Taking control:

The case for a more effective European Union Code of Conduct on Arms Exports

A report by European Union non-governmental organisations

SEPTEMBER 2004

Acknowledgements

This report has been written by, and represents the views of, NGO representatives from across the EU, with special thanks to Robert Parker, Amnesty International UK; Claudio Gramizzi, GRIP; Holger Anders, IANSA; Chiara Bonaiuti, Italian Observatory on Arms Trade (IRES Toscana); Michael Crowley, Omega Foundation; Oliver Sprague, Oxfam GB; Elizabeth Kirkham, Saferworld; and Piotr Jaworski. Editing by Elizabeth Kirkham, Saferworld. The report is published by Saferworld.

Financial support for the production of the report was provided by Amnesty International UK, Oxfam GB, Pax Christi Netherlands and Saferworld. Saferworld's contribution to the report was made possible by the generous support of the Ploughshares Fund.

The report has also been endorsed by the following organisations:

Africa Europe Faith and Justice Network AEFJN
Agir ici, France
Aldrig mere krig, Denmark
Amnesty International, Austria
Amnesty International, Belgium
Amnesty International, Denmark
Amnesty International, Finland
Amnesty International, France
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Arbeitsgemeinschaft für Entwicklungszusammenarbeit AGEZ (Working Association for Development Cooperation), Austria
BASIC, UK
Campaign Against the Arms Trade (CAAT), UK
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Croix-Rouge de Belgique – Communauté francophone
Czech Working Group on Arms Trade Control
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Fredsakademiet, Denmark
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Groupe de recherche et d'information sur la paix et la sécurité (GRIP), Belgium
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Kvinder for Fred, Denmark
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Obcianske oko (Civic Eye), Slovakia
Osservatorio permanente sulli armi leggere, Italy
Österreichische MedizinerInnen gegen Gewalt und Atomgefahren OMEGA (International Physicians for the Prevention of Nuclear War IPPNW – Austria)
Oxfam GB
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Oxfam-Solidarity, Belgium
Pax Christi International
RAIAL, AL-BF (Réseau d'action internationale sur les armes légères – Belgique francophone)
Saferworld, UK
Samarbejdskomiteen for Fred og Frihed, Denmark
Swedish Peace and Arbitration Society, SPAS
Transparency International, UK
The Verification Research, Training and Information Centre (VERTIC), UK

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1. Introduction

THE CURRENT REVIEW of the European Union (EU) Code of Conduct on Arms Exports (CoC) is a crucial opportunity to address weaknesses in the CoC and to develop and further enhance the associated control apparatus. Regardless of any progress that is made, Member states should continue to work for the strengthening of the CoC and to identify those issues which will require further attention in order to realise a fully comprehensive and effective arms export control regime.

2. Developing the EU Code of Conduct criteria

It is imperative that the CoC criteria accurately reflect the existing obligations of states under international law. However, amendments are necessary in order to ensure that states can be seen to be upholding their international responsibilities. Moreover, the export criteria should be clear and sufficiently detailed to allow for a common interpretation to develop; this is not the case. Additionally, whilst the eight criteria of the CoC do address a broad range of concerns, there should be scope for including other issues, for example corruption in the arms trade, within the existing criteria or through the addition of new criteria.

It will be difficult to convey how, precisely, to apply the criteria of the CoC within the text of the CoC itself. Accordingly, in view of the complex nature of many of the factors involved in arms export licensing, member states should consider producing additional substantive guidelines in order to show more fully how to apply the criteria.

3. Developing the operative provisions

Applying the EU Code of Conduct to all relevant transactions

EU member states should ensure that the scope of EU controls is extended to cover the full range of military, security and police equipment, technology, weaponry, components, expertise or services so as to ensure these do not contribute to human rights violations or breaches of international humanitarian law, exacerbate conflict or instability, or undermine development.

Notification of denials

Member states should quickly move to clarify the various circumstances in which a denial is considered to have been issued. To this end, all member states should, as soon as possible, take part in an exchange of information on national licensing procedures

with a view to ensuring that all export denials, whether preliminary, informal, or formal, are notified. All member states should commit to the issuing of denial notifications within a month of the refusal of an export licence.

Promoting greater convergence and understanding amongst EU member states on the application of the EU Code of Conduct

Member states should work towards the involvement of all EU member states in consultations on undercutting. As an interim step, however, they should immediately agree to the sharing of information relating to undercutting amongst all 25 states.

Enhancing internal transparency

The denial notification database should include all denials issued since the CoC was agreed in 1998 and all information relevant to each denial. Member states should immediately agree to share information on consultations amongst all member states and the denial notification database should be expanded to include details of consultations and their outcomes as well as information on suspect end-users who are known or suspected to have engaged in the re-export, diversion, or misuse of controlled goods.

Widening the impact of the EU Code of Conduct

EU member states should establish formal 'adherence criteria' which require states to possess adequate legislative and administrative procedures and to publish an annual report on their arms exports. Capacity-building and assistance should be made available to prospective members of the EU who wish to align themselves to the CoC, but whose national export control systems are deemed not suitably robust. All countries that align themselves to the CoC should be eligible for assistance to understand and implement different aspects of EU agreements on arms export control. All states that are aligned to the CoC should be invited to an annual meeting to discuss the evolving application of the criteria and the implementation of supporting agreements.

EU control lists

Member states should press for a speedy adoption of the Community Trade Regulation concerning trade in certain equipment which could be used for capital punishment, torture, or other cruel, inhuman, or degrading treatment or punishment and should ensure it covers all items which have potential for use in the application of the death penalty. They should re-introduce the prohibition on the export or import of "specially designed or manufactured rope for execution and hanging" which has been removed from the list in Annex 1 to the proposed Community Trade Regulation. Member states should suspend from trade those items such as electroshock weapons whose medical effects are not fully known, pending the outcome of rigorous and independent inquiries into their effects

Annual reporting on EU arms exports: an important instrument of transparency

The current CoC Review provides the ideal opportunity for EU member states to commit to the production of comprehensive Annual Reports on their arms exports. The revised CoC should include a specific requirement that all member states produce such reports covering all relevant information about their arms exporting activities and following a 'common model'.

Member states should quickly complete the process of harmonising data collection, retrieval, and presentation, so as to facilitate consistent provision of information in the

context of the CoC Consolidated Report. This should contain more detailed information, in particular about the categories and types of products covered by the licences granted by each member state to each destination. For each denial, information relating to the intended recipient, the type and quantity of equipment proposed for transfer, and the reason for the refusal, should be provided in the Consolidated Report. It should also provide at least some information on the outcomes of the consultations that have taken place.

Ensuring a common understanding of key principles

Member states have not yet articulated a clear understanding of what actually constitutes an "essentially identical transaction" (EIT). Member states should clarify the progress that has been made on the issue of EIT, elaborating on how this term is being interpreted in practice. Member states should provide for publication in the Consolidated Report information about consultations which have taken place and whether or not a transaction was considered to be essentially identical. Transactions should be considered essentially identical not only when they concern identical or similar types of equipment in relation to a particular end-user, but also when they raise similar concerns with regard to any of the criteria of the CoC.

4. **Other issues**

Developing effective end-user controls in the EU

Member states have acknowledged the need for common standards for end-user controls by agreeing on a list of the most basic information that is necessary in an end-user certificate (EUC) and on a list of further measures that "might also be required". The list of required provisions should be expanded to include those which are currently optional, and member states should reach agreement on the circumstances in which an EUC should be required. End-use certification requirements should also include: a non-misuse clause, declaring that the material will not be used for proscribed uses, according to the CoC criteria; penalties for breaching end-user assurances including the halting of all further arms supplies from the recipient (and ideally from all EU member states); and the right to follow up arms once exported and to check on their end-use. All EUC should have legal force and should be signed by the government authorities of the destination country which should carry out checks on the firms involved in importing the goods.

Developing effective EU controls on arms brokering

EU member states should agree to strengthen the Common Position on Arms Brokering by committing to the introduction of extra-territorial controls, and to the establishment of national registers of arms brokering agents, by June 2006. They should also agree to exchange detailed information on brokering licenses which they have granted and denied, as well as on relevant consultations. Member states should also identify appropriate mechanisms for the exchange of information on individual arms brokers whom they consider unfit to receive brokering licenses. A review of the implementation of the Common Position should take place by June 2007 and should seek to extend the agreement to include controls on services such as transporting and financing arms transfers.

Licensed production overseas (LPO)

If current trends continue, the number of overseas licensed production arrangements will continue to increase, becoming more varied and difficult to control. EU member states should agree that all prospective LPO agreements involving EU companies are

subjected to prior licensed approval by national governmental authorities. The licensing process should involve scrutiny of the likely export markets and end-use of the goods to be produced and it should be as stringent a process as is applied to the direct export of arms. LPO agreements should contain strict limits on the quantities of military, security, and police products that can be produced. The lifetime or duration of such agreements and details of intended end-users should be clearly defined. Each agreement to establish a LPO facility should also reserve the right of the licensor government to monitor the LPO agreement. Where there is evidence that arms resulting from an LPO agreement have been misused in the licensee's home country or have been exported to destinations not subject to agreement, the LPO agreement should be immediately revoked and provision of related parts, training, and technology should be halted.

Components of concern and incorporation

The effective control of this international trade in components for weapons systems presents a major challenge for the EU. Member states should reassert their commitment to the export criteria as set out in the CoC and affirm that these criteria apply to components as well as to complete weapons systems, taking into account the ultimate destination and end-use of the final product. They should rebuff any attempts to weaken the criteria regarding exports of strategic components for final assembly elsewhere. EU member states should improve the way they provide information on components in their annual reporting and should specify whether the components are for spares and upgrades, or if they are destined for incorporation into other products. All EU member states should ensure that licensing approval is required for the transfer of military, security, and police production technology for controlled goods. The criteria used by the governments for such licence determination should be as stringent as for transfer of military, security, and police equipment and arms.

Controlling the transit of arms across the EU

Member States should exert control over the movement of strategic goods through their territory, regardless of the origin or end-user of these goods. They also have a responsibility to ensure that their territory is not being used as a transit route for the transfer of arms to conflict or human rights crisis zones. Member states should move quickly to develop a common approach towards licensing the transit of strategic goods through the EU. A new common EU policy should be based on best practice and should: set out those circumstances under which a transit licence is required; provide for a comprehensive system of pre-notification of transit routes to the appropriate authorities; and set out those penalties that should apply if the law on transit is broken.

Assisting new member states and associated countries in implementing the EU Code of Conduct

The effective implementation of the CoC by the member states and other countries with EU aspirations will only be achieved when supported by assistance mechanisms implemented in conjunction with relevant EU institutions. Accordingly, the EU Council of Ministers should ensure that funds are available to provide for the technical assistance to the new EU member states for the development of their export control infrastructure. At least once a year the member states and all European countries with EU aspirations should meet in order to discuss their export control requirements and to elaborate a working plan for the next year.

Transforming the EU Code of Conduct into a Common Position

By obliging member states to ensure conformity of national policies with the CoC, a Common Position would provide an opportunity to strengthen and harmonise national EU arms export control legislation. Member states should: strengthen the CoC in all its aspects along the lines of the recommendations set out in this report; adopt the strengthened CoC as a Common Position; and specify that agreed-on common practices retain their political character until there is consensus to integrate practices into the Common Position.

Consistency in implementing international embargoes

The lack of consistency in the implementation of multilateral embargoes has done little to bolster the objectives and credibility of the CoC. Member states should make an explicit commitment to ensure that all future EU embargoes refer to those categories of equipment on the Common Military List or in the Annexes to the Dual-Use Regulation to which an embargo is to apply. Moreover, until there is agreement of and implementation of a relevant Community Trade Regulation, the text of any future EU arms embargo should specify the exact types of police, paramilitary, internal security and other equipment to which an embargo is also to apply. All pre-existing EU embargoes should be amended in to reflect this commitment.

Improving consistency in member states' approach to sensitive regions, countries and end-users

The steps that member states have taken thus far to promote a common approach to sensitive countries, regions, and end-users are unlikely to be sufficient, in themselves, to ensure consistent application of the CoC across the EU. Member states should develop an EU checklist of 'red flag' early-warning indicators to indicate to desk officers in relevant ministries when there are serious concerns about a particular end-user. They should also establish a 'misuse and diversion' notification system along similar lines to the denial notification process, so that all EU member states would be informed of any incidents of the misuse or diversion of previous EU arms transfers.

Enhancing accountability in EU arms export policy

While member states have undertaken to develop a dialogue with the European Parliament, it is important that this forum is offered an enhanced role in scrutinising implementation of the CoC and in making recommendations for its improvement. The CoC Review provides an ideal opportunity to set out certain minimum standards to ensure that national parliaments and the EU parliament play an active part in monitoring member states' implementation of the CoC.

1

Introduction

SINCE THE EU CODE OF CONDUCT ON ARMS EXPORTS (CoC) was agreed in June 1998, there has been a marked improvement in levels of transparency and accountability associated with EU arms export control. Twelve EU governments now produce annual reports on their arms export licensing activities, and the member states have agreed a range of measures relating to the operation of the CoC. In addition, a number of countries outside the EU have been encouraged to subscribe to the principles enshrined in the CoC.

Despite these advances, it remains a moot point as to whether the CoC has actually led to increased restraint in EU arms exporting, since EU member states are still supplying arms to countries that abuse human rights, that are suffering internal instability, or that are situated in regions of tension. Moreover, many aspects of EU arms export control policy and practice – from controls on end-use and licensed production, to the level of information provided on arms exports – require changes in order to widen their scope and improve their effectiveness.

The current review of the CoC is thus a crucial opportunity to address existing weaknesses in the CoC and to develop and further enhance the associated control apparatus. However, since the CoC is a dynamic instrument, the conclusion of the review should not be regarded as the culmination of efforts to improve EU arms export controls. Rather the member states should, after the review, continue to work for the strengthening of the CoC and to identify those issues requiring further attention in order to put in place a fully comprehensive and effective arms export control regime.

2

Developing the EU Code of Conduct criteria

THE EXPORT CRITERIA are the essence of the CoC since they establish the minimum standards against which member states assess export licence applications. Based upon the eight Criteria on Conventional Arms Transfers issued in Luxembourg and Lisbon in 1991 and 1992, the CoC criteria are the most extensive of their kind. Indeed, developing the criteria marked a new departure for the multilateral control of arms transfers. However, the fact that the development of the CoC criteria was the first exercise of its kind means that problems and issues would almost inevitably emerge about their scope, specificity, and/or interpretation.

At a fundamental level, it is imperative that the CoC criteria accurately reflect the existing obligations of states under international law. Unfortunately, the CoC criteria fall short in this crucial regard and amendments are required to ensure that states can be seen to be upholding their international responsibilities. Moreover, in order to be optimally effective, such multilateral export criteria should be clear and sufficiently detailed to allow a common interpretation to develop. Unfortunately, the CoC criteria are lacking in both of these respects. Additionally, such multilateral export criteria also need to be comprehensive, covering all of those issues that are relevant to the effective regulation of strategic exports. Whilst the eight criteria of the CoC do address a broad range of concerns, there is at least one important issue – relating to corruption in the arms trade – which has not been covered.

States' existing obligations under international law

It is a serious issue for member states that the criteria of the CoC do not accurately reflect states existing obligations under international law. Recent calls by NGOs for the adoption of an international 'Arms Trade Treaty' have served to bring the inadequacies of the CoC criteria into sharp focus. Accordingly, the CoC Review provides a critical opportunity for EU member states to show that they support the aims and objectives of an international Arms Trade Treaty by bringing the criteria of the CoC into line with their existing responsibilities.

Clarity

The existing criteria of the CoC are variable in terms of their detail and specificity. Some, such as the human rights criteria, do contain considerable detail, although they should be developed further; others are minimal. Indeed the criteria relating to

internal instability and development are so sparse or loosely drafted that it is difficult to see how member states can possibly arrive at a common interpretation of these concerns. At the same time, there is a need for greater clarity within all of the criteria in order to reduce the scope for differing interpretations. This should, wherever possible, involve defining those circumstances where a licence should not be granted, rather than saying what factors should be "taken into account".

Recommendations

A number of changes to the CoC text can be envisaged so that the criteria are clearer and more precise, and more accurately reflect states' international legal responsibilities. These should be regarded as non-exhaustive and do not preclude further elaboration of the text at any point. Recommendations are set out in the attached Annex but can be briefly summarised as follows:

Criterion 1
- **further elaboration of states' international obligations;**
- **a commitment not to export small arms to non-state actors.**

Criterion 2
- **reference to additional relevant international human rights instruments;**
- **elaboration regarding states' obligations under international law to not transfer arms that might be used to commit human rights violations;**
- **further detail on how to conduct an assessment of risk with regard to the possible use of equipment to abuse human rights.**

Criterion 3
- **inclusion under the internal instability criterion of the risk that equipment transferred may be used in the commission of violent crimes;**
- **elaboration on how to assess the risk associated with transfers to countries emerging from internal conflict.**

Criterion 4
- **inclusion of the possibility that a state may use force against another population as well as another state;**
- **further detail on how to assess the impact of a transfer in relation to a recipient's legitimate defence needs;**
- **factoring in the impact of new technology on regional stability.**

Criterion 6
- **an explicit commitment not to transfer arms that would violate states' obligations under international law, such as weapons that are incapable of distinguishing between combatants and civilians or that would cause unnecessary suffering, or transfers which have not been authorised by the recipient state;**
- **an explicit commitment not to transfer arms which they know, or ought to know, would be used to violate the UN Charter, customary international law including the prohibition on the threat or use of force, or international humanitarian law, or would be used in the commission of genocide or crimes against humanity, or would be diverted and used for the aforementioned;**
- **elaboration on how to assess a country's attitude towards terrorism;**
- **a commitment to take into account a country's non-participation in the UN Register on Conventional Arms Transfers.**

Criterion 7[1]
- **a presumption against authorisation when a transfer is likely to adversely affect sustainable development;**
- **introducing greater specificity into the assessment of the impact of a transfer on the sustainable development of the recipient;**
- **reference to the need to assess the cumulative impact of arms transfers on sustainable development.**

1 NB The new Criterion 7 (development concerns) was formerly Criterion 8; the new Criterion 8 (end-use concerns) was formerly Criterion 7. This change has been made because the Criterion relating to end-use prohibits the transfer of equipment which would be used to breach any of the CoC and so logically should feature at the end.

Criterion 8[1]

- **an explicit prohibition on the transfer of arms which may be diverted and used in breach of any of the criteria of the CoC.**

By so amending and developing the criteria of the CoC, and by redoubling their efforts to apply these criteria in spirit and letter, EU member states will show the international community that they take their international legal responsibilities very seriously, and encourage other states to do likewise.

Comprehensiveness

Whilst the existing criteria of the CoC do cover a broad range of issues that are relevant to the control of conventional arms transfers, they do not constitute an exhaustive list. There are other concerns which, it can be argued, should be factored into decisions on arms export licensing. For example, there are powerful arguments in favour of including, within the CoC criteria or within accompanying guidelines (see below), provisions requiring that arms export deals are free from corrupt practices – from the level of the supplier, through the middlemen, and to the level of the recipient.

Recommendation

- **The CoC should be amended to prohibit the licensing of deals which are known to have involved corrupt practices; deals which are suspected to have involved corruption should be investigated prior to a licensing decision being made.**

Guidelines for interpretation of the criteria

Amendments to the criteria of the CoC are necessary if they are to fully reflect the range of member states' obligations and concerns regarding the transfer of arms. However, it will be difficult to convey how, precisely, to apply the criteria of the CoC within the text of the CoC itself. Accordingly, in view of the complex nature of many of the factors involved in arms export licensing, member states should consider producing additional substantive guidelines in order to show more fully how to apply the criteria. It is encouraging to note that member states have already begun an exchange of information on their implementation of Criterion 8 – sustainable development.

Recommendations

- **In order to be most productive, the results of the information exchange on the application of Criterion 8 should be published as guidance so that experience and lessons learned can be shared amongst all EU member states.**
- **Similar information exchange exercises should be carried out to encompass the remaining seven criteria and a comprehensive 'Handbook' should be published. This would prove particularly valuable to the new EU member states and would greatly enhance the prospects for a common approach to export licensing amongst the 25.**

3

Developing the operative provisions

THE OPERATIVE PROVISIONS OF THE COC are critical to its effective and efficient implementation. There is wide agreement among the member states that the denial notification and consultation mechanisms are yielding important progress in terms of harmonising EU arms export control policy. However, the limited nature of these and other Operative Provisions is undoubtedly proving a barrier to the development of a truly common approach. Six years into the operation of the CoC it is apparent that the CoC Operative Mechanisms are ripe for review and further development.

3.1 **Applying the EU Code of Conduct to all relevant transactions**

Operative Provision One of the CoC states: "Each EU Member State will assess export licence applications for military equipment made to it on a case-by-case basis against the provisions of the Code of Conduct." In addition, Operative Provision Six extends the coverage of the CoC to certain dual-use goods "where there are grounds for believing that the end-user of such goods will be the armed forces or internal security forces or similar entities in the recipient country"[2].

However, despite the fact that EU member states have applied the CoC Criteria and Operative Provisions to direct commercial exports of arms and dual-use goods licensed by government, there are a wide range of transfers of military, security and police equipment, technology, weaponry, components, expertise, or services to which the CoC did not explicitly apply from the outset. Such transfers included government-to-government transfers, intangible transfers especially as part of licensed production agreements, arms brokering, arms transit/transshipment and the provision of military, security and police expertise. Consequently, since the CoC was agreed, NGOs and investigative journalists have uncovered examples of such transfers which have facilitated human rights violations[3], have entered conflict zones, or which threaten sustainable development.

2 NGOs have raised concerns regarding the application of this provision, as certain dual-use goods appear to have been incorporated into MSP systems by initial civilian end-users and then transferred to military end users. See Undermining Global Security: the European Union's arms exports, Amnesty International, May 2004 for more detail.

3 Undermining Global Security: the European Union's arms exports, Amnesty International, May 2004.

EU member states' response

In the light of growing civil society concern about such transfers, EU member states have begun to take limited steps to extend the scope of the CoC to other types of transactions, as follows:

Transit and transhipment

Although the EU member states have not been able to reach agreement on a common licensing regime for transit of military, security, and police equipment or weaponry, the 2002 EU Consolidated Annual Report states that, in those cases where a licence is required for transit or trans-shipment of any of the goods on the EU military list, the criteria of the CoC should be duly taken into consideration[4]. In a further potential advance, the Netherlands Government, which holds the EU presidency from July 2004, has recently stated that "such licence applications should in principle always be assessed against the criteria of the CoC. Furthermore, member states should agree upon applying the denial notification and consultations system to transit licences."[5]

Brokering

In June 2003 the EU adopted a Common Position on Arms Brokering. Article 3 of this Common Position determines that member states will assess applications for a licence or written authorisation for specific brokering transactions against the provisions of the CoC. In addition, paragraph 4.20 of the *User's Guide* to the CoC stipulates that member states which have laws on brokering and operate a licensing system for brokering transactions should notify denials in the same way as for export licence denials.

Whilst welcome, such initiatives on the part of EU member states are, thus far, unlikely to be sufficient to ensure that all transfers of military, security, and police equipment, technology, weaponry, components, expertise, or services from the EU are adequately controlled. Moreover, whilst a recent suggestion on the part of the government of the Netherlands that "Operative Provision One of the Code should…be changed…by adding brokering and transit licences to the present wording"[6] is also encouraging, it is, as yet unclear whether or not such a change will be implemented.

Recommendations

- **EU member states should ensure that the scope of EU controls is extended to cover the full range of military, security, and police equipment, technology, weaponry, components, expertise, and services so as to ensure these do not contribute to human rights violations or breaches of international humanitarian law, exacerbate conflict or instability, or undermine development. To be meaningful, definitions and determination criteria in the strengthened CoC must at least cover all:**
  - **i. government-to-government military, security, and police equipment transfers,**
  - **ii. arms brokering by EU citizens and residents,**
  - **iii. the transhipment/transit of arms via the EU**
  - **iv. transfers of 'surplus arms'**
  - **v. intangible transfers of technology, especially as part of licensed production agreements**
  - **vi. the provision of military, security and police personnel, training, or expertise.**
- **As a first step, member states should conduct a collective information sharing exercise in which all member states outline those circumstances in which they apply the CoC, in order to highlight any gaps that exist.**

4 Annex 1 of the Council's Fourth Annual Report According to the Operative Provision 8 of the EU Code of Conduct on Conventional Arms Exports, 11 November 2002, Doc13779/92, PESC446 COARM14.

5 Presentation by Dutch Government official at a conference co-sponsored by the Irish Government, Saferworld and Amnesty International, Dublin, December 2003.

6 Ibid.

3.2 Notification of denials

Operative Provision 3 of the CoC stipulates that members will circulate through diplomatic channels details of licences refused in accordance with any of the CoC c riteria, and that "before any member state grants a licence which has been denied by another member state or states for an essentially identical transaction within the last three years, it will first consult the member state or states which issued the denial(s)." Denials are circulated to all member states (though no time limit for circulation is specified), while consultations are to remain confidential among the member states directly concerned.

The denial notification mechanism is central to the operation of the CoC since it enables member states to enter into a dialogue concerning the interpretation and application of the export criteria. Officials have commented on how useful the mechanism has proved in bringing to their attention concerns and issues of which they could otherwise have been ignorant. In particular, states with limited capacity, for example in terms of intelligence-gathering, have found the operation of the denial notification mechanism to be a revelation in terms of understanding the risks posed by particular exports to particular destinations.

Prompt issuing of denials

The process whereby denials are issued has undergone some improvements in recent years. Until relatively recently, denials were circulated amongst all member states through diplomatic channels, where information is distributed through the embassies of the member states. This is a cumbersome process, which can lead to a significant lapse of time between the issuing of a denial and it coming to the attention of the relevant officials in other EU member states. However, it is understood that, in a very welcome step, member states have now developed procedures for the immediate circulation of information by electronic means. Moreover, it has been agreed amongst the member states that denials should be circulated within a month of their being issued, though it is not known to what extent this proviso is being adhered by all member states.

What constitutes a denial?

It has also become apparent that, since each EU member state has its own particular process of export licensing, the point at which an export licence denial is issued can vary widely. The CoC provides for member states to notify denials based on refusal of permission to start negotiations or a formal initial inquiry about a specific order. However, licensing systems may involve unofficial or pre-licence-application contacts between licensing authorities and industry, whereby an indication will be given to companies whether it is worth proceeding with an official application. Indeed, industry may favour this type of pre-licensing approach particularly with regard to major weapons systems owing to the costs which would be incurred should an export licence be sought and refused following a large-scale marketing effort. However, if such preliminary approaches are not included in export licence denials, the possibility exists for member states to unwittingly undercut each other.

The issue of at what point an indication becomes a denial is a crucial one for member states. The Swedish authorities, for example, have had to confront this question, as their system is premised on informal contacts and, indeed, for the first two years of the operation of the CoC, Sweden reported no licence denials. In recognition of this problem, Sweden has changed its procedures and now issues denials (eight in 2000; sixteen in 2001; ten in 2002).

In a welcome development, the Fifth Annual Report on the operation of the CoC contained details of a 'Users Guide' with the aim of clarifying member states' responsibilities for issuing denials. The Users Guide supplements the commitments contained within Operative Provision 3 of the CoC. If implemented consistently, the Users Guide should provide a helpful elaboration of the process of issuing denials,

thereby facilitating the development of a consistent approach. However, the Users Guide does not cover the issue of how informal or pre-licensing 'denials' are to be factored into the operation of the CoC. Member states recognise that procedures vary across the EU and, as such, they must be aware of the potential for this problem – which is likely to have worsened with the accession of 10 new EU member states in May 2004 – to adversely affect the effectiveness of the CoC.

Recommendations

- **Member states should quickly move to clarify the various circumstances in which a denial is considered to have been issued. To this end, all member states should, as soon as possible, take part in an exchange of information on national licensing procedures with a view to ensuring that all export denials, whether preliminary, informal, or formal are notified.**
- **All member states should commit themselves to issue denial notifications within a month of the refusal of an export licence.**

3.3 Promoting greater convergence and understanding amongst EU member states on the application of the EU Code of Conduct

It is noteworthy that member states themselves have recently begun to acknowledge the value of sharing information on undercutting amongst the wider group as opposed to between the two (or more) parties to a consultation. They have asserted that sharing of information on consultations that result in a decision to undercut is of particular importance[7]. However, the dissemination of substantive information regarding those consultations which result in denials being upheld is also important. Such consultations may yield important additional information or lead to clarification of the reasons behind a particular denial which could be of use to other member states.

Despite the obligations of confidentiality currently subsumed within the CoC, member states have also made the welcome assertion that such confidentiality should not "thwart the objective of transparency underlying the Code of Conduct"[8]. However, there can be little doubt that when the substance of consultations on undercutting is kept confidential – between the state(s) issuing the denial and the state(s) requesting the consultation – this inevitably serves to limit transparency and impede the effective implementation of the CoC by all states.

Member states have agreed to share information on undercutting "to the extent compatible with national considerations"[9]. Whilst the growing acceptance of the principle of information sharing is to be welcomed, nevertheless it is disappointing that member states do not yet have enough confidence in each other to allow the systematic sharing of information relating to undercutting amongst the wider group of states. At the same time, it should be noted that the sharing of information on consultations after the event itself represents only a partial solution in terms of efforts to develop a common approach. Ever since the CoC was first mooted, NGOs have argued that consultations on undercutting should involve all member states. The majority of member states also supported this position during the original CoC negotiations. The Review of the CoC, therefore, provides the ideal opportunity for member states to build on the progress that has been made over the past six years and to institute those measures which were not politically acceptable at the outset. The involvement of all member states in consultations on undercutting is achievable at a practical level since the number of consultations has to date not been large, and the use of electronic means of communication should facilitate such a process. Multilateral consultations would

7 Fifth Annual Report according to Operative Provision 8 of the EU Code of Conduct on Conventional Arms Exports, p 15.
8 Ibid, p 17.
9 Ibid, p 15.

greatly enhance the prospects of the objectives of the CoC being met through the development of a truly common approach to arms export licensing.

Recommendation

- **Member states should work towards the involvement of all EU member states in consultations on undercutting; as an interim step, however, they should immediately agree to the sharing of information relating to undercutting amongst all 25 states.**

3.4 Enhancing internal transparency

The Fifth Consolidated Report on the operation of the CoC claims that member states have agreed to establish a central denial database thereby creating a resource which all member states can use to search for information on specific denials that have been issued. Whilst the level of information to be retained remains unclear, it is understood that all operational denials will be included (those issued within the previous three years) and that it could become operational around mid-2004. Initially, denials are to be submitted to the Council Secretariat which is to compile them once a month and circulate the information to all 25 member states by means of a computer disk, prior to the eventual establishment of a secure online database. It would, however, be desirable if the database were to include all denials issued since the CoC was agreed in 1998 (since there may be ongoing concerns relating to particular end-users) as well as all information relevant to each denial. The new EU member states, in particular, will benefit from having access to information on past denials of which they could otherwise be unaware.

Beyond the recording of denials there are a number of other functions which the central denial database could be adapted so as to fulfill. For example, a logical step on from retaining information on denials would be for the database to include information on consultations and their outcomes. It is recognised that information on consultations is currently only shared beyond the state(s) issuing a denial and the state(s) initiating the consultations at national discretion; for such a development to take place in a comprehensive fashion, member states must be willing to share information on consultations systematically with all other member states. However, there would appear to be no reason why states that have already shown a willingness to share information with all other member states could not agree to have this information placed in the database as well. This is a step that NGOs strongly urge EU governments to take, since the holding of comprehensive information in a central database on denials and consultations will considerably enhance internal transparency about the operation of the CoC and help to promote greater consistency in its application.

In addition, a central database of information on denials and consultations could also conceivably be adapted to store other important data. Member states already possess and sometimes exchange information about suspect end-users. NGOs have long argued that exchanges of information on end-users who are known or suspected to have engaged in re-export, diversion, or misuse of controlled goods should be systematised. Accordingly, retaining such information in a central database could provide an extremely valuable resource for member states to use when considering export licence applications and would further assist in the development of a 'level playing field' across the enlarged EU (see also Section 3.8 below).

Recommendations

- **Member states should establish the denial notification database as soon as possible; the database should include all denials issued since the CoC was agreed in 1998 and all information relevant to each denial.**

- **Member states should immediately agree to share information on consultations amongst all member states and, once established, the denial notification database should be expanded to include details of consultations and their outcomes.**
- **Also once established, the denial notification database should be expanded to include information on suspect end-users who are known or suspected to have engaged in the re-export, diversion or misuse of controlled goods.**

3.5 Widening the impact of the EU Code of Conduct

Encouraging other non-EU countries to adopt the principles of the CoC has been a stated aim of the CoC and its development since its adoption in July 1998. Indeed, Operative Provision 11 states that:

"EU Member States will use their best endeavours to encourage other arms exporting states to subscribe to the principles of this Code of Conduct."

At the same time, member states have repeatedly committed themselves to continuing their policy of promoting the principles and criteria of the CoC and engaging non-EU countries in dialogue.

The CoC is the most comprehensive multilateral conventional arms export control regime, so ongoing efforts to encourage third countries to adhere to the principles of the CoC are to be welcomed and encouraged. Yet the concern remains that few concrete steps have been taken in order to promote effective implementation of the CoC amongst non-EU countries that have aligned themselves to the CoC principles and amongst other prospective adherents. This view was re-enforced at a recent conference hosted by the Irish Government and attended by officials and NGO representatives from around the enlarged (post-1 May 2004) EU in December 2003. At this conference a number of the then accession countries made it clear that they had not received adequate assistance from EU Members in preparing them for formal implementation the CoC, despite having aligned themselves formally to its criteria since 1998/99.[10]

Recent initiatives

Whilst 10 former EU associate countries became fully-fledged EU member states on 1 May, a number of EU associate countries continue to be aligned to the principles of the CoC, whilst remaining outside its Operative Provisions. These countries include Bulgaria, Croatia, the Former Yugoslav Republic of Macedonia, Romania and Turkey. Other groupings aligned to the CoC include EFTA countries (Iceland, Lichtenstein, Norway, Switzerland) and Canada. Whilst these countries remain some way from being fully integrated into the CoC apparatus, some progress has nevertheless been made.

In a welcome move, member states have agreed to share some information on denials on an aggregate basis with Associated Countries whilst encouraging these countries to reciprocate. According to the Fifth Annual Report on the CoC, the information to be shared by EU member states relates to the following: country of destination, short description of equipment and military list rating of items, classification of end-user as government agency or private entity, and reasons for refusal (by identifying the appropriate CoC Criteria that triggered the refusal).[11]

Member states have also agreed to "share information on denials on an aggregate basis with selected non-member countries", however there is no indication as to which these countries may be or what level of information is to be shared with them.[12] Moreover,

10 Views expressed during "Arms export controls in an enlarged European Union" an International Conference hosted by the Irish Department of Foreign Affairs in association with Saferworld, held in Dublin on 12 December 2003.

11 Fifth Annual Report According to Operative Provision 8 of the EU Code of Conduct on Arms Exports, p 23. http://www.grip.org/bdg/pdf/g4051.pdf.

12 Ibid, p 6.

in 2002, a decision was taken by member states to allow access to the evolving interpretation of the CoC's principles and criteria on the part of non-EU countries that have become involved in the restructuring of the EU defence industry. However, since it is explicitly stated that this will "not entail access to information made available in the course of the procedures referred to in the operative provisions of the Code" again the nature, and the focus, of this discourse remains unclear.

It is clear, moreover, that EU member states have been endeavouring to engage a range of countries on export control-related matters, although any aims and outcomes of these consultations are not well publicised. For example, the Fifth Consolidated Report documents discussions that have taken place with the US on ways to follow up on the December 2000 Declaration by the EU and United States on the responsibility of states and on transparency regarding arms exports, although no indication of progress is given. There is also a reference in the Third Consolidated Report to dialogue with the ASEAN Regional Forum on arms export controls, yet no indication of any concrete outcomes.[13] Member states have also had bi-lateral discussions about widening the impact of the CoC, although such initiatives have not been reported in successive EU Consolidated Reports. It is known, for example, that the UK Foreign and Commonwealth Office has held discussions with the Government of Albania during the summer of 2003 on arms export control issues, whilst during the same year, the Government of the Netherlands held bilateral consultations with Romania and Slovakia which included visits of relevant experts to the Netherlands.

Whilst there would seem to be no lack of willingness on the part of EU member states to engage third countries in dialogue on the subject of the CoC, the way in which information on the operation of the CoC is shared appears to be unco-ordinated. The absence of any coherent or formalised mechanism which progressively encourages convergence and restraint amongst a wider group of countries represents a significant failing. If member states are serious about ensuring that states that align themselves to the principles of the CoC actually implement the provisions through their arms export policy, then much more needs to be done. In view of the fact that it is in EU member states' interest to ensure that their denials are not unwittingly undercut by friendly countries, then every effort should be made to share information on denials as widely as possible amongst states that are considered to be responsible partners.

Recommendations

- **To ensure that alignment to the CoC has substance in practice, members of the Council of the EU Working Group on Conventional Arms Exports (COARM) should create a formal mechanism whereby countries that demonstrate commitment to the principles of the CoC are progressively integrated into its operation. This should involve varying levels of engagement, from annual exchanges of information on the evolving implementation of the CoC criteria, through the quarterly circulation of aggregate denial notifications, to the involvement of partner countries in the denial notification and consultation provisions. Future Accession countries should be included in the full operation of the CoC at least one year before they become full EU Members.**
- **To ensure that all prospective adherents have the wherewithal that enables their full engagement with the CoC process, EU member states should establish formal 'adherence criteria'. As well as possessing adequate legislative and administrative procedures within their export licensing system, potential adherents should publish an annual report on their arms sales and be accountable to their national legislatures for the implementation of their export control policies and licensing decisions. Countries that are aligned to the CoC should be encouraged to provide annual reports for inclusion in the Annual EU Consolidated Report.**

13 Third Annual Report According to Operative Provision 8 of the EU Code of Conduct on Arms Exports http://projects.sipri.se/expcon/eucodear2001.htm.

- **Capacity building and assistance should be made available to prospective countries who wish to align themselves to the CoC, but whose national export control systems are deemed not suitably robust. As a priority, this should be extended at the earliest opportunity to anticipated future members of the EU, for example Bulgaria and Romania (see also Section 3.5 on Assisting New member states and Associated Countries in Implementing the EU Code).**
- **All countries that align themselves to the CoC should be eligible for assistance to understand and implement different aspects of EU agreements on arms export control. Assistance could include *inter alia* exchange visits and secondments by officials, and seminars and workshops on issues such as end-use certification and monitoring, arms brokering, and best practice guidelines, or any additional guidance on the implementation of the individual criteria (such as those being developed for Criterion 8).**
- **All states that are aligned to the CoC should be invited to an annual meeting to discuss the evolving application of the criteria and the implementation of supporting agreements. This would help enhance the sense of such countries as partners in the CoC and give substance to the concept of 'alignment' to the CoC.**
- **Notwithstanding the potential dangers of seeking to impose a Euro-centric approach to arms export control outside the wider Europe, it is nevertheless the case that key concepts contained with the CoC – such as the application of rights based criteria, transparency and reporting requirements, and the detailed information exchange amongst exporting governments – would be key building blocks in the establishment of an international arms trade treaty. As such, EU member states should ensure that the valuable experience of the CoC is made available as widely as possible (for example to the states participating in the Economic Community Of West African States (ECOWAS) Moratorium, or the Nairobi Declaration). Wherever possible, COARM should seek to send a EU representative to key regional meetings to share this experience.**

3.6 **EU control lists**

An essential tool to aid the harmonisation and convergence of EU member states' export policies is a commonly accepted list of military items to be controlled under the CoC. In accordance with Operative Provision 5, on 13 June 2000 the Council adopted a common list of equipment to be covered by the CoC. On 17 November 2003 the Council adopted a revised version of the common list, entitled Common Military List of the European Union[14].

The status of the Common Military List

The common list has the status of a political commitment within the framework of the EU's Common Foreign and Security Policy (CFSP). In this sense, all member states have made a political commitment to ensure that their national legislation enables them to control the export of all the goods on the list. It should be treated as a minimum list, not an exhaustive one, and the development of national control lists should not be limited to the items on the common list.

The common list of military equipment represents a significant positive development in the operation of the CoC and in the process of member states' convergence in the field of conventional arms exports. It is evolutionary in character and should be updated regularly.

14 http://ue.eu.int/pesc/ExportCTRL/en/c_31420031223en00010026.pdf.

Non-military (police and security) equipment

However, not all equipment which has the potential to be used for internal repression appears on the Common Military List. Security equipment used for law enforcement purposes but which is also often used for internal repression, such as mechanical restraints, electroshock weapons, chemical irritants and 'less lethal' kinetic impact weapons, is not subject to control in many member states.

On 30 December 2002, the Commission made a proposal for a Council Regulation concerning trade in certain equipment which could be used for capital punishment, torture, or other cruel, inhuman, or degrading treatment or punishment. The Trade Regulation will ban the import, export, and brokering of items used in the application of the death penalty such as gallows, guillotines, and gas chambers. It will also ban items that the Commission has categorised as 'torture equipment' including electroshock stun belts, leg irons, and thumbcuffs. These items will appear in Annex I of the Trade Regulation. However, the proposed Annex 1 falls short of full comprehensiveness in that it fails to include some items which have potential for use in the application of the death penalty.

In addition to the list of banned items in Annex I, the Trade Regulation will require that all member states introduce controls on the export of equipment which may have a legitimate law enforcement use but that can be easily used for torture, for example, stun batons, mechanical restraints including restraint chairs and shackle boards, and riot control agents such as tear gas. These items will appear in Annex II to the Trade Regulation.

Particularly welcome are the provisions which cover brokering, mediating, and arranging of deals in such equipment, including through 'third countries'. This is absolutely essential because traders and dealers who try to sell security equipment to customers who are likely to use it for torture or serious ill-treatment will try to circumvent national controls by exploiting weak controls in foreign jurisdictions. The fact that accession countries will also be subject to the provisions of the Trade Regulation will extend this control mechanism to a wide number of potentially unscrupulous dealers and brokers in Europe and should have a significant positive impact.

Recommendations

Whilst the progress that has been made on the Common Military List and in the development of the EU Trade Regulation are to be welcomed, there are a number of outstanding issues which ought to be addressed:

- **Member states should remove OP 5, which calls for the adoption of a common military list, as it is now obsolete.**
- **Member states should re-introduce the prohibition on the export or import of "specially designed or manufactured rope for execution and hanging" which has been removed from the list in Annex 1.**
- **Member states should suspend from trade those items such as electroshock weapons whose medical effects are not fully known, pending the outcome of rigorous and independent inquiries into their effects.**
- **A presumption of denial should be applied to any export authorisations involving destinations and end-users in countries where it is likely the items in question will be used for torture or other serious human rights violations.**
- **Member states should press for a speedy adoption of the Trade Regulation by the Council and should ensure it covers all items which have potential for use in the application of the death penalty.**

3.7 Annual reporting on EU arms exports: an important instrument of transparency

National annual reports are a fundamental tool of transparency in arms export policy. The development of the CoC has helped to increase the attention paid to, and importance conferred upon, this mechanism. The fact that the governments of most 'old' EU member states publish annual reports on their arms exports not only facilitates information exchange between member states on their commercial activities in this area, but allows parliamentarians and non-governmental actors access to such information. Accordingly, they can take part in debates on the implementation of policy and on what should be considered best practice. Consequently, such transparency serves as an important element in the establishment of effective and responsible practices. In turn, it also constitutes a vital element in the struggle against weapons proliferation.

Current national practices: omissions and positive developments

Among the governments of the 15 EU countries which adopted the CoC in 1998, only three do not as yet publish any annual report on arms and military goods exports.[15] Whilst the CoC does not explicitly require governments to publish detailed reports on these issues, it is clear that the establishment of the CoC has resulted in the publication of national annual reports becoming the norm rather than the exception. However, it remains an important task for the governments of Austria, Greece and Luxembourg to, themselves, produce a comprehensive report on their exports of arms and related equipment; there can be little justification for denying the citizens of these countries access to such information, which is freely available across the rest of the EU.

During the six years that the CoC has been implemented, some governments have sought to improve their annual reports. Whilst a large proportion of improvements have been suggested by non-governmental organisations and national parliaments, the degree of involvement of non-governmental interlocutors in the debate has varied from country to country. As a result, significant improvements to annual reporting have been achieved in some member states[16], whereas in others only very limited changes have been introduced.[17]

A comparison of the EU national annual reports on arms exports shows huge differences from one national practice to the other. This heterogeneity in data presented and in the level of detail of the published information represents a considerable obstacle to an informed analysis of EU member states' policy in this field. Some governments transmit detailed documents mentioning the exact number of licences granted to every state, the nature of the products covered by these licences and information on the denials notified.[18] Others only publish very general data, limited to the whole value of their exports per recipient country.[19]

Furthermore, the provision of information on export licence denials also varies considerably in national annual reports. In view of the fact that the denial notification procedure is central to the effective operation of the CoC, it is extremely disappointing to note that national annual reports typically include very few details about export licences denied. Some national reports simply ignore the issue, while others include very general information on this topic. It is clear, however, that some information, such as the purported recipient country and the type of products covered by the denial, is essential in order to build an accurate picture of how the CoC criteria are being interpreted by EU governments.

15 The governments of Greece, Austria and Luxembourg have yet to publish any annual report on their arms exports.
16 In France and the UK, following the recommendations formulated by non-governmental actors and national parliaments the comprehensiveness of these governments' annual reports has been improved.
17 The Italian annual report, for example, has not integrated any fundamental improvements since 1999.
18 For example, the national annual reports of Finland, Germany, Holland and the United Kingdom.
19 This is the case of the Italian annual report.

Recommendations: national annual reports

The current CoC Review procedure launched by EU Governments provides the ideal opportunity for EU member states to commit to the production of comprehensive annual reports on their arms exports. Indeed, the revised CoC should include a specific requirement that all states produce such reports. The publication of more homogeneous and comprehensive reports covering all relevant information about their arms exporting activities and following a 'common model' would also help to promote the adoption of such practices by the new EU member states, some of which have yet to make much progress in this area.

National annual reports on arms exports should be produced promptly and on a quarterly or six-monthly basis, to allow Parliaments and the public to have access to up to date information. At a minimum, national annual reports should, contain, for all recipient countries, the following information:

- **The number of export licences granted, by recipient country.**
- **A full description of the types of products covered by the licences, including the Military List categories they belong to, by recipient country.**
- **The intended end-user of the equipment (at a minimum specifying whether this is a government department, armed forces, police, private user etc).**
- **The financial value of each licence granted.**
- **The quantity of each type of product covered by each licence, especially for weapons such as small arms and light weapons (SALW).**
- **Details of export licences granted during the previous years and still to be honoured.**
- **The amount and value of deliveries throughout the year (if possible, relating to recent and previously issued export licences). Information should also refer to those deliveries of military or security equipment which, for whatever reason, were not subject to a formal licensing requirement (for instance, as for those deliveries which are in the framework of government-to-government agreements).**
- **The number of denials issued and the types and quantities of products submitted to the denied licences, by recipient country.**
- **The reasons explaining such denials, with explicit indication of the CoC criteria applied.**
- **Information on known cases of misuse and diversion of military and security equipment previously delivered, by end-user and by country.**
- **Relevant information and specifications about the regional and international treaties to which the recipient countries adhere.**
- **Relevant information and specifications regarding the national export control system and policies.**

Enhancing the Consolidated Report on the operation of the CoC

Since 1999, the European Council of Ministers has published an Annual Report According to Operative Provision 8 of the European Code of Conduct on Arms Exports (Consolidated Report). This report on the implementation of the CoC provides a broad overall view of European policy on arms export controls and allows some insight into the impact of the CoC on national practices in the export of weapons and military products.

The report published by the European Council collates information on the number and value of licences granted and the value of exports authorised by all member states, providing a somewhat general overview of how the CoC is being implemented. Very recently, this report has been improved and enhanced with statistics previously not made available as well as with information on the development of EU arms export control policy. This progress represents an important advance towards increased

transparency. However, further improvements need to be made if the Consolidated Report is to function as a means whereby member states' implementation of the CoC can be judged.

One of the principal obstacles to the provision of more meaningful data is the fact that member states all have their own individual methods of gathering and storing information relevant to arms export control. The lack of a uniform standard means that states are not in a position to provide the same level and type of information on their arms export practice, leading to gaps and inconsistencies across the member states. Accordingly, accurate comparisons cannot always be made between the arms exporting activities of different EU governments. Member states have, however, asserted that they are undertaking harmonisation of the national reports, so as to produce more transparent summary tables, and it is to be hoped that this is reflected in the next (sixth) Consolidated Report which it is anticipated will be published in late 2004.

Although the aim of the Consolidated Report is not to replace the national reports and its scope cannot, in any case, be as broad, some additional improvements are nonetheless required. Even if the existing level of data on licences granted and actual exports was to improve in terms of accuracy and consistency, the general nature of the information provided to date does not enable observers to make a fully accurate or detailed comparison of how individual member states are applying the criteria of the CoC.

In addition, since information about export licence denials, including the reasons for the denial, is crucial to any understanding of how the CoC is being implemented, much more information is required in this area. At present, only the total number of denials issued by each member states is revealed along with the number of the criteria on which the decision to issue the refusal were based, whilst even this limited information is not provided by all member states.

Beyond this, if the Consolidated Report is to contribute to the strengthening and reinforcement of the CoC it should also provide much more substance in relation to consultations that have taken place between the member states on the subject of individual denials. At present, the Report provides only the number of consultations initiated and the number of requests for consultations received by each member state, which reveals very little about the operation of the CoC.

Finally, the European Union continues to play an important part in supporting and helping strengthen a number of regional arms control instruments, such as, for example, the Western Africa Moratorium on Small Arms and Light Weapons.[20] The Consolidated Report on arms exports should, as a consequence, contain relevant data on how member states are supporting such initiatives, and provide additional information that shows how the arms transfers to particular countries are consistent with the goals and objectives of relevant regional and international agreements. This practice could increase the transparency on the effectiveness of such treaties, strengthen their implementation, and encourage EU member state to adopt a more responsible attitude towards these countries and their international engagements.

Recommendations: the Consolidated Report

In order to enhance transparency and accountability surrounding the member states' implementation of the CoC, and to promote progress towards a harmonised approach to arms exports, significant improvements ought to be made to the Consolidated Report, as follows:

- **Member states should quickly complete the process of harmonising data collection, retrieval, and presentation, so as to facilitate consistent provision of information in the context of the Consolidated Report.**

20 The EU has been called to play an active part in the implementation of this regional initiative, both from ECOWAS member-states and UN Secretary General. See the "Report of the Secretary-General on ways to combat subregional and cross-border problems in West Africa, S/2004/200", 12 March 2004.

- **The Consolidated Report should contain more detailed information, in particular about the categories and types of products covered by the licences granted by each member state to each destination. Such information could be provided electronically on the website of the Council Secretariat.**
- **For each denial, information relating to the intended recipient, the type and quantity of equipment proposed for transfer, and the reason for the refusal, should be provided in the Consolidated Report. As an interim step, in the next Consolidated Report information on denials should at least be broken down so that it is clear how many denials were issued and under which criterion by each member state to each recipient state.**
- **In addition to the number of consultations initiated and received by each member state, the Consolidated Report should provide at least some information on the licences under debate and the outcomes of the consultations that have taken place, including whether or not two transactions were considered 'essentially identical'.**
- **The Consolidated Report should include information on how EU member states are supporting and ensuring respect for international agreements such as the West Africa Moratorium on Small Arms and Light Weapons.**

3.8 Ensuring a common understanding of key principles

Operative provision 3 of the CoC states that: "Before any Member State grants a licence which has been denied by another Member State or States for an essentially identical transaction within the last three years, it will first consult the Member State or States which issued the denial(s)." Accordingly, since it is central to defining those circumstances in which an undercut is taking place, the concept of the "essentially identical transaction" (EIT) is at the heart of the operation of the CoC.

The need for a common understanding of an EIT

Member states have not yet articulated a clear understanding of what actually constitutes an EIT. Their continuing failure to do so, moreover, raises the prospect of differences arising about those circumstances when undercutting may (or may not) have taken place, thereby impairing the development of a common approach.

In response to these concerns, in 2000, member states sought to clarify the issue of EIT by asserting that the "daily operation of the Code's denial mechanism will result in an accumulation of experience that will provide the basis for a clear understanding of what is meant by an [EIT]".[21] Furthermore, it was argued that a "comprehensive approach to assessing transactions" together with a "broad interpretation of the concept of [EIT]" would "provide the experience needed to gradually evolve a more precise definition of the term".[22] In order to facilitate this process, member states agreed to share "to the extent compatible with national considerations… information on the occasions in which consultations result in the conclusion that two transactions are not essentially identical".[23] Whilst these statements were welcomed, there has, since, been very little additional information given about the progress that member states have been making on this issue. Thus, it is unclear to what extent a common understanding has developed of what constitutes an EIT.

It is to be hoped and expected that member states are interpreting the concept of an EIT in its broadest sense. It may be obvious, in some situations, when two transactions are essentially identical, for example, when licence applications relate to identical or even similar types of military equipment. However, items of equipment or technology that would contribute to similar capabilities of the end-user, or which raise similar

21 Fifth Annual Report according to Operative Provision 8 of the EU Code of Conduct on Conventional Arms Exports, p 16.
22 Ibid.
23 Ibid.

risks for diversion, human rights, or regional stability, should also be considered essentially identical. Thus, the question of whether transactions are "essentially identical" should not be determined through narrow technological criteria, but rather through the issues that the transaction would raise in relation to the CoC.

Recommendations

Since the CoC has been in operation for six years, member states should now be in a position to crystallise and articulate what is meant by an EIT.

- **In the interests of transparency and in order to reassure parliaments and the public that the CoC is being implemented fully, member states should clarify the progress that has been made on the issue of EIT, elaborating on how this term is being interpreted in practice.**
- **Member states should provide for publication in the EU Consolidated Report information about consultations which have taken place and whether or not a transaction was considered to be essentially identical.**
- **Transactions should be considered essentially identical not only when they concern identical or similar types of equipment in relation to a particular end-user, but also when they raise similar concerns about any of the Criteria of the CoC.**

4

Other issues

NGOS HAVE LONG ARGUED THE CASE for strengthening and developing EU arms export controls in order to create a fully comprehensive and integrated control regime. The member states have taken steps to close some loopholes in export controls – such as end-use and arms brokering – but the measures that have been agreed remain inadequate. Furthermore, there are a number of additional aspects that will require considerable attention on the part of the member states if the EU arms export control apparatus is to function properly and ensure the effective implementation of the CoC. The following sets out a comprehensive set of steps and recommendations for action on the part of the member states with a view to strengthening existing mechanisms and closing loopholes and omissions in current EU export controls.

4.1 **Developing effective end-user controls in the EU**

End-user controls are measures adopted by arms exporting countries with the aim of preventing military and related equipment that is exported from being misused or diverted for illegal use (such as the violation of human rights). End-user controls are also intended to act as a deterrent against the unauthorised re-export of arms to a third party. In some ways, end-use controls represent a test of the political will of governments to make their export control policy really effective.

All EU member states have a system of end-user controls for arms transfers, although these systems differ widely in respect of their formulation, their scope, the degree of political or legal force attached, and the variety of actors involved in the authorisation and verification procedures. At the same time, EU member states also set differing standards whereby an end-user certificate (EUC) is required.

Current EU controls

Those EU countries with the most stringent end-use requirements include Belgium, Sweden and Italy. In these countries the EUC has legal force and must be issued by the government authorities of the recipient country. The EUC includes a non re-export clause which includes a pledge that the material to be exported is for the recipient's own use and will not be re-exported without prior official approval by the exporting government authorities. The national embassies are then instructed to verify the EUC, in order to detect and limit cases of falsification. Some end-use systems contemplate the imposition of sanctions if the non re-export clause is not respected. Others, such as the Swedish, envisage the possibility of random follow-up checks to ensure that the

exported goods are being used in accordance with licensing regulations.[24] Other EU member states prefer to rely on more flexible systems, with countries such as the UK generally requiring an EUC to be signed by the importing company. At the same time, the UK places a premium upon pre-licensing checks rather than on systematic investigations after the export has taken place.

Experience demonstrates that the most articulated, binding, and stringent end-user monitoring systems limit cases of diversion, with a positive impact on internal and international security. At the same time, diversion and misuse of military equipment is recurrent in countries with weak end-use controls and verification systems (for example some new EU members)[25], and is more likely where countries have a more flexible system[26] or where some categories of equipment or types of transaction are exempted from EUC (for example 'civil' small arms in Italy or licensed production arrangements in Germany)[27].

The need for a common system

The lack of a common stringent EU system for end-user certification and monitoring presents the risk that unscrupulous end-users will seek to source their arms from those member states with the least onerous end-user requirements, thus violating a fundamental tenet of the EU CoC, namely the creation of high common standards for the control of arms exports. Moreover, the proliferation of co-production agreements amongst EU member states, including through the Framework Agreement, could further worsen this problem. These agreements raise the possibility of co-produced military and related equipment being moved freely to the member state with the weakest end-use restrictions prior to final export from the EU. Such agreements may also lead to an erosion of national controls on parts, components, and technologies without any appropriate counter-measures, such as a centralised monitoring system.

The need for a common EU system for end-use control is now clear. Such a system should build upon best practice across the EU and internationally – for example drawing upon the US Blue Lantern Programme. However, some EU governments remain to be convinced about the benefits of a strengthened and harmonised end-user system. Reservations have been expressed, for example, as to the utility of conferring EUC with legal force, because exporter governments will be reluctant to take legal action against a recipient government. However, conferring legal status on an EUC would be useful because it would provide an extremely solid basis for any subsequent decision to suspend or revoke a licence in the event of diversion or misuse of the goods exported.

Some governments have also question the desirability of detailing in the EUC the uses of the equipment which are considered proscribed, and of setting out a range of sanctions that could be imposed should assurances be breached. However, where this is accompanied by a requirement that the recipient allow end-use monitoring to take place, the exporter is well placed to be able to influence the behaviour of the recipient in a positive way. Moreover, establishing these standards within an EUC at the inception of any arms export deal would have the added advantage of ensuring that sensitivities regarding sovereignty are considered at the outset.

Recently, in a welcome move, member states have acknowledged the need for common standards for end-user controls by agreeing on a list of the most basic information that is necessary in an EUC. In addition, member states have agreed on a list of further

24 France has a stringent system to monitor the itinerary of war material: custom control; certificate of arrival at final destination, signed by the importing company or government and sent within a time limit to the exporting government; control on administrative documents and banking transactions; and subsequent monitoring controls, with transnational collaboration among custom authorities and intelligence services.

25 See *Arms production, exports and decision-making in Central and Eastern Europe*, Bernardo Mariani and Chrissie Hirst, Saferworld, June 2002; and *Arms Trade, Human Rights, and European Union Enlargement: The Record of Candidate Countries*, Human Rights Watch Briefing Paper, 8 October 2002. Available via http://www.hrw.org/.

26 See *Out of Control: The loopholes in UK controls on the Arms Trade*, Oxfam, December 1998, available via http://www.oxfam.org.uk/what_we_do/issues/conflict_disasters/downloads/control.rtf.

27 Amnesty International, End User Monitoring and Controls, http://www.amnesty.org.uk/action/camp/arms/enduse.shtml.

measures that "might also be required". This supplementary list includes possible provisions such as an explicit ban or other restrictions on the re-export of the equipment in question, an undertaking that the equipment would not be used for anything other than their declared purpose, and the possibility that the exporting government may make checks on the authenticity of the undertakings provided by an importing government.

Recommendations

These measures represent a good basis for strengthening and harmonising the end-user certification procedures across the EU. However, the list of required provisions should be expanded to include those which are currently optional, and member states should reach agreement on the circumstances in which an EUC should be required, based upon an inclusive approach. The proposal of the Netherlands Government to create an operative provision about end-use certification should also be swiftly implemented.

- **In addition to those mandatory and voluntary measures already identified by member states the following elements should also be included within end-use certification requirements:**
  - **i. A non-misuse clause, declaring that the material will not be used for proscribed uses, according to the CoC criteria;**
  - **ii. Penalties for breaching end-user assurances, including the halting of all further arms supplies from the recipient (and ideally from all EU member states);**
  - **iii. The right to follow up arms once exported and to check on their end-use.**
- **All EUC should have legal force and should be signed by the government authorities of the destination country, which should carry out checks on the firms concerned in the importation of the goods. EUC should also be authenticated by the diplomatic authorities of the exporting country in order to identify and limit cases of falsification or forgery.**
- **The EUC should be an integral part of a comprehensive system of export controls, in which the information collected in the various phases, as well as the range of actors involved, act as a guarantee against collusion in illicit trafficking:**
  - **i. In the authorisation phase, exports to countries at risk of diversion should be screened with a view to fully assessing the risks involved; where these are significant, exports of arms and sensitive equipment should be refused;**
  - **ii. Deliveries should be documented by a certificate of arrival at final destination to be sent to the exporting authority within a specified time-frame;**
  - **iii. Member states should examine the possibility of establishing a system of joint export monitoring, and promote collaboration among customs authorities and intelligence services, prioritising those countries and transfers that are of most concern because of the risk of diversion and misuse;**
  - **iv. Member states should co-operate more closely on end-use control through an information-exchange mechanism in which one member state's knowledge of any problem of end-use or diversion is communicated to all; to this end, it would be useful to establish an EU database regarding re-export and diversion risks (see Section 3.4 on enhancing internal transparency in the CoC).**

4.2 Developing effective EU controls on arms brokering

In recent years there has been a growing recognition amongst states of the dangers and serious consequences of allowing the activities of arms brokering agents to continue unregulated. In response to this, in June 2003, EU member states adopted the EU Common Position on the control of arms brokering. It commits member states to adopt national legislation in order to license brokering activities taking place on their territory, and to assess such licence applications against the criteria of the CoC on arms exports. The Common Position also encourages member states to control "brokering activities outside of their territory carried out by brokers of their nationality resident or established within their territory" and stipulates that "Member States may … establish a register of arms brokers".[28] These two last-named provisions are voluntary, rather than mandatory.

The Common Position further stipulates the establishment of a system for information exchanges on, among other issues, denials of brokering licensing applications. As suggested in the November 2003 User's Guide to the CoC, "all Member States who have laws on brokering and operate a licensing system for brokering transactions should notify denials in the same ways as for export licence denials in accordance with and to the extent permitted by their national legislation and practices".[29]

Loopholes in the EU regime

The Common Position and plans to integrate information exchanges on denials of brokering licences into the already established system under the CoC are extremely welcome. However, no timetable has been provided as to the date by when member states should have implemented the binding provisions of the Common Position. There also remain significant concerns that the proposed controls and processes will be insufficient to curtail the activities of unscrupulous arms brokering agents.

For example, it is highly regrettable that member states have not committed themselves unequivocally to controlling arms brokering activities that are conducted by their nationals or residents, but which occur outside their territory. Given the often highly mobile nature of those involved in undesirable arms transfers, the lack of extra-territorial controls means that those wishing to avoid national controls will simply step outside the EU to another country with no or lax controls in order to conduct their dealings.

The absence of an obligation to create registers on arms brokers is a further cause for concern. Such registers, particularly if tied to a regular reporting obligation, as is the case in France, would allow for significantly greater oversight and monitoring of the activities of arms brokers. It would also enable member states to ban from engaging in brokering activities those who have been convicted of a serious criminal offence. This would, among other benefits, provide industry with an easy tool to verify that a broker they consider doing business with has been subject to prior governmental scrutiny.

There is also an urgent need to identify mechanisms among EU member states for exchanges of information on brokers who give rise for concern. The EU Declaration on Combating Terrorism of March 2004 instructs the General Secretariat of the EU Council to examine measures for exchanges of information on convictions for terrorist offences and for the establishment of a European register on convictions and disqualifications relating to terrorist offences.[30] There is no evident reason why the General Secretariat should not also be instructed to investigate such measures with regards to those considered unfit to engage in arms brokering activities.

28 European Union. 2003. *Council Common Position 2003/468/CFSP of 23 June 2003* on the control of arms brokering, Official Journal of the European Union, 25.6.2003, L 156/79f., articles 2.1 and 4.1.

29 European Union. 2003. *User's Guide to the European Union Code of Conduct on Arms Exports* (EU document 14283/03), 6.11.2003, p 21.

30 European Union. 2004. *Declaration on Combating Terrorism*. European Council, Brussels, 25.3.2004, p 4f.

Furthermore, no explicit mention is made in the Common Position of the need to regulate supplementary activities such as arranging for or providing transportation or financial services, despite the fact that these services form an integral part of the arms brokering nexus. In the absence of controls, individuals may continue to carry out such activities as part of undesirable arms transfers without running the risk of legal punishment.

Finally, Member states should also submit information to the EU Council on brokering licences granted. This information should include the total number of licences issued, with a clear identification of the country of final destination of the brokered goods under each licence, a description and value of the goods, as well as the stated end-use and end-user of the brokered goods. This information, as well as information on the total number of brokering licences denied, and of consultations initiated and received, should be integrated into the annual report according to Operative Provision 8 of the CoC on arms exports.

Recommendations

In order to provide a fully effective response to the problem of arms brokering, EU member states should agree to strengthen the Common Position on Arms Brokering as follows:

- **Member states should commit to introducing extra-territorial controls on arms brokering, and to establishing national registers of arms brokering agents, by June 2006.**
- **Member states should agree to exchange detailed information on brokering licences granted and denied as well as on relevant consultations. This information should be integrated into the annual report on the implementation of the CoC.**
- **Member states should identify appropriate mechanisms for the exchange of information on individual arms brokers whom they consider to be unfit for receiving brokering licences.**
- **A review of the implementation of the Common Position should take place by June 2007. The review should seek to extend the agreement to include controls on services such as transporting and financing arms transfers.**

4.3 Licensed production overseas

Licensed production overseas[31] (LPO) is the process whereby a company in one country allows a second company in another country to manufacture its products under licence. In terms of efforts to prevent weapons proliferation, LPO is of particular concern since it involves the establishment of new centres of production and the spread of technology over which the government of the licensor company may have little or no control. The EU (including the new) member states, have allowed LPO agreements to spread around the world for the manufacture of a wide range of military, security and police equipment and weaponry.[32]

Current EU controls

Currently, the CoC skirts around the issue of LPO. Criterion 7 of the CoC requires member states to consider the "risk that… equipment will be diverted within the buyer country or re-exported under undesirable conditions," and to consider "the capability of the recipient country to exert effective export controls." However, there is no

31 Licensed production agreements are often also referred to as licensed manufacturing agreements, co-production agreements or technology transfer agreements; and are sometimes classified within the general term of "offsets".

32 For further recent examples see: *Undermining Global Security: the European Union's arms exports*, Amnesty International, May 2004.

specific Criterion or Operative Provision in the CoC that specifically addresses the serious risks posed by the uncontrolled spread of LPO.

Recently, however, the EU has begun to look into the issue. In the third EU Consolidated Report an undertaking was made to "study the problem of manufacture under licence in third countries."[33] Subsequently the fifth Consolidated Report contained an agreement by member states that "when considering licence applications [for exports] for the purposes of production overseas of equipment on the Common Military List, account will be taken of the potential use of the finished product in the country of production and of the risk that the finished product might be diverted or re-exported to an undesirable end-user."[34] Although this does not refer to LPO directly, it would in most cases be relevant to licensed production arrangements entered into where the licensor is an EU-based company. Since then, a proposal has been made to incorporate the wording above, from the Fifth Consolidated report, into the CoC text itself. This would be a welcome step, indicating an acknowledgement by EU member states of the need to control LPO. However this in itself would not be sufficient to ensure that effective control of LPO would take place. EU member states need to develop a common system for the complete regulation of LPO based upon 'best practice' both from within and outside the EU. This should regulate the production, overseas, not only of Military List equipment, but of paramilitary, security, police and dual-use equipment also.

Existing good practice

The United States

In the United States, licensed production (or manufacturing licence) agreements are treated on the same basis as are physical exports of controlled goods and require prior approval from the US State Department. The US licensed production contracts usually limit production levels and prohibit sales or transfers to third countries without prior US government consent. There is also provision, albeit limited, for prior Congressional approval of licensed production deals.[35]

Sweden

In Sweden co-operative arrangements and licensed production agreements are controlled by the national Inspectorate of Strategic Products (ISP). If a Swedish defence company wants to co-operate with a defence company in another country in order to develop a new defence system, it is encouraged to advise the ISP of its intentions, and it may be necessary to receive approval from the ISP before any agreement is signed (dependent on the nature of the finished product). Similarly, should the companies concerned want to establish a licensed production facility outside Sweden, the company needs the prior approval from ISP. With regard to the subsequent export of the goods produced under licence, the ISP may require a 'white list' of potential export markets to be agreed in advance, or it may stipulate that third-country sales cannot take place without its explicit case-by-case approval.

The OSCE Small Arms Document

One of the few regional agreements that contains explicit references to controlling LPO is the Organisation for Security and Co-operation in Europe (OSCE) Document on Small Arms and Light Weapons which establishes "criteria to govern exports of small arms and technology related to their design, production, testing and upgrading, which are based on the OSCE document on "Principles Governing Conventional Arms Transfers."

33 Third Annual report according to Operative Provision 8 of the European Union Code of Conduct on Arms Export, Council of the European Union, Brussels, 7 November 2001, http://register.consilium.eu.int/pdf/en/01/st13/13657en1.pdf.

34 Fifth Annual Report According to Operative Provision 8 of the European Code of Conduct on Arms Exports (2003/C 320/01), http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/c_320/c_32020031231en00010042.pdf.

35 The US State Department must notify Congress before licensed production agreements over $50 million are approved.

Furthermore it declares that: "Participating States will make every effort within their competence to ensure that licensing agreements for small arms production concluded with manufacturers located outside their territory will contain, where appropriate, a clause applying the above criteria to any exports of small arms manufactured under license in that agreement." Although these provisions are non-binding and cover only small arms and light weapons, the agreement is nonetheless significant since 55 States, including all the existing EU and new member states, have committed themselves to the document.

Recommendations

If current trends continue, the number of licensed production arrangements will continue to increase, and the means whereby production technologies and component parts can become available to licensed production facilities are also likely to become more varied and difficult to control. EU member states therefore need to take concerted and prompt action as follows:

- **EU member states should establish a new Operative Provision within the CoC which requires that all prospective agreements involving EU companies for the manufacture overseas of military, security, police and dual-use equipment are subjected to prior licensed approval by national governmental authorities. Licensing approval should be required at the level of the LPO agreement itself rather than seeking to control the transfer of individual components or machine tools used in such production. Such a comprehensive 'one-stop-shop' approach should, for each LPO agreement, regulate the export of all related component parts, production equipment and technology (whether military list, dual-use or ostensibly civilian) transferred as part of the LPO agreement.**
- **The licensing process for LPO agreements should involve scrutiny of the likely export markets and end-use of the goods to be produced, and it should be as stringent a process as is applied to the direct export of arms and controlled goods. Specifically, licensing of such licensed production agreements should not be given:**
  - **i. where an export licence application for a direct weapons transfer would be refused (that is, one that would breach the CoC Criteria);**
  - **ii. where the recipient state cannot demonstrate sufficient accountability in terms of end-use control; or**
  - **iii. to states that have a record of violating UN and other international arms embargoes.**
- **LPO agreements should contain strict limits on the quantities of military, security, and police products that can be produced. The lifetime or duration of such agreements and details of intended end-users should be clearly defined.**
- **LPO agreements must also contain a clause that prohibits sales or transfers to third countries of either arms or licensed production technology, without the prior consent of the original licensing EU government. Any such permission should be reported to the licensing states parliament in its annual report.**
- **Each agreement to establish a LPO facility should also reserve the right of the licensor government to monitor the LPO agreement. Where there is evidence that arms resulting from an LPO agreement have been misused (for example for human rights violations) in the licensee's home country or have been exported to destinations not subject to agreement, the LPO agreement should be immediately revoked. In such cases all provision of related machine tools, parts, training, and technology should be halted.**
- **LPO agreements, as well as direct export licence applications, should be scrutinised by a relevant parliamentary oversight body in each EU member state prior to the granting of governmental approval. All such licensed production agreements should then be recorded in the annual report of each licensor's country and also in the EU Consolidated Annual Report.**

4.4 Components of concern and incorporation

The export of components[36] for military, security, and police equipment and weaponry is an ever-increasing part of the global arms market. Yet the effective control of this international trade in components for weapons systems presents a major challenge for EU member states, as many countries are often involved in the manufacture of a single weapons system, and components are likely to be less visible in the final product, making it much harder to monitor whether or not such export items have been misused.

The importance of the trade in components and sub-systems to the defence industry was highlighted in a 1999 submission to a UK Parliamentary Select Committee by the UK Defence Manufacturers Association (DMA): "the UK especially demonstrates great strength in the high technology sub-systems sphere… In consequence, a considerable proportion of defence export contracts won each year have been for subsystems, components, spares, etc and there are very few major Western high technology programmes which do not have some level of British subcontractor participation."[37]

Beyond the UK, through partnership agreements, offset deals, technology transfer, and licensed production agreements, many companies in the old and new EU member states have had a growing involvement in the components and sub-systems sector. Indeed, many EU companies not normally associated with the conventional military or 'bombs and bullets' production have significant involvement in the high-tech 'dual-use' sector. For example, a recent report on Ireland identified that whilst Ireland's 'military' exports in 2002 were only valued at €34 million the 'dual-use' exports were valued at €4.5 billion.[38]

Given this trend, there are concerns amongst NGOs and other observers of the EU arms trade that there is a lack of effective control over the transfer of component parts and subsystems. Where such components and subsystems are classified as "dual-use goods", under the CoC, their licensing for export appears to be only subject to the criteria of the CoC if they are destined for a military or security end-user in the recipient country. Increasingly, however, components and subsystems are being transferred to arms manufacturing companies within the EU and overseas, thereby placing doubt over the extent to which EU member states actually consider the implications of the ultimate use of the final product before sanctioning the export of components.

Present EU controls

There appears to be considerable ambiguity and a lack of harmonisation concerning the application of the CoC to the transfer of components. Indeed, in the last few years a number of EU member states have made statements qualifying the application of the CoC criteria in this area, for example[39]:

On 8 July 2002, the UK Foreign Secretary announced new export licensing guidance to be applied to the sale of UK components which are to be incorporated in defence equipment in a second country, for onward export to a third country. In effect, the guidelines hand over control of re-export to the "incorporating" state, subject to certain conditions. In the same statement the UK Government announced that under this new arrangement, head-up-display units had been licensed to the USA for incorporation into the cockpits of F-16 aircraft scheduled for delivery to Israel in 2003.

It was reported that in 2000 Denmark had introduced a change to its export control legislation that meant that it was no longer mandatory for all Danish arms exporters

36 Components include subsystems, electronics, software, production equipment and technology, and engines – anything that is not a complete or finished weapons system, a weapons platform, a weapon, or ammunition. Components also include spare parts and upgrades of equipment already in service.

37 Memorandum submitted by the Defence Manufacturers Association, http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmtrdind/52/91109a07.htm.

38 Export Licensing for Military and Dual-use goods, June 2003, Fitzpatrick Associates, p 24, www.entemp.ie/tcmr/finalreport.pdf.

39 For further recent examples see: *Undermining Global Security: the European Union's arms exports*, Amnesty International, May 2004.

to specify who was the final recipient of their exports, as long as the initial recipient country was an EU or NATO country. In April 2002, press reports stated that a Danish manufacturing company which had a Danish kroner 100m order of missile-seeking displays for 144 Israeli F-16 fighter planes had been "able to circumvent the current debate about arms supplies to Israel by despatching the equipment to [an] American producer … who then installs the displays into the Israeli planes, [with the result that] the company can sidestep the need to inform politicians."[40]

Recommendations

The growing scale and extent of the international trade in components and subsystems requires EU member states to develop a concerted response which reinforces, rather than undermines, their commitment to preventing the proliferation and misuse of arms and sensitive equipment, as follows:

- **EU member states should reassert their commitment to the export criteria as set out in the CoC, and affirm that these criteria apply to components as well as to complete weapons systems, taking into account the ultimate destination and end-use of the final product. They should rebuff any attempts to weaken the criteria on the export of strategic components for final assembly elsewhere.**
- **EU member states should improve the way they provide information on components in their annual reporting. They should specify whether the components are for spares and upgrades, or if they are destined for incorporation into other products.**
- **For small arms and light weapons, EU member states should provide a further breakdown of what equipment has been licensed (for example trigger mechanisms, or proofed barrels) and they should also provide the quantity of items that they have licensed, as is currently the case for whole small arms. Customs data, used to report the physical exports of small arms, should also include components, in order to provide a realistic and accurate assessment of the EU state involvement in the small-arms trade.**
- **All EU member states should ensure that licensing approval is required for the transfer of military, security, and police production technology for controlled goods. The criteria used by the governments for such licence determination should be as stringent as for transfer of military, security, and police equipment and arms.**

4.5 Controlling the transit of arms across the EU

The issue of transit is an important one for EU member states, for two main reasons. Firstly, at a fundamental level, member states should exert control over the movement of strategic goods through their territory, regardless of the origin or end-user of these goods. Secondly, member states also have a responsibility to ensure that their territory is not being used as a transit route for the transfer of arms to conflict or human rights crisis zones.

Addressing the issue of transit

In the first half of 2002, member states undertook an exchange of information on national policies with regard to the transit of strategic goods through their territories. Questions were raised over whether it is acceptable for arms which would not be licensed for direct export from member states to be allowed to pass through the EU and use EU port facilities. The exchanges led to the drafting of an internal document which summarised and compared the different systems for controlling goods in transit currently in use across the EU. In addition, reference to the transit issue was made in the fourth Consolidated Report on the operation of the CoC:

40 Copenhagen Post Online, 26 April 2002, 'Arms exports under fire', www.cphpost.dk/get/63668.html.

"In those cases where member states require a licence for transit or transhipment of any of the goods on the EU Common List, the criteria of the [CoC] should be duly taken into consideration by member states when deciding on applications for such licences."[41]

In terms of developing a common system for controlling the transit of strategic goods through the territory of the EU, the steps thus far taken by member states remain woefully inadequate. Crucially, member states have not even agreed upon those circumstances when a transit licence is required. There are a number of different situations which need to be considered, for example, when transit is from one EU member state to another via a third, when it is from outside the EU through one member state to another, or when it is from one member state through another to a destination outside the EU. That which is of greatest concern relates to transit of goods from a destination outside the EU through the EU to another non-EU destination. It is important the member states, at the very least, take steps to harmonise policy on this last-named scenario. Otherwise the danger will remain that unscrupulous exporters will seek to exploit differences in the application of transit controls across the EU and organise the transfer of military, security, and police equipment destined for conflict and human rights crisis-zones *through* the territories of member states with the weakest controls.

It is probable that commercial considerations, and the desire not to inhibit the free flow of trade through EU ports, lie behind EU member states' reluctance to take concerted action to control the transit of strategic goods through their territory. However, such a position is not tenable in the light of the new and unpredictable security threats now faced by the West and given the recent expansion of the EU to include a number of states for whom transit is a particularly pressing issue. Whilst preventing the transfer of military, security, and paramilitary equipment to conflict and human rights crisis zones should be a top priority for member states, the prevention of terrorism must also be an important rationale for common controls on the transit of strategic goods through the EU. Indeed, the potential for terrorists to exploit weak transit controls, particularly over maritime trade, has led the US Government to initiate its "Container Security Initiative" whereby security criteria are used to identify high-risk containers and pre-screening is carried out in overseas ports before cargoes are shipped to the US. Whilst such an approach may not be appropriate for the EU, it does nevertheless serve to highlight the serious nature of the transit issue. If EU member states fail to close the loopholes in their transit regulations, the danger of EU territory being used by terrorist groups as a transit route for arms and explosives will persist.

Recommendations

In the light of the myriad security threats that now face EU member states, concerted action must be taken to control the transit of strategic goods across the EU:

- **Member states should move quickly to develop a common approach towards licensing the transit of strategic goods through the EU and, in the interests of transparency and accountability, should publish the internal document relating to systems that are currently operational in different member states.**
- **Based on best practice and enforced in national legislation, the new common EU policy on the transit of strategic goods should:**
  - **i. set out those circumstances under which a transit licence is required;**
  - **ii. provide for a comprehensive system of pre-notification of transit routes to the appropriate authorities;**
  - **iii. set out those penalties that should apply if the law on transit is broken.**
- **Member states should include information on transit licences granted in their national annual reports – including details of types of goods, quantities, routes, suppliers, and end-users.**

41 Fourth Annual Report according to Operative Provision 8 of the EU Code of Conduct on Conventional Arms Exports, p 6.

4.6 Helping new member states and associated countries to implement the EU Code of Conduct

The recent enlargement of the European Union by ten new countries is a fact of great political and historical importance. The Eastern and Western lungs of Europe now finally breathe together. Apart from its political value, the enlargement of the EU is also a confirmation of its effectiveness. The EU enlarged by ten new countries, and with some other states still applying for membership, is proving to be an effective mechanism of socio-economic co-operation.

Nowadays, the EU faces a great challenge; it must not only manage the widening, but must also continue the deepening of co-operation. There are still several fields where European States should co-operate more closely. In the context of the recent violent conflicts and terrorist attacks it seems obvious that arms export control is one of those fields and indeed, the 'old' 15 member states already developed significant levels of co-operation in this respect. It must be also acknowledged that the new member states were granted a certain access to the existing co-operation mechanisms prior to Accession Day. Participation in some COARM meetings and access to certain information exchanges have undoubtedly improved arms export control and smoothed the integration process amongst the new member states. Much has already been achieved in terms of implementing the CoC by the new member states and the Associated Countries. However, there is still a lot to be done.

Managing the transition to full membership

During the pre-accession period the implementation of the *acquis communautaire* by the Candidate Countries is smoothed by the special EU technical assistance programs (for example PHARE or SAPARD). Unfortunately, this technical assistance is not targeted at arms export control. This is also the case in the Structural Funds which are to replace the pre-accession programs in the new member states. Consequently, the new member states, as well as other European non-member states, are deprived of significant financial and technical assistance on arms export control, although smaller amounts may be available through the member states' Common Foreign and Security Policy budget lines. In view of the new threats and challenges now faced by the EU, financial and technical assistance for the development of export control infrastructure in the Associated and new member states should be a priority.

In 1993 the Copenhagen European Council agreed criteria for new membership of the EU. According to those criteria a candidate country is, among other things, required to establish institutions which guarantee democracy, rule of law, and human rights, as well as to adjust its administrative structures, so that European Community legislation, transposed into national legislation, is implemented effectively through appropriate administrative and judicial structures. In order that such criteria are met in full, all interested states should establish effective arms export control system, and thus, as in the case of the issues directly regulated by the *acquis*, all EU-oriented states should be given special technical assistance to develop their arms export control systems.

Generally speaking, there are three groups of countries which should be covered by these assistance mechanisms:

1. Current member states, with a special focus on the ten new members;
2. Countries which are likely to join the EU in the not too distant future (Romania, Bulgaria, and former Yugoslav states);
3. Countries which will probably stay outside of the EU in the medium term but may seek membership in the longer term (for example Ukraine or Moldova).

It goes without saying that the level of this assistance should depend on the political and economic status of a country. Consequently, new member states should mainly benefit from information exchange and training, whereas non-member states should also receive technical and financial aid to help them establish an adequate export

control capability. As a result, the enlarged EU should ensure that there are adequate financial resources available in order to support member and non-member states to implement the CoC.

Recommendations

The effective implementation of the CoC by the member states and other countries with EU aspirations will only be achieved when supported by assistance mechanisms implemented by the respective countries in conjunction with relevant EU institutions. A great responsibility in this respect lies with the Council of the European Union. The following recommendations are strongly urged.

- **The EU Council of Ministers should ensure that funds are available to provide technical assistance to the new EU member states for the development of their export control infrastructure.**
- **At least once a year the member states and all European countries with EU aspirations should meet in order to discuss their export control requirements and should elaborate a working plan for the next year. For both technical and political reasons it could be helpful to organise such meetings directly after one of the COARM meetings.**
- **More detailed discussions, accompanied by training and presentations on the most important technical issues, should be organised in regional groups. Participation in such meetings should not be limited to high government officials only. The regional meetings should also attract experts from all governmental departments and institutions involved in arms export control. This regional focus and participation of officers, who are actually responsible for the day-to-day operation of the export control system, would ensure better technical co-operation amongst Member and non-member states alike.**
- **Regional meetings for the representatives of the national parliaments, industry, NGOs, and research centres from both member and non-member states, should be organised. This broad range of participants would contribute to a better understanding and consequently better functioning of the export control system across Europe.**
- **In order to ensure effective implementation of the CoC it is also important to look at this problem from a more holistic perspective. An in-depth socio-economic analysis of the defence sector in each EU and associate country, followed by the exchange of information on best practice, could serve as an example of this broader approach. It is our belief that the EU should give special attention to this sector of the economy and by doing so involve the defence industry in compliance with the export control system. This would be especially important in the case of new member states and post-communist non-member states, which have experienced serious economic problems after the fall of the Iron Curtain.**

4.7 Transforming the EU Code of Conduct into a Common Position

Ever since the adoption of the CoC in 1998 there have been calls by certain governments, national parliaments, the European parliament, non-governmental organisations and other actors to strengthen the CoC on arms exports by making it legally binding on member states. Whilst the aim of enhancing the effectiveness of the CoC would be furthered by member states adopting the CoC into their national arms export control legislation, for some time there has seemed little appetite for such a move.

It is thus most welcome that, with the adoption of the Common Position on the Control of Arms Brokering in June 2003, the debate on adopting the CoC as a legal document has been reopened and member states have consulted the legal service of

the General Secretariat of the EU Council on the possible legal implications of such a move.

Its status as a politically-binding agreement means that compliance with the CoC is voluntary for EU member states and there exists no legal obligation to conform to its criteria and operative provisions. The primary basis for decisions on arms export licenses remains the national legislation of member states; only a few have incorporated the criteria of the CoC into their national arms export control legislation. As a result, member states have licensed the export of arms which would appear to conflict with the CoC criteria but which are nevertheless permissible under national law. This has resulted in conflicting and incoherent national arms export policies. These undermine the capacity of member states and the EU to achieve the stated goal of the CoC, "to set high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers by all EU Member States".[42]

Strengthening the CoC

The failure of the CoC to establish high common standards for arms export control across the EU is a central issue that the current Review of the CoC must consider. Whilst a few member states operate restrictive arms export control policies, these are continually under threat from those member states operating at a lower standard. Accordingly, if the CoC is to achieve its stated aims, there is a pressing need firstly for the initiative to be strengthened in all its aspects (by the recommendations in this report) and secondly for it to be transformed into a legally-binding document.

Transforming the CoC into a Common Position

In considering ways in which the CoC can be given legal status one possible way forward could be to transform the CoC into an EU Common Position. Under the Consolidated Treaty of the European Union, member states "shall ensure that their national policies conform to the common positions" they adopt in the Council of the EU.[43] Whilst it would not oblige member states to transpose the CoC into their national legislation, adopting the CoC as a Common Position would nevertheless oblige member states to ensure that their arms export control policies and licensing decisions do not conflict with the CoC criteria. This would signal a greater level of commitment than exists under the current politically-binding arrangement whereby member states, in effect, decide the extent to which they will implement the CoC.

At the same time, care would need to be taken to ensure that a Common Position did not inadvertently undermine advances that have been made in arms export control policy, whether at EU or national level, or harm prospects for improvements in future. Given that the current export control regime is in need of further development (as set out in this report), it is critical that if a Common Position is agreed, there should continue to be explicit reference to the principle that it will not "infringe on the right of member states to operate more restrictive national policies".[44]

It is essential, moreover, that the CoC as a Common Position does not restrict member states' freedom to negotiate and agree upon further principles and measures related to the operation and the operative provisions of the CoC. Several useful agreements have been concluded covering a variety of issues relating to the CoC, from principles governing denial notifications, to common standards for end-use certification, to commitments relating to the sharing of information with non-EU member states. Member states should retain the flexibility required to continue this process.

42 CoC, 8 June 1998, preamble.

43 Consolidated Version Of The Treaty On European Union, 2001, article 15. See http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.000501.html.

44 CoC, operative provision 2.

A Common Position should therefore stipulate that associated agreements on common practices should remain of a politically-binding character until member states agree to confer legal status upon a particular initiative. This would follow on from the successful development of the recent EU Common Position on Arms Brokering.

Conclusion

Despite advances, member states are still a long way from practising a harmonised, responsible approach to arms export control. Adopting the CoC as a Common Position would not remove the need for the harmonisation of national legislation. However, by obliging member states to ensure conformity of national policies with the CoC, a Common Position would provide an important basis for strengthening and harmonising national EU arms export control legislation.

Recommendations

In order to promote the implementation of responsible national arms export policies that are in conformity the CoC, member states should:

- **Strengthen the CoC in all its aspects along the lines of the recommendations set out in this report.**
- **Adopt the strengthened CoC as a Common Position stating clearly that it is the responsibility of member states to ensure the conformity of their national export policies with the criteria and provisions of the CoC.**
- **Specify that agreed-on common practices retain their political character until there is consensus to integrate practices into the Common Position. Member states could in this context stipulate, for example, a three-yearly review process on the implementation of the Common Position with a view to discuss such matters.**
- **Begin a process of comparing national legislation to identify the highest standards currently in operation across the EU, with a view to harmonisation of arms export control laws at the highest level.**

4.8 Consistency in implementing international embargoes

The full implementation of EU and other multilateral arms embargoes should be a major priority for EU member states. Indeed given the emphasis that EU governments have sought to place on the goal of harmonisation, restraint, and responsibility in their arms export policy since the advent of the CoC, it would be reasonable to assume that the implementation, by EU member states, of EU and other multilateral arms embargoes would be co-ordinated at policy level and consistent in practice.

The scope of EU and other international arms embargoes

Unfortunately, for varying reasons, EU member states still have some way to go in the development of a consistent approach towards international embargoes. Firstly, the wording, and therefore the scope, of EU and other embargoes has varied considerably over the years. For example, the EU arms embargo on Burma, which dates back to 1991 and takes the form of a "Council Statement" appears to amount to little more than a "decision to refuse the sale of any military equipment from Community countries to Burma"[45]. The embargo on China is merely described in a Declaration of the European Council of June 1989 in terms of an "interruption by the member states of the community of military co-operation and an embargo on trade in arms with China"[46]

45 Council Statement concerning Burma, The Hague, July 29, 1991.
46 European Council Declaration on China, 26–27 June 1989, http://projects.sipri.se/expcon/euframe/euchidec.htm.

with no further elaboration of what types of military equipment is covered. As a result, the implementation of the embargoes in force against China and Burma has been left to national discretion and, therefore, varying interpretation.

More recently, efforts have been made by EU member states to define, with greater specificity, the range of equipment to be covered by particular restrictions. The recent Council Regulation (EC) No 314/2004 of 19 February 2004 concerning Zimbabwe which includes a prohibition on the provision of equipment that might be used for internal repression contains an Annex in which a comprehensive list of equipment to which the Regulation applies is set out. It is somewhat puzzling, therefore, that a Council Common Position 2004/161/CFSP, also of 19 February 2004, that imposes an embargo on the transfer to Zimbabwe by member states of arms and military materiel of all types, whilst clearly aiming to be comprehensive, fails to refer to the Common Military List, the Annexes to the Dual-Use Regulation or any other commonly held list of controlled equipment by the member states.

The same concerns can also be raised in relation to long-standing EU arms embargoes – such as that relating to Sudan – which have recently been revised and updated. The Sudan embargo, now of Council Common Position 2004/31/CFSP of 9 January 2004, prohibits the "sale, supply, transfer or export of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts for the aforementioned to Sudan".

Criticisms relating to a lack of specificity in the scope and coverage can also be leveled at UN and OSCE embargoes which also systematically fail to provide a detailed definition of the types of arms and equipment to which any given embargo applies.

Another reason for the varying interpretation of EU and other international embargoes may be found in the expediency which underlies their formulation in the first instance. For example, where an embargo is imposed against a country which is perceived as posing a serious threat to international peace and security – such as Iraq under Saddam Hussein – there is a considerable onus upon states to be seen to be upholding the embargo in all its aspects. However when an embargo is imposed in order to show disapproval of the internal actions of a regime, then states, seeking new markets for their defence industry, can sometimes seem less concerned with adhering, in the strictest sense, to the spirit of the embargo. Indeed the frequency with which discussions have been held in the EU on the possibility of abandoning the restrictions against China is indicative of a waning commitment to this embargo on the part of several member states.

The lack of consistency in the implementation of multilateral embargoes has done little to bolster the objectives and credibility of the CoC. It is encouraging that EU member states are understood to have developed guidelines for the development of future arms embargoes and will in future make reference to commonly held lists of controlled equipment. However, a clear statement of intent by EU member states has yet to be made.

Recommendations

- **Member states should make an explicit commitment to ensure that all future EU embargoes refer to those categories of equipment on the Common Military List or in the Annexes to the Dual-Use Regulation to which an embargo is to apply.**
- **Until there is agreement of and implementation of a Community Regulation for the control of non-military equipment that could be used for internal repression, the text of any future EU arms embargo should specify the exact types of police, paramilitary, internal security, and other equipment to which an embargo is also to apply. In addition, all pre-existing EU embargoes should be amended to reflect this commitment.**

- **EU member states should initiate discussions at UN level with a view to agreement on a common international list of military, security, police, and dual-use equipment to which future international embargoes can apply. In the meantime, member states should continue to exchange information on national interpretations of non-EU embargoes.**

4.9 Improving consistency in member states' approach to sensitive regions, countries and end-users

In the Preamble to the CoC, the then 15 member states declared themselves:

DETERMINED to set high common standards which should be regarded as the *minimum* for the management of, and restraint in, conventional arms transfers by all EU member states, and to strengthen the exchange of relevant information with a view to achieving greater transparency,

DETERMINED to *prevent* the export of equipment which might be used for internal repression or international aggression, or contribute to regional instability;[47]

However, despite these stated intentions, there has been a distinct lack of consistency in application of the CoC by EU member states for exports to certain sensitive regions, countries and end-users. Indeed there have been a number of cases where differing 'interpretations' by EU governments of the CoC have resulted in officially sanctioned arms exports in clear contradiction of fundamental CoC Criteria. The details of certain transfers that have come to light – either through limited government reporting or through the investigative work of journalists and human rights and arms control researchers – have given grave cause for concern. For example, arms or security equipment from the EU has been transferred to embargoed destinations in breach of Criterion One and, moreover, to security forces where there is a clearly risk of their use for human rights violations (Criterion Two) or to commit breaches of international humanitarian law (Criterion Six).[48]

EU member states' response

Since the enactment of the CoC, through discussions of the COARM, member states have tried to improve the consistency of the CoC's application. Specific initiatives include:

a. The running by the UK government of two seminars for new EU member states on harmonising the application of the CoC Criteria.[49] During these seminars the implications of the CoC were discussed as well as the specific obligations and problems that the new member states were anticipating. It is expected that the process of 'harmonising the interpretation' of the CoC will now continue within the monthly COARM meetings of EU officials.

b. The adoption in October 2003 of a User's Guide which contains practical guidelines and clarifications with respect to member states' responsibilities under the system of denial notification and consultations. At a recent international arms control conference, a representative of the Dutch Government proposed that: "Considering the importance of the Guide an explicit reference to it should be included in the Operative Provisions of the CoC. The text of the Guide should furthermore be made public and be annexed to the annual EU reports."[50]

47 EU Code of Conduct for Arms Exports, 8 June 1998; www.smallarmssurvey.org/source_documents/Regional%20fora/European%20Union/EUCodeofConduct.pdf, emphasis added.

48 See *Undermining Global Security: the European Union's arms exports*, Amnesty International, May 2004.

49 The November 2003 seminar in Tallinn, Estonia was attended by Estonia, Latvia, Lithuania, UK, Denmark, Finland and Sweden; the January 2004 seminar in Bratislava, Slovakia was attended by Slovakia, Poland, Slovenia, Hungary, Czech Republic, UK, Austria, Germany and the Netherlands.

50 Conference co-sponsored by the Irish Government, Saferworld and Amnesty International, Dublin, December 2003.

c. Plans to establish a database of EU government licence denials. Such a database should enhance information exchange amongst member states, aid assessment of arms export licence applications, and increase the consistency of application of the CoC across member states.

Whilst welcome, these initiatives need to be developed further and built upon in order to ensure that a consistent approach is developed towards sensitive regions, countries, and end-users.

As mentioned in Section 3.4 above, the recommended development of a database of information on sensitive end-users (linked to the denials database) could be an important resource for member states, helping the EU to establish an 'institutional memory' with regard to relevant exchanges of information. This could incorporate a notification system whereby any member state receiving credible evidence of misuse or diversion of military, security, and police equipment would promptly bring this to the attention of other EU member states. Countries and end-users of particular concern could then be highlighted or flagged on the database, thereby encouraging member states to take particular care in assessing export licence applications from a defined list of entities. In this regard, any export licences granted by a member state to such regions, countries, or entities should also be immediately notified to all other EU member states.

In addition, NGO representatives have noted, when in dialogue with relevant government officials from disparate countries, that whilst many are familiar with states' rights under international law, not all are so well acquainted with states' obligations about the transfer of arms. This raises the need for the redoubling of efforts within the EU and outside to ensure that officials involved in licensing of military, security, and police transfers are fully aware of their relevant political commitments and international obligations.

Recommendations

The steps that member states have taken thus far to promote a common approach to sensitive countries, regions, and end-users are unlikely to be sufficient, in themselves, to ensure consistent application of the CoC across the EU. Accordingly, member states should:

- **Ensure that all relevant officials working in the departments of all EU foreign affairs, development, defence, economics, and interior ministries who are involved in the export licensing process undergo collective training in how to consistently and rigorously apply the CoC. Such training must include relevant details of EU member states' obligations under human rights and international humanitarian law.**
- **Develop an EU checklist of 'red flag' early warning indicators to indicate to desk officers in relevant ministries when there are serious concerns about a particular end-user which could impact upon the licensing of particular types of military, security, police or dual-use transfers. Such indicators should be drawn up in consultation with key Inter-Governmental Organisations, NGOs, and civil society actors, and should draw upon relevant experience and good practice of States within and outside the EU.**
- **Establish a 'misuse and diversion' notification system along similar lines to the denial notification process, so that all EU member states would be informed of any incidents of the misuse or diversion of previous EU military, security, or police equipment exports. In the event of such misuse of arms the recipient would place at risk future arms sales from all member states.**
- **Establish procedures to ensure effective parliamentary scrutiny of arms transfer policy and practice – including a mechanism for prior parliamentary scrutiny of sensitive or 'borderline' licence applications which may violate the principles of the CoC and states' existing obligations under international law.**

4.10 Enhancing accountability in EU arms export policy

While member states have undertaken to develop a dialogue with the European Parliament, it is important that this forum is offered an enhanced role in scrutinising implementation of the CoC and in making recommendations for its improvement. To date, the European Parliament has attempted to oversee the implementation of the CoC by producing an annual analysis and response to the Council's annual report on the implementation of the CoC. The European Parliament's Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy appoints a rapporteur to draft the response. For the first three years this was Gary Titley MEP and the last report was drafted by Karl von Wogau MEP. However, their efforts have been hampered by a lack of transparency on the part of member states and a lack of resources for the oversight of issues related to foreign affairs.

Enhancing accountability in EU arms export control policy

Plugging the democratic accountability gap in this area of Common Foreign and Security Policy will require a real commitment to improving transparency on the part of member states, as well as increased resources to match heightened European Parliament ambitions. Encouragingly, the most recent Council annual report states that "development of a dialogue with the European Parliament" is one of its priorities for the near future.

Successive European Parliament reports on the implementation of the CoC have called on member states to provide more detailed information on their arms export policies and practices. The first two reports recommended that member states should make provisions for parliamentary scrutiny of their arms export control policies and their export licensing decisions. One example of how such scrutiny can be achieved is the UK Parliament's Quadripartite Select Committee. Comprised of members of the Defence, Trade and Industry, Foreign Affairs and International Development Select Committees, the Quadripartite Committee examines the UK's record on arms sales and produces regular reports on arms export policy and practice and makes recommendations. The Secretaries of State for Trade and Industry and Foreign Affairs are required to give evidence before this committee, as are other interested parties including NGOs and defence industry representatives.

Recommendations

The CoC Review provides an ideal opportunity to set out certain minimum standards to ensure that national parliaments and the EU parliament play an active part in monitoring member states' implementation of the CoC. Such steps would enhance accountability and help build greater public confidence in the operation of the CoC.

- **Member states must ensure that these are not empty words and that a meaningful dialogue is opened with the European Parliament on this issue.**
- **Member states must ensure regular parliamentary oversight of their arms export policy and practice at a national level, for example, through the establishment of a parliamentary committee to scrutinise and assess government conduct in this area.**

ANNEX

Revised and clarified EU Code criteria taking account of states' existing obligations under international law

EU Code of Conduct for Arms Exports, 8 June 1998

NB: Knocked-back text indicates suggested deletions, italic indicates suggested insertions into the current EU Code text

The Council of the European Union,

BUILDING on the Common Criteria agreed at the Luxembourg and Lisbon European Councils in 1991 and 1992,

RECOGNISING the special responsibility of arms exporting states,

DETERMINED to set high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers by all EU Member States, and to strengthen the exchange of relevant information with a view to achieving greater transparency, DETERMINED to prevent the export of equipment which might be used for internal repression or international aggression, or contribute to regional instability,

WISHING within the framework of the CFSP to reinforce their co-operation and to promote their convergence in the field of conventional arms exports,

NOTING complementary measures taken by the EU against illicit transfers, in the form of the EU Programme for Preventing and Combating Illicit Trafficking in Conventional Arms,

ACKNOWLEDGING the wish of EU Member States to maintain a defence industry as part of their industrial base as well as their defence effort,

RECOGNISING that states have a right to transfer the means of self-defence, consistent with the right of self-defence recognised by the UN Charter,

have adopted the following Code of Conduct and operative provisions:

Criterion one

Respect for the international commitments of EU member states, in particular the sanctions decreed by the UN Security Council and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations

An export licence should be refused if approval would be inconsistent with, inter alia:

Rationale behind proposed changes below: To provide greater clarity by elaborating on relevant obligations of Member States.

a. the international obligations of member states*, including the Charter of the United Nations, decisions of the UN Security Council, international treaties to which Member States are bound,* and their commitments to enforce UN, OSCE and EU arms embargoes;

b. the international obligations of member states under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;

c. their commitments in the frameworks of the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement;

d. their commitment not to export any form of anti-personnel landmine;

Rationale behind proposed changes below: To include reference to the commitment made by Member States in the 1998 Joint Action on Small Arms.

e. *their commitment not to transfer small arms to non-state actors.*

Criterion two

The respect of human rights in the country of final destination

Rationale behind proposed changes below: To provide greater clarity by elaborating on relevant international human rights instruments.

Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, *such as the Universal Declaration on Human Rights, the 1950 European Convention for the Protection of Fundamental Rights and Freedoms, the 1966 International Covenant on Civil and Political Rights, the 1990 UN Basic Principles for the Use of Force and Firearms by Law Enforcement Officials,* Member States will:

Rationale behind proposed changes below: To provide greater clarity regarding states' obligations under international law.

a. not issue an export licence if there is a clear risk *in circumstances in which they have knowledge or ought reasonably to have knowledge* that the proposed export might be used for internal repression *in the commission of serious violations of human rights or may be diverted and used for such violations*;

b. exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU, *the ICRC or where compelling evidence has been reported by reputable human rights organisations*.

Rationale behind proposed changes below: To provide greater clarity regarding how states could assess the risk of proposed exports being used to commit serious violaitons of human rights.

In assessing whether there is a risk that a proposed export might be used in the commission of serious violations of human rights Member States will consider the current and past record of the proposed recipient. Where there is a history of misuse of a nature such that it raises concerns regarding the proposed transfer, evidence of sustained improvement to the attitudes and practices of the recipient, including demonstrable political and social transformations, must exist before a licence is granted.

For these purposes, equipment which might be used for internal repression will include, inter alia, equipment where there is evidence of the use of this or similar equipment for internal repression by the proposed end-user, or where there is reason to believe that the equipment will be diverted from its stated end-use or end-user and used for internal repression. In line with operative paragraph 1 of this Code, the nature of the equipment will be considered carefully, particularly if it is intended for internal security purposes.

Internal repression *Serious violations of human rights* includes, inter alia, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments., including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

Criterion three

The internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts

Member States will not allow exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

Rationale behind proposed changes below: To elaborate on the potential nature of internal tensions.

Member States will operate a presumption of denial with regard to the issuing of licences where transfers of arms of the kind under consideration are likely to be used for or to facilitate the commission of violent crimes.

Rationale behind proposed changes below: To clarify those considerations that should affect Member States assessment of arms and security export licences to countries emerging from internal conflict.

Furthermore, following the cessation of conflict within a country, Member States shall refrain from licensing transfers until a durable peace has demonstrably been established together with an internationally supported reconstruction initiative and appropriate security sector reform programmes.

Criterion four

Preservation of regional peace, security and stability

Rationale behind proposed changes below: To highlight the fact that populations, as well as states, can be subject to aggression.

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

When considering these risks, EU Member States will take into account inter alia:

a. the existence or likelihood of armed conflict between the recipient and another country *or population*;

b. a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;

Rationale behind proposed changes below: To illustrate how Member States can make a judgement regarding the likelihood of an export being used other than for a recipient's defence and security needs.

c. whether the equipment *is commensurate with the recipient's legitimate defence and security needs and* would be likely to be used other than *in meeting these needs;* for the legitimate national security and defence of the recipient;

Rationale behind proposed changes below: To expand on those factors that could have a material impact upon regional stability.

d. *the dangers attached to introducing new military technologies into a region and* the need not to affect adversely regional stability in any significant way.

Criterion five

The national security of the member states and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries

Member States will take into account:

a. the potential effect of the proposed export on their defence and security interests and those of friends, allies and other member states, while recognising that this factor cannot affect consideration of the criteria on respect of human rights and on regional peace, security and stability;

b. the risk of use of the goods concerned against their forces or those of friends, allies or other member states;

c. the risk of reverse engineering or unintended technology transfer.

Criterion six

The behaviour of the buyer country with regard to the international community, as regards in particular to its attitude to terrorism, the nature of its alliances and respect for international law

Rationale behind proposed changes below: To provide greater clarity regarding states obligations under international law.

Member States will not authorise the transfer of arms which would violate their obligations under international law including those arising under or pursuant to:

a. *the prohibition on the use of arms that are incapable of distinguishing between combatants and civilians or are of a nature to cause superfluous injury or unnecessary suffering;*

b. *customary international law, including, for example, the transfer of arms to a party within a state where the transfer does not have the express authorisation of that state.*

In addition, Member States will not authorise transfers of arms in circumstances when they have knowledge or ought reasonably to have knowledge that transfers of arms of the kind under consideration are likely to be:

c. *used in breach of the United National charter or corresponding rules of customary international law, in particular those on the prohibition on the threat or use of force in international relations; used in the commission of serious violations of international humanitarian law applicable in international or non-international armed conflict;*

d. *used in the commission of genocide or crimes against humanity;*

e. *diverted and used in the commission of any of the acts referred to in the preceding sub-paragraphs of this article.* diverted and used in the commission of any of the acts referred to in the preceding sub-paragraphs of this article.

diverted and used in the commission of any of the acts referred to in the preceding sub-paragraphs of this article.

Furthermore, Member States will take into account inter alia the record of the buyer country with regard to:

Rationale behind proposed changes below: To provide greater clarity regarding how a state's attitude to terrorism can be assessed.

a***f.*** its support or encouragement of terrorism and international organised crime*, for example as evidenced by providing funding for terrorist organisations or by allowing its territory to be used as a base for terrorist cells or networks;*

b. its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts;

c***g.*** its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms

control and disarmament conventions referred to in sub-paragraph b) of Criterion One;

Rationale behind proposed changes below: To ensure that a state's participation in the UN Register is taken into account.

h. *its non-participation in the UN Register of Conventional Arms.*

Criterion eight *seven* **The compatibility of the 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**

Rationale behind proposed changes below: To provide greater clarity as to how concerns relating to sustainable development should be factored into Member States' arms and security export licensing.

Member states will operate a presumption against authorisation where transfers of arms of the kind under consideration are likely to adversely affect sustainable development.

Member States will take into account, in the light of information from relevant sources such as UNDP, World Bank, IMF and OECD reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They will consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid. *have a negative impact on the sustainable development of the recipient country. In making an assessment, Member states will consider in this context the recipient's relative levels of military and social expenditure, taking into account any EU or bilateral aid, its external debt and balance of payments.*

Member states should also take in to account the cumulative impact from arms transfers on a recipient country.

Criterion seven *eight* **The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions**

Rationale behind proposed changes below: To ensure that concerns relating to diversion have a consistent impact in terms of the licensing of arms and security exports.

Member states will not licence the export of arms where they have knowledge or ought reasonably to have knowledge that transfers of arms of the kind under consideration are likely to be diverted and used in breach of any of the Criterion of this Code of Conduct.

In assessing the impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user, the following will be considered:

a. the legitimate defence and domestic security interests of the recipient country, including any involvement in UN or other peace-keeping activity;

b. the technical capability of the recipient country to use the equipment;

c. the capability of the recipient country to exert effective export controls;

d. the risk of the arms being re-exported or diverted to terrorist organisations (anti-terrorist equipment would need particularly careful consideration in this context).