserver1>; Jeremy Page, 'Massacre city opens to the world - but where are all the people?' *The Times*, 19 May 2005, <http://www.timesonline.co.uk/tol/news/world/article524055.ece>.

¹⁰⁵ Council Common Position concerning restrictive measures against Uzbekistan (2005/792/CFSP), 14 November 2005, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:299:0072:0079:EN:PDF>.

¹⁰⁶ UK Working Group on Arms, Submission to the UK Quadripartite Select Committee, January 2005.

In 1998, four fast-assault craft were sold by a Dutch company to the Sudanese Government for use by its police force.¹⁰⁷ *Jane's Fighting Ships* notes that the boats are very suitable for river operations, such as on the White Nile, which runs through what was then a conflict zone in South Sudan. Despite the sensitive destination – the EU has had an arms embargo in place against Sudan since 1994¹⁰⁸ – the boats did not need an export licence as they are not listed as military or dual-use goods. In interviews the company said it always made sure to export its ships without armaments, but if needed could deliver the bolts to put a machine gun on the craft.¹⁰⁹

The dangers should be clear. The move to transferring components and sub-assemblies rather than finished products has a tendency to reduce the visibility and thus the accountability of the trade, even more so when an increasing proportion of sensitive transfers may be of items which are not on any lists of controlled goods (military or dual-use). Subjecting important components to less rigorous control, or even no control at all, when considered in light of the ongoing changes to the way the arms trade works, will weaken EU transfer controls over time. The EU regime as currently structured is predisposed to downplay this issue. This needs to change, with greater focus on preventing negative consequences rather than only controlling preset lists of equipment.

The situation becomes even more worrying when considered alongside the trend of production moving to non-EU states. With the current EU regime and national practice focused on regulating the movement of items from national territory, there are very real concerns that, without change, EU controls will over time become increasingly irrelevant. As webs of ownership and association develop outside EU territory, even if parent companies remain headquartered in the EU, activity will simply move beyond Member States' control.

Member States appear to be struggling to deal with these new realities. Indeed, the 2004 incorporation guidelines suggest they are retreating from them.

Recommendations

Member States must meet the challenges of globalisation of arms production and trade by:

- *licensing any attempt by an EU entity to set up a foreign production facility, with strict controls placed on production ceilings and potential markets – note that for such situations, licensing authorities must make every attempt to take a long-term view*
- *insisting that EU parent companies retain control over the arms transfer decisions of any non-EU entities over which they wield effective control*
- *revoking the 2004 incorporation guidelines and requiring that transfers for incorporation are subject to the same rigorous controls as other transfers*
- *introducing catch-all clauses that give governments the power, where certain conditions apply, to require exporters to apply for a licence to transfer items not on any control list*
- *responding vigorously to any irresponsible use or transfer of foreign-made items where EU technology, items and know-how is involved, for example by making representations in-country to have the problem addressed and in terms of subsequent licensing decisions*
- *co-operating closely with international partners to share relevant information on problematic cases of licensed production or re-transfer, incorporation, and reverse-engineering.*

¹⁰⁷ Arjen van der Ziel, 'Damen valt aan Snelle aanvalsboden voor Soedanees regime' ['Damen assaults/fast assault craft for Sudanese regime'], *FEM/De Week [Dutch business weekly]*, 16 October 1999, Country report: Netherlands, Campagne tegen Wapenhandel, December 1999, <http://www.enaat.org/reports/1999b-NL.PDF>.

¹⁰⁸ Council Common Position concerning the imposition of an embargo on arms, munitions and military equipment on Sudan, 7 January 2004, <http://register.consilium.eu.int/pdf/en/03/st16/st16297.en03.pdf>.

¹⁰⁹ Arjen van der Ziel, 'Damen valt aan-Snelle aanvalsboden voor Soedanees regime' ['Damen assaults/fast assault craft for Sudanese regime'], *FEM/De Week [Dutch business weekly]*, 16 October 1999.

6

Gaps in the current regime: post-export controls

CLOSELY RELATED TO THE ISSUES OF GLOBALISATION and the increasing importance of dual-use and COTS items is the question of how to prevent misuse or problematic retransfer after the goods or technology have been shipped. So far, Member States have proved reluctant to tackle this head on. The User's Guide does include some optional steps that can be taken at the national level, for example, establishing in advance with the buyer acceptable end-use and placing limitations on re-export.¹¹⁰ It notes also that “on-site inspections or delivery verification certificates are particularly useful tools to help prevent diversion” and invites those who use such measures to “inform partners about their experience in this field”.¹¹¹ However there is no obligation to follow these steps, and take-up has been very uneven, with Member States frequently expressing a strong preference for focussing control efforts at the pre-licensing stage. While a rigorous pre-licensing approach must be central to any arms transfer control regime, Member States undervalue post-export controls at their peril, as the following examples show.

UK equipment in Indonesia

In the 1990s the UK Government exported Hawk jets, armoured personnel carriers and tanks to Indonesia. In the 2003 offensive in Aceh, the Indonesian military used Hawk jets, Scorpion tanks, Saracen armed vehicles and military Land Rovers, despite guarantees from Indonesia that UK-sourced equipment would not be used for internal repression or in offensive operations in counter-insurgency action. A senior military official admitted his intention to use the Scorpions tanks saying “they will become a key part of our campaign to finish off the separatists.” He went on: “maybe later the British foreign minister will have a fit.”¹¹²

¹¹⁰ User's Guide, best practices in the area of end-user certificates, paras 2.1.2. & 2.1.3., p. 19.

¹¹¹ *Ibid.*, Post-shipment verification, para. 2.3.1., p. 21.

¹¹² Ministers flout arms sales code', *The Guardian*, 6 December 2003, <http://www.guardian.co.uk/print/0,3858,4813557-103685,00.html>; Richard Norton Taylor 'Land Rovers Deployed Against Civilians', *The Guardian*, 18 June 2005, <http://www.guardian.co.uk/uk/2005/jun/18/politics.armstrade>; 'Indonesia uses UK Hawks in Aceh offensive', *The Guardian*, 20 May 2003, <http://www.guardian.co.uk/world/2003/may/20/politics.indonesia>; 'Outcry as Indonesia defiant over UK jets', *BBC News*, 22 May 2003, <http://news.bbc.co.uk/1/hi/uk/3050729.stm>; John Aglionby and Richard Norton-Taylor, 'Scorpions move in on rebels as Indonesia reneges on weapons pledge to Britain', *The Guardian*, 24 June 2003, <http://www.guardian.co.uk/politics/2003/jun/24/uk.indonesia1>.

Belgian submachine guns to 'Jordan'

In 1998, Belgium authorised the sale of 100 P90 submachine guns to Jordan. According to an end-user certificate, these were for the Special Forces protecting the Jordanian Royal family. However the commander of the Jordanian Special Forces had arranged to sell the guns on, and two days after their arrival in Jordan, the submachine guns were re-transferred to a gun-dealer in Switzerland. They were then sold on to a dealer in the Netherlands for conversion into semi-automatic guns. Approximately half were then delivered to private owners in Switzerland, with others delivered to, among others, Belgian and Finnish gun dealers. About 20 guns remained in the Netherlands as payment for the conversion. In September 1999, four of these 'Jordanian' submachine guns were found in weapons caches belonging to a Dutch arms- and drug- trafficker. Others were reportedly used in armed hold-ups in France and in Belgium. An investigation by the office of the public prosecutor in Liège (Belgium) into whether the diversion of the P90s represented a criminal offence concluded that "no fault was found to have been committed on Belgian soil".¹¹³

Small arms to Iraq

As recorded in chapter 4 above, EU Member States have in recent years been involved in the supply of significant numbers of small arms into Iraq, despite ongoing concerns about the security of those arms once transferred. Of the hundreds of thousands of Glock pistols that have been shipped from Austria, it has been reported that as many as tens of thousands of these Glocks could have been diverted within Iraq¹¹⁴, while at least 62 of these pistols have been discovered in police raids in Turkey.¹¹⁵

Concerns also surround the 2006 shipment of more than 20,000 Beretta pistols from Italy to Iraq via Britain. Even the brokers involved in arranging the transfer were suggesting that at least some of the intended end-users of the Berettas, the Iraqi police, were likely to sell them on. Chris Price of Helston Gunsmiths, one of the companies involved, said: "Some police I presume are corrupt, and they sell them on the black market. Some of these Berettas have turned up in the hands of wrong people and it's opened the lid on it. Because Iraq is in such a mess, there must be kit flying all over place. Everyone must be at it."¹¹⁶

How post-export controls can make a difference: the case of onward export from India to Myanmar (Burma)

In late 2006/early 2007 it was reported in the defence press that India was considering transferring Advanced Light Helicopters (ALHs) to Myanmar (Burma). At least ten companies based in six EU Member States have been involved with the development or supply of components or munitions for the ALH. There has been an EU arms embargo on Myanmar (Burma) in place since 1988, which includes indirect transfers (ie via another country) of military components. After being alerted to the prospect of a transfer by an NGO report¹¹⁷, EU Member States communicated to India their wish that ALHs should not be transferred. India subsequently announced that no such transfers would take place.

The comparison with the transfer by India in 2006 and 2007 of four BN-2 Islander maritime surveillance aircraft to Myanmar (Burma) is instructive. These aircraft were originally exported to India from the UK in the 1970s. However, when the UK Government requested that India not proceed with the re-export, India felt able to ignore the UK request on the grounds that there was no contractual restriction on disposal. Indeed a senior Indian naval official was reported as saying "We should tell [the UK] where to get off."¹¹⁸

¹¹³ 'Out of sight, out of mind? Scope for strengthened EU standards on delivery and post-delivery controls for military equipment', *GRIIP*, December 2005, <https://www.grip-publications.eu/bdg/g4591.html>.

¹¹⁴ 'Tens of thousands of Glock pistols on black market: Austrian made weapons unaccounted for in Iraq', *Weiner Zeitung*, 9 October 2007, <http://www.wienerzeitung.at/DesktopDefault.aspx?TabID=4082&Alias=wzo&cob=306535¤tpage=0>.

¹¹⁵ File on Four, 'Iraqi Guns'; 'Wirbel um Pistolen aus Österreich', *Der Standard*, 22 February 2006.

¹¹⁶ Mark Townsend & Barbara McMahon, 'UK guns in al-Qaeda hands' *The Observer*, 19 March 2006, <http://www.guardian.co.uk/uk/2006/mar/19/alqaida.military>.

¹¹⁷ 'Indian helicopters for Myanmar: Making a mockery of embargoes?', EU NGOs, July 2007, http://www.saferworld.org.uk/publications.php/270/indian_helicopters_for_myanmar_.

¹¹⁸ Sandeep Dikshit, 'Curbs apply only to aircraft spares: UK', *The Hindu*, 4 February 2006, <http://www.hindu.com/2006/02/04/stories/2006020403311300.htm>.

The surveillance aircraft; the ALHs were not. In the case of the helicopters, some of the EU Member States involved (eg Italy) prohibit re-export without permission, and thus were in a much stronger bargaining position.¹¹⁹

These cases highlight the fact that things can and do go wrong after arms are transferred, regardless of the assessment process that takes place before licences are issued. They also point to the types of measures that Member States should consider to either prevent misuse or diversion occurring, or to be quick to learn of it when it does happen and take remedial steps to recover the situation or prevent its repeat.

Of course, almost by definition it is impossible to know how frequently diversion takes place, and finding out is a large part of the battle (by definition, any examples we have are already in the public domain, however there is no way of knowing how representative these are). In any event, Member States should be building provision for comprehensive end-use checking, delivery verification, follow-up monitoring and information-sharing as the means by which the risks and consequences of diversion can be minimised. Member States must stop regarding post-transfer controls as a non-essential extra in the arms transfer control regime. Instead, they should be seen as part of a virtuous transfer-control circle – measures taken after items are transferred can be used to better inform assessment of subsequent licence applications.¹²⁰

Recommendations

Drawing upon the numerous examples of good practice in various EU Member States and also upon the options for “Licensing Practices” included in the User’s Guide to the EU Code, Member States should introduce:

- *standardised procedures for issuing and verifying end-use certificates*
- *re-export controls as standard in all transfer licences*
- *delivery verification procedures for all transfers to non-EU destinations*
- *reservation of the right to conduct post-export end-use monitoring (and the development of mechanisms and procedures to exercise this right on a selective basis)*
- *rigorous end-use controls on all EU licensed production overseas*
- *systematic information exchange among Member States on breaches and sanctions for breaches of end-use certification and other end-use undertakings, and on related issues.*

¹¹⁹ ‘Indian helicopters for Myanmar’.

¹²⁰ For more on this issue, see ‘EU NGO submission to COARM on harmonisation among EU Member States on end-use and post-export controls’, May 2008.

7

Other issues

THERE ARE, IN ADDITION TO THE CHALLENGES IDENTIFIED ABOVE, a number of other transfer control issues where Member States need to do more if the EU Code is to fulfil its intended objective. These include – but are not limited to – arms brokering, embargoes, corruption and transparency, which are considered briefly below.

Control of arms brokering

The 2003 EU Common Position on the Control of Arms Brokering obliges each Member State to require a licence for any arms transfer from one third country to another that is organised (brokered) from its territory. According to information provided by the Secretariat of the EU Council Working Group on Conventional Arms (COARM), 19 of the EU's 27 members are now compliant with the Common Position.¹²¹ While it is unclear why any Member State should not yet be fully compliant with a Common Position more than four years after its adoption, this must still be acknowledged as a major step forward (the eight non-compliant states are Cyprus, France, Greece, Ireland, Italy, Latvia, Luxembourg, and Portugal).¹²²

The Common Position, however, could go further by requiring Member States to control the arms brokering activities of their citizens when these activities take place outside national territory. Without this additional level of (extraterritorial) control, EU citizens can avoid the law simply by moving into another jurisdiction. Given that the arms trade is international by its very definition, expecting traders to operate only from their own territory seems fundamentally flawed.

The need to control arms brokering is clear. For example, in Italy in 2000, Ukrainian Leonard Minin was arrested and charged with arms trafficking and illegal possession of diamonds. According to seized documents he arranged two arms shipments to Sierra Leone, subject to an arms embargo.¹²³ Minin was released after judges ruled they lacked jurisdiction as the transfers in question had not passed through Italy.¹²⁴

¹²¹ Email correspondence with COARM Secretariat.

¹²² *Ninth Annual Report according to the Operative Provision 8 of the European Union Code of Conduct on Arms exports*, Council of the European Union, EU Council Document 12919/11/07 Rev.1, 25 September, Table C, pp. 327–8.

¹²³ *Amnesty International Terror Trade Times*, Issue No. 4, June 2003.

¹²⁴ 'A Catalogue of Failures: G8 Arms Exports and Human Rights Violations', *Amnesty International*, May 2003.

Recommendations

Member States should take the following actions regarding arms brokering:

- *the Common Position on the Control of Arms Brokers should be amended so that those elements currently listed as optional are made mandatory*
- *the extraterritorial elements in the Common Position should be strengthened to cover all brokering activities of EU nationals, regardless of where these are carried out*
- *all Member States should ensure as a matter of urgency that they are compliant with the Common Position*
- *Member States must commit the necessary resources and political capital to ensure that every effort is made to prosecute those suspected of illegal brokering activities.*

Corruption

A variety of factors, such as the sometimes vast sums of money at stake, the widespread use of middlemen and the level of secrecy typically involved, have traditionally made the defence sector (including in Europe) particularly prone to corruption.¹²⁵

In 2007, Slovak Economy Minister Lubomir Jahnatek said in an interview that the Slovak arms industry should learn how to officially account for bribes that would promote sales of Slovak arms to some developing countries where corruption in arms trade is unavoidable. He described bribes as “non-traditional forms of sale that really work”¹²⁶ (though such methods are far from ‘non-traditional’). Ignorance of international anti-corruption obligations (as enshrined in the OECD Convention against Corruption for instance), combined with a willingness to turn a blind eye to corruption when it relates to the defence sector, makes defence exports particularly vulnerable to corruption, and underlines the importance of embedding rigorous anti-corruption requirements within the transfer controls process. Current references to corruption within the EU arms transfer control regime are few and far between, and lacking in substance.

The €4.5 billion procurement contract undertaken by South Africa in 1999 (see chapter 4 above) is an example of a deal that has been mired in corruption allegations for years. In 2003 Tony Yengeni, the Chair of the South African Defence Committee at the time of the arms deals, was found guilty of corruption for receiving a large discount on the purchase of a luxury car from one of the firms bidding for the contract. In 2004 Schabir Shaikh, financial advisor to Jacob Zuma, was found guilty of corruption and fraud for *inter alia* soliciting ZAR500,000 (€67,000) per year from Thomson CFS to protect them from corruption investigations. He was also convicted for paying ZAR1.3 million (€350,000) to Jacob Zuma – at the time Vice President of South Africa and now leader of the ruling African National Congress (ANC) – to use his influence to further Shaik’s business interests. Shaik is currently serving a 15-year sentence and was ordered to pay €4.5 million of his assets to the state. The court judgement in the Shaik case said there was evidence of “a mutually beneficial symbiosis” between Shaik and Zuma, and the ANC leader is now under investigation for allegedly accepting bribes from Thint (local subsidiary of French arms company Thales) to halt inquiries into the arms deal.¹²⁷

Britain, Germany and Sweden are now investigating companies within their respective jurisdictions over corruption allegations in connection with the South African sales.¹²⁸

¹²⁵ Transparency International ranks it among the three most corrupt sectors. See ‘Bribe Payers Index 2002’, Transparency International, http://www.transparency.org/policy_research/surveys_indices/bpi/bpi_2002.

¹²⁶ Associated Press, ‘Slovak opposition calls on economy minister to resign over remarks on bribes in arms trade’, *International Herald Tribune*, 22 March 2007, <http://www.iht.com/articles/ap/2007/03/22/europe/EU-GEN-Slovakia-Bribes.php>.

¹²⁷ ‘S Africa’s controversial arms deal’, *BBC News*, 20 December 2007, <http://news.bbc.co.uk/1/hi/world/africa/7153473.stm>.

¹²⁸ Georg Bönisch and Markus Dettmer, ‘Bribery Allegations Cloud German Ship Sale to South Africa’, *Der Spiegel*, 2 June 2007, http://www.armsdeal-vpo.co.za/articles10/ship_sale.html; Chris McGreal, ‘Arms deal investigators probe BAE payments to South African’, *The Guardian*, 6 January 2007, <http://www.guardian.co.uk/world/2007/jan/06/bae.armstrade>; and ‘Sweden joins UK, Germany in arms deal probe’, *Sunday Independent*, 11 March 2007, http://www.armsdeal-vpo.co.za/articles10/swedes_join_uk.html.

Specific allegations centre on an approximately €21 million payment by German company Thyssen-Krupp to senior South African politicians via Switzerland¹²⁹, and a €70 million “commission” paid by BAE Systems¹³⁰ (one of six ongoing investigations by the UK’s Serious Fraud Office into corruption claims concerning BAE Systems¹³¹).

Recommendations

Member States must take a far more proactive approach to preventing and punishing corrupt practices in the arms trade through measures such as:

- *requiring full disclosure (to government) of identities and all payments to agents and intermediaries, who should be vetted through an independent centralised business conduct agency*
- *including a contract-specific ‘no corruption’ guarantee as part of the documentation required with all licence applications, with a named company executive personally and legally responsible for ensuring such guarantees are kept*
- *requiring that robust compliance systems are extended to subsidiaries and joint venture partners*
- *requiring corporate commitment to the investigation of alleged anti-bribery violations, voluntary disclosure of corruption (and other) violations and enhanced monitoring of offsets*
- *providing for civil procedures (with a ‘balance of probability’ evidentiary test) where corruption is suspected*
- *requiring enhanced transparency and anti-corruption measures when the risk of corruption is considerably significant.*

Transparency

Levels of public transparency have come a long way since 1985, when Sweden became the first Member State to publish a national report on arms exports. At the last count, only 9 of the 27 Member States do not publish a national report (the 9 are Cyprus, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta and Poland), and the general trend has been for national reports to improve over time. The first EU Consolidated Report was just four pages long, and the only statistical information provided was, for each Member State, the total value of licences issued, the total number of licences issued, the total number of licence denials and the total number of bilateral consultations. The most recent EU Consolidated Report is a significant advance on what went before. It provides considerably more information, including a breakdown of licensing information from each Member State by recipient country and by Military List category.

Despite these improvements, transparency in the EU suffers two main impediments. First, reports still do not provide the type of information that would allow external observers to make informed judgements about the quality of specific licensing decisions by their governments. States claim to make decisions on a case-by-case basis; they should provide a level of data that allows external assessment on the same basis. This would involve meaningful descriptions of goods, the quantities of goods being licensed, and meaningful information about end-use and end-users. They should also explain the rationale for their decisions in marginal cases. Second, the variance in national reporting from state to state is extreme, in terms of both content and

¹²⁹ ‘Arms: Germans squeeze Mbeki’, *Mail and Guardian*, 5 October 2007, http://www.mg.co.za/articlePage.aspx?articleid=321116&area=/insight/insight__national/.

¹³⁰ ‘Arms deal: Who got R1bn in pay-offs?’, *Mail and Guardian*, 12 January 2007, http://www.mg.co.za/articlePage.aspx?area=/insight/insight__national/&articleid=335106.

¹³¹ ‘BAE in several corruption probes’, *BBC News*, 9 February 2007, <http://news.bbc.co.uk/1/hi/business/6339625.stm>.

timeliness. Member States should prioritise convergence in national reporting, and seek to expand best practice.

The majority of Member States' reports provide basic information such as the number of licences issued, an approximate value for licences issued, the recipient country and the Military List category of the equipment (which is roughly equivalent to the information now included in the EU Consolidated Report). Beyond this, different Member States have adopted a range of additional practices which, taken together, would do much to bring the overall quality of reporting to a more appropriate level. These 'best practices' include:¹³²

- providing more specific descriptions of equipment beyond Military List categories, as practised to varying extent in Finland, France, the Netherlands, Portugal, Slovenia and the UK
- identification of the final end-user of the transferred equipment, as practised to varying extent in Belgium, Denmark, France, the Czech Republic and Spain
- reporting on government-to-government or gifted transfers as practised in the UK
- providing information specific to actual deliveries of exports, as practised in Austria, the Netherlands, Romania and Sweden
- reporting on transit and/or transshipment licences, as practised in Estonia and the Netherlands
- identification of goods which are licensed for incorporation, as practised in the UK
- providing detailed information on brokering activities, as practised in Italy and Romania
- identification of registered companies with permission to engage in the export and/or trade of military goods, as practised in Bulgaria, the Czech Republic, Italy, Denmark and Sweden
- reporting on dual-use equipment, as practised in Bulgaria, Estonia, Spain and Sweden
- reporting on the transfer of manufacturing rights and co-operation agreements with foreign companies, as practised in Sweden
- reporting on provision of technical assistance, as practised in Spain
- information on enforcement procedures and prosecutions, as practised in Estonia, Germany and the UK
- detailed reporting on licences denied, as practised in the Netherlands.

Recommendation

Each Member State should agree in principle to, and then work towards, adopting best practice in national reporting from around the EU.

¹³² The examples of which countries implement the following best practice are illustrative, not comprehensive.

8

Conclusion

IN THE 1980S AND 1990S, a number of EU Member States were acutely embarrassed by revelations about their arms exports. There was a general acknowledgement that old methods of transfer control had been found wanting, and a new approach was needed. The EU Code was that new approach, and it has frequently been the benchmark to which other regions have aspired and against which they could measure themselves.

However, times are changing, and the EU Code needs to change with them. A politically-binding document is no longer enough. Member States need to have the courage of their rhetoric of responsibility, and to allow their arms transfer licensing decisions to stand the test of legal scrutiny. The EU Code must become a Common Position; in effect, legally-binding.

Once the status of the EU Code has been changed, Member States will then need to consider how to strengthen its implementation and reach. Too many decisions are still being made that seem to contravene the EU Code criteria. At the same time, a growing proportion of the arms trade is at risk of slipping outside of EU control, as production become more diffuse and shifts offshore. Unless more is done to face these challenges, the EU arms transfer control regime runs the risk of becoming increasingly irrelevant.

The EU should be doing all it can, through its transfer control system, to prevent violations of human rights or international humanitarian law, to prevent terrorist abuses, and to support peace and security and sustainable development. The occasion of the tenth anniversary of the adoption of the EU Code of Conduct on Arms Exports is the perfect opportunity for Member States to look afresh at how they can do this better. They must grasp this opportunity with both hands.

ANNEX 1: List of recommendations

Status of the EU Code Member States should replace the EU Code with the Common Position immediately.

Convergence In order to improve convergence of practice across the EU, Member States should:

- recommit to using the EU regime as a means of spreading best practice, rather than as a way of reducing EU behaviour to that of the lowest common denominator
- increase transparency with regard to the details about individual licensing decisions and in particular about the denial notification and consultation mechanisms
- revise the consultation mechanism to develop a system of peer review in the case of possible ‘undercuts’ (that is, where one Member State intends to approve a transfer previously refused by another)
- amend the language of the criteria or produce new guidance on criteria implementation to reduce the current excessive room for Member States to make contradictory and contrary decisions
- improve the quality of information-sharing regarding marginal cases (for both approved and refused transactions) to provide a bank of relevant information for reference in future difficult cases.

Globalisation Member States must meet the challenges of globalisation of arms production and trade, by:

- licensing any attempt by an EU entity to set up a foreign production facility, with strict controls placed on production ceilings and potential markets – note that for such situations, licensing authorities must make every attempt to take a long-term view
- insisting that EU parent companies retain control over the arms transfer decisions of any non-EU entities over which they wield effective control
- revoking the 2004 incorporation guidelines and requiring that transfers for incorporation are subject to the same rigorous controls as other transfers
- introducing catch-all clauses that give governments the power, where certain conditions apply, to require exporters to apply for a licence to transfer items not on any control list
- responding vigorously to any irresponsible use or transfer of foreign-made items where EU technology, items and know-how is involved, for example by making representations in-country to have the problem addressed and in terms of subsequent licensing decisions
- co-operating closely with international partners to share relevant information on problematic cases of licensed production or re-transfer, incorporation and reverse-engineering.

Post-export control Drawing upon the numerous examples of good practice in various EU Member States and also upon the options for ‘Licensing Practices’ included in the User’s Guide to the EU Code, Member States should introduce:

- standardised procedures for issuing and verifying end-use certificates
- re-export controls as standard in all transfer licences
- delivery verification procedures for all transfers to non-EU destinations
- reservation of the right to conduct post-export end-use monitoring (and the development of mechanisms and procedures to exercise this right on a selective basis)

- rigorous end-use controls on all EU licensed production overseas
- systematic information exchange among Member States on breaches and sanctions for breaches of end-use certification and other end-use undertakings, and on related issues.

Arms brokering

Member States should take the following actions regarding arms brokering:

- the Common Position on the Control of Arms Brokers should be amended so that those elements currently listed as optional are made mandatory
- the extraterritorial elements in the Common Position should be strengthened to cover all brokering activities of EU nationals, regardless of where these are carried out
- all Member States should ensure as a matter of urgency that they are compliant with the Common Position
- Member States must commit the necessary resources and political capital to ensure that every effort is made to prosecute those suspected of illegal brokering activities.

Corruption

Member States must take a far more proactive approach to preventing and punishing corrupt practices in the arms trade through measures such as:

- requiring full disclosure (to government) of identities and all payments to agents and intermediaries, who should be vetted through an independent centralised business conduct agency
- including a contract-specific ‘no corruption’ guarantee as part of the documentation required with all licence applications, with a named company executive personally and legally responsible for ensuring such guarantees are kept
- requiring that robust compliance systems are extended to subsidiaries and joint venture partners
- requiring corporate commitment to the investigation of alleged anti-bribery violations, voluntarily disclosure of corruption (and other) violations and enhanced monitoring of offsets
- providing for civil procedures (with a ‘balance of probability’ evidentiary test) where corruption is suspected
- requiring enhanced transparency and anti-corruption measures when the risk of corruption is considerably significant.

Transparency

Each Member State should agree in principle to, and then work towards, adopting best practice in national reporting from around the EU.

This report takes stock of the EU Code of Conduct on Arms Exports ten years since it was adopted, and assesses the impact of the EU's international transfer control regime.

Since the adoption of the EU Code, there have been positive developments and achievements in the EU transfer control regime. However, the picture is far from perfect. This report recommends a number of changes to the EU Code and to the EU's international transfer control regime as a whole. If adopted, these recommendations would help minimise the risk of EU involvement in the supply of arms which contribute to human rights violations, serious breaches of international humanitarian law, or which undermine peace and security or sustainable development.

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Saferworld works to prevent and reduce violent conflict and promote co-operative approaches to security. We work with governments, international organisations and civil society to encourage and support effective policies and practices through advocacy, research and policy development and through supporting the actions of others.



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ISBN 1-904833-28-4