

ARMS SUPPLIES TO UKRAINE: DOES THE EUROPEAN ARMS EXPORT CONTROL SYSTEM NEED REVISION?

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I. INTRODUCTION

From many perspectives, the ongoing war in Ukraine has been a game changer for the defence sector in the European Union (EU). The conflict has brought war back to Europe and questioned the security architecture of the EU and Europe more widely. Partly due to the negative repercussions for continental security of a Russian victory, EU member states, European countries and Western partners have agreed to sustain Ukraine's efforts to counter Russian aggression through the provision of humanitarian, financial and military aid, including the transfer of lethal military equipment. Even though third-party military support from one country to another has occurred in the past, this has generated wide debate in European capitals. More importantly, it has focused renewed attention on the defence sector and arms exports, and in some cases increased the political and public acceptability of defence spending and the transfer of military equipment to a party to a conflict for its self-defence.

EU member states have been funding the supply of lethal and non-lethal military equipment to Ukraine at the bilateral level and through the European Peace Facility (EPF)—an off-budget EU instrument for supporting the Common Security and Defence Policy (CSDP). The EU's responsibility through the EPF to conduct pre-licensing risk assessments and potential impact assessments of these transfers has given it a new role in arms transfers. Investigating member states' transfers of equipment to Ukraine through the EPF is particularly important from an export policy perspective, especially if the risk and

SUMMARY

Russia's invasion of Ukraine has put arms control and arms export controls at the heart of the political discussion. Since February 2022, European Union (EU) member states have changed their approach to the support provided to Ukraine. From an initially cautious stance, they have moved towards the transfer of both light and heavy weapons and equipment through bilateral agreements or within the framework of the European Peace Facility.

Events in Ukraine are inevitably influencing trends in arms acquisition among EU member states, which is having repercussions for both arms production and exports. At the same time, economic trends are increasing the prospects for expanded joint production of military equipment among EU member states facilitated by the European Commission.

This paper analyses these trends and examines the performance of the current regime on arms exports, particularly in the case of jointly produced armaments and competing national approaches. It discusses the potential benefits and drawbacks of a truly EU-wide system of export controls and makes proposals on how to improve coordination among the EU member states.

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impact assessments under the EPF duplicate controls performed at the member state level.¹

At the same time, the equipment transferred to Ukraine has further highlighted and accelerated the need for member states to replace, replenish and update their inventories, potentially through increased joint development and production of military equipment at the EU level. Ongoing and future initiatives to strengthen defence industrial capacity at the EU level will eventually lead to the production, acquisition and export of jointly produced equipment. Questions on export modalities for these future systems need to be addressed now, given the lack of speed in decision making at the EU level.

In view of these developments, this paper investigates the modalities for the transfer of military systems to Ukraine from both a country and an EU perspective. The paper questions the appropriateness of the current system of exports control at the EU level and highlights some of the main challenges posed by Common Position 2008/944/CFSP, which sets out common rules on the control of exports of military technology and equipment.² Finally, it investigates the appropriateness of the export system with regard to military equipment jointly produced under the EU framework, analyses the potential benefits and drawbacks of an alternative export system and makes proposals on modification of the current set-up.

II. EU ARMS EXPORT POLICY

Policy on the export of defence and defence-related items is a specific strategic competence of EU member states and helps to shape the defence policies of each country. Like any decision that falls within the realm of the Common Foreign and Security Policy (CFSP), export policy on defence and defence-related material is lightly regulated at the EU level. Despite the fact that decisions are formally binding, activities conducted in this field are beyond the control of the Court of Justice of the European Union (CJEU) and the European Commission has no powers of enforcement. Moreover, Article 346 of the Treaty on the Functioning

of the European Union exempts member states from disclosing information that affects their security interests or essential interests that are connected to the production of and trade in arms, which further limits oversight.

Nonetheless, EU member states have agreed in the past to coordinate their policies on export controls to a certain extent, while maintaining ultimate control over their respective national systems. With scope to improve standards at the international level, EU member states decided to adhere to several international treaties and agreements on regulating arms exports and non-proliferation. One example in this area is the Arms Trade Treaty (ATT), to which all EU member states are party, and for which the EU provides support with implementation.³

Following a first attempt to formulate common standards in the 1998 EU Code of Conduct on Arms Exports, which was modified in 2005, EU member states adopted Common Position 2008/944/CFSP on the rules governing the control of exports of military technology and equipment in 2008. Although formally legally binding, articles 1, 3 and 12 of the common position restate the centrality of member states as the actors responsible for agreeing or denying a licence, and for ensuring that national legislation allows for the control of exports of products included on the EU Common Military List. Given the room for manoeuvre of member states and the lack of a dedicated EU control authority, the common position cannot be considered an EU export control policy. This has been made increasingly obvious by the presence of diverging views on and approaches to arms exports among EU member states. In some cases, divergence can entail the adoption of stricter rules at the national level, such as in the case of Sweden which in 2017 decided to include criteria on the democratic status of the recipient country.⁴

¹ European Parliament, 'Subcommittee on Security and Defence', 29 Nov. 2022.

² Council Common Position 2008/944/CFSP of 8 Dec. 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L335, 13 Dec. 2008, pp. 99–103.

³ Council Decision (CFSP) 2021/649 of 16 Apr. 2021 on Union support for activities of the ATT Secretariat in support of the implementation of the Arms Trade Treaty, *Official Journal of the European Union*, L133/59, 20 Apr. 2021; and Bromley, M., Cooper, N. and Holtom, P., 'The UN Arms Trade Treaty: Arms export controls, the human security agenda and the lessons of history', *International Affairs*, vol. 88, no. 5 (2012), pp. 1029–48.

⁴ Swedish Inspectorate for Strategic Products, 'Kommentar på ändrade riktlinjer för krigsmaterielexport' [Commentary on amended guidelines for munitions exports], updated 21 Dec. 2022.

How it works

The common position puts the state at the heart of the export system but does not provide any guidelines on implementation. A users' guide facilitates correct implementation of the common position and its eight criteria. This guide has been periodically revised. Implementation of the common position is discussed by member states in the Working Party on Non-Proliferation and Arms Exports' Subgroup on Conventional Arms Exports (COARM). The subgroup, which is chaired by the European External Action Service (EEAS), also reviews the operation of the common position and can make proposals on its modification. The common position and users' guide were last modified in 2019. The latter now includes more explicit guidance on democracy, human rights and International Humanitarian Law, following proposals by Sweden.⁵ Because the position falls under the CFSP, however, the European Commission has no formal control over implementation, which raises questions regarding the adequacy of the system.

Member states are formally required to share information on denials of requests if the denial is based on any of the eight criteria included in the common position.⁶ In addition, the procedure requires consultations between a member state that has denied an export and a member state considering a basically identical request for an export. The reasoning behind this requirement is to limit as far as possible divergence on exports to countries that do not satisfy the requirements of the common position. Consultations are seen as an instrument to try to reduce such divergence. Here again, however, the final decision remains in the hands of the member state, which can eventually agree an export previously denied by another member state through the submission of a detailed explanation of its decision. Previous examples show that consultations on licence denials do not exclude the possibility of a member state agreeing to an export, as these depend on contingent political weighing and political assessments.⁷ Unity on export practices would increase the benefits of a common system that has

⁵ Swedish Government, Strategic Export Controls in 2021: Military Equipment and Dual-Use Items, Comm. 2021/22:114, 7 Apr. 2022, p. 15.

⁶ Council Common Position 2008/944/CFSP (note 2), Article 4.

⁷ Cops, D., Duquet, N. and Gourdin, G., *Towards Europeanized Arms Export Controls? Comparing Control Systems in EU Member States* (Flemish Peace Institute: Brussels, 2017), pp. 165–66; and Erikson, J. L., 'Market imperative meets normative power: Human rights and

already enhanced socialization of EU member states' practices and increased transparency.⁸ Moreover, a unified approach would increase trust among member states and further streamline export procedures, which would have positive repercussions for national industrial entities and for the strategic goals of export policy, as evidenced by the need for speed in decisions on transfers to Ukraine.⁹ Moreover, in the case of joint production, it would reduce the blocking or checking of exports by an EU partner country involved in the joint production of the equipment that has stricter approaches to exports.¹⁰

Transparency is particularly relevant for systems where implementation relies on member states and there is no verification mechanism at the EU level. Increased transparency on national application of the common position therefore serves the twofold purpose of increasing both convergence and accountability. To this end, the 2019 modification includes clearer requirements for member states to increase transparency on licences granted or denied in the reports member states must submit to the EEAS, which eventually form a consolidated EU report; to submit more detailed information on implementation of the common position; and to publish more user-friendly national reports within a specific time frame.¹¹ However, the level of detail shared varies from one member state to another as reports are compiled following national regulations.¹²

Legal barriers

Because the field of application of the common position is the CFSP, the EU institutions do not have

European arms transfer policy', *European Journal of International Relations*, vol. 19, no. 2 (June 2013), pp. 209–34.

⁸ Wisotzki, S. and Mutschler, M., 'No common position! European arms export control in crisis', *Friedens und Konfliktforschung*, vol. 10 (2021), pp. 273–293; and European External Action Service (EEAS), 'Arms exports control: Launch of online database increasing transparency on EU arms exports', Press release, 26 Oct. 2020.

⁹ European Parliament (note 1).

¹⁰ Giegerich, B., 'Germany's National Security Strategy previews change in arms-export policy', IISS Military Balance Blog, 30 June 2023.

¹¹ Council Common Position 2008/944/CFSP (note 2).

¹² Council of the European Union (EU), Twenty-Fifth Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 16605/23, 11 Dec. 2023, p. 16.

jurisdiction.¹³ For instance, it is not possible to bring an export decision by a member state in front of the CJEU, as the court has no judicial powers on the topic. At the state level, there are as many approaches to legal controls on arms exports as there are EU member states. In some countries it is possible to appeal a decision in the national courts, while others preclude this, thereby rendering a decision to export military equipment purely political or the state's alone.¹⁴

The politico-strategic character of these decisions is further emphasized when there is secrecy over a specific export procedure, while at the same time there is no possibility of requesting a judicial review. Harmonization of the export control decisions of EU member states is at the core of the common position but results have been unsatisfactory. Discrepancies in approaches were particularly obvious in the case of transfers to the Middle East and North Africa (MENA) following the Arab Spring, after which some countries took a different approach to arms exports to the region. For instance, the Netherlands de facto embargoed arms exports to MENA states.¹⁵ Since mid 2023, however, in the light of the potential inclusion of the Netherlands in the de minimis agreement on arms exports among France, Germany and Spain, the country has modified its policy towards arms exports to Saudi Arabia, Türkiye and the United Arab Emirates, which highlights the highly political nature of such exports.¹⁶

Arms embargoes can be considered an additional tool for framing and binding member states' activities in the area of arms exports. At the EU level, embargoes are sanctioning instruments within the framework of the CFSP that only apply to EU member states, unless a country freely decides to abide by the EU's restrictions. The common position is explicit in prohibiting exports to a country affected by an embargo or sanctions. However, despite the legally binding aspect of embargoes they can be subject to national interpretation. In addition, the lack of enforcement

mechanisms can lead to potentially problematic divergences in approach.

Modifications to the system could be made with regard to the interpretation of embargoes and the interruption of ongoing contracts. On the first point, diverging member states' interpretations of embargoes can have negative consequences for respect for the embargo. A shared interpretation, as well as a common system of sanctions, would help to reduce the risk of divergence. Some changes are slowly taking place in this area. The war in Ukraine has been a catalyst for the drafting of a directive on criminal offences and penalties for violation of the EU's restrictive measures.¹⁷ This includes goods listed on the EU Common Military List and dual-use items.¹⁸ This change was triggered by the potential problems that non-harmonized observance of restrictive measures, including arms embargoes, could cause, not least problems related to diversion. The agreement reached between the European Parliament and the European Council confirms the criminalization of circumvention of arms embargoes, but enforcement is expected to remain in the hands of member states.¹⁹

A further issue to be addressed with regard to arms embargoes is the interruption of existing contracts. There can be instances in which there is a time lapse between the prevention of a licence being issued and the halting of an export, due to the operationalization of contracts signed and licences issued before the arms embargo. Member states have discretionary powers to decide to apply an arms embargo retroactively, but these are controversial, as was shown by the 2014 embargo against Russia. Some EU member states continued to deliver equipment included in contracts signed prior to 2014, which did not formally contravene the embargo but de facto undermined it.²⁰

¹³ Consolidated version of the Treaty on European Union, *Official Journal of the European Union*, C326/1, 26 Oct. 2012, Article 24(1).

¹⁴ Examples of countries that allow some kind of court oversight at the national level are Belgium, France, Italy and the Netherlands. See Wisotzki and Mutschler (note 8).

¹⁵ For an assessment of the impact of the Arab Spring on select EU member states see Duquet, N., *Business as Usual? Assessing the Impact of the Arab Spring on European Arms Export Control Policies* (Flemish Peace Institute: Brussels, 2014); and Cops, Duquet and Gourdin (note 7).

¹⁶ Dutch Government, 'Aanpassingen wapenexportcontrolebeleid' [Adjustments to arms export control policy], 4 Oct. 2023.

¹⁷ European Commission, Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures, COM(2022) 684 final, 2 Dec. 2022.

¹⁸ Cirilig, C.-C., 'Proposal for a directive on the violation of Union restrictive measures', EU Legislation in Progress, European Parliamentary Research Service, PE 751.409, July 2023.

¹⁹ Council of the EU, 'Council and Parliament reach political agreement to criminalise violation of EU sanctions', Press release, 12 Dec. 2023; and European Commission (note 17).

²⁰ Brillaud, L. et al., 'EU member states exported weapons to Russia after the 2014 embargo', Investigate Europe, 17 Mar. 2022.

Towards an update of the common position

To ensure its continued relevance, the common position is kept up to date through the work of COARM. Its updates and modifications to the users' guide are of great value for identifying pressing issues regarding the application and working of the common position. Thanks to COARM, the common position was modified in 2015 and 2019. A third update is expected in 2024, as prescribed in the 2019 update.²¹

Nonetheless, the outcomes of the previous review processes missed opportunities to make concrete changes and improvements.²² The first review process (2012–15) led to an elaboration of the users' guide to better support member states in the implementation of the common position. The first review also created an IT system to enhance information sharing among member states. However, it failed to integrate specifications on governance or criteria on democracy, despite widespread discussion on the topic in the light of the Arab Spring.²³ The focus of the first review was on the creation of modalities to verify member states' compliance with the common position, but the initiative did not produce tangible results.²⁴ The 2019 review mentions the need to comply with the ATT in its preamble, but this did not lead to any major changes to the standards on arms exports. However, the second review does contain additional details on transparency requirements for arms exports, approve the creation of an online searchable database and adopt clearer timelines for the submission of national contributions to the EU consolidated annual report.²⁵

The lack of a harmonized understanding of arms exports and national divergencies has led over the years to the development of additional national criteria on arms exports, further misaligning positions and creating new divergencies on export decisions.²⁶

In identifying potential updates to the common position, the 2024 review should take into account the next stages of the joint capability development

²¹ Council Decision (CFSP) 2019/1560 of 16 Sep. 2019 amending Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L239/16, 17 Sep. 2019.

²² Wisotzki and Mutschler (note 8), pp. 273–93.

²³ Wisotzki and Mutschler (note 8).

²⁴ Cops, D. and Duquet, N., 'Reviewing the EU Common Position on arms exports: Whither EU arms transfer controls?', Flemish Peace Institute, Policy brief, Dec. 2019.

²⁵ Wisotzki and Mutschler (note 8), pp. 273–93.

²⁶ Cops and Duquet (note 24).

projects under the European Defence Fund (EDF), which are intended to strengthen the European Defence Technology Industrial Base (EDTIB).²⁷ The war in Ukraine has generated a renewed impetus for strengthening the EDTIB and several initiatives have been designed to foster and increase the joint development, production and acquisition of military systems. Under the EDF Regulation, the EU will have no intellectual property rights over the products jointly developed through the fund unless it has provided support through public procurement.²⁸ The regulation states that exports should follow the rules indicated in the common position. Unless there is a truly common understanding and approach to arms exports, however, the prescription in the regulation is meaningless.

Against this background, COARM has established a focus group to identify a common approach to facilitating the export and transfer of jointly produced military equipment without lowering the bar on controls.²⁹ If agreement cannot be found, one potential repercussion could be a gradual diminution in participation in joint production projects by those countries that have stricter rules on arms exports. This could leave the new products free from components with heavy export requirements, but also lacking in relevant technological characteristics and expertise.³⁰ The inability to deliver one million ammunition rounds to Ukraine within a time frame of one year demonstrated that production capacity and the EDTIB must be sustained and potential difficulties resolved, including when it comes to exporting the final products.³¹

The common position would benefit greatly from proper application of the Intracommunity Transfer Directive (2009/43/EC), which was introduced to simplify the transfer of defence-related products

²⁷ Council Common Position 2008/944/CFSP (note 2), point 11.

²⁸ Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 Apr. 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092, *Official Journal of the European Union*, L170/149, 12 May 2021, point 62.

²⁹ Council Common Position 2008/944/CFSP (note 2); and Dutch Government, 'Dutch export policy on strategic goods in 2021', July 2022, p. 34.

³⁰ Béraud-Sudreau, L. et al., *Russia's War Against Ukraine: A New Impetus for the Harmonisation of European Arms Export Policies? A Trilateral Perspective from France, Germany, and Sweden* (Armament Industry European Research Group, ARES: Paris, July 2023).

³¹ Kayali L., Posaner J. and Barigazzi J., 'EU to Ukraine: You'll get half the ammo we promised by March', *Politico*, 31 Jan. 2024.

within the EU.³² This continues to be poorly implemented by member states.³³ Particularly in the light of further cooperation on capability development, proper and uniform application of the directive would reduce the time needed for, and uncertainty over, the transfer of defence-related materials among member states. The update should address the indications of the Strategic Compass, which set out a plan to improve the CSDP by 2030 and called on member states to reinforce export controls and cooperation with partners, and to increase the capacity to control intangible transfers, including of scientific knowledge.³⁴

One question to be addressed by member states is whether they want to substantially modify the common position in a way that reduces their control. The European Parliament made its position clear in its 2022 annual report on the CSDP.³⁵ It called on member states to:

define arms export policies as part of security policy and to urgently establish an effective EU-level arms export policy which guarantees that the Member States fully comply with the eight legally binding criteria on arms exports, that their national exports do not fuel regional tensions or undermine the security of other Member States, allies, partners or of the EU as a whole, while fully supporting the legitimate security and defence needs of allies and partner countries, especially those whose territorial integrity is violated and which are exercising their right to self-defence as enshrined in the UN Charter.³⁶

The latter is the case in Ukraine.

³² Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community, *Official Journal of the European Union*, L146/1, 10 June 2009.

³³ European Parliament, *EU Defence Package: Defence Procurement and Intra-Community Transfers Directives*, European Implementation Assessment, European Parliamentary Research Service, PE654.171, Oct. 2020.

³⁴ EEAS, *A Strategic Compass for Security and Defence*, [n.d.].

³⁵ There is also a Greens/EFA group proposal for a regulation on stricter rules on arms export. See the Greens/EFA in the European Parliament, 'Briefing on the draft regulation on EU arms exports to establish stricter control', 12 Oct. 2021; and the Greens/EFA in the European Parliament, 'No weapons for dictators', [n.d.].

³⁶ European Parliament, Texts adopted, 'Implementation of the Common Security and Defence Policy: Annual report, 2022', European Parliament resolution of 18 January 2023 on the implementation of the Common Security and Defence Policy, annual report 2022 (2022/2050(INI)), P9_TA(2023)0010, point 26.

III. THE NOVELTY OF ARMS EXPORTS TO UKRAINE

Immediately after Russia's invasion, EU member states began contemplating ways to provide support to Ukraine.³⁷ At the EU level, Common Position 2008/944/CFSP sets out eight criteria that EU member states should observe when issuing arms export licences. As highlighted above, despite the goal of harmonizing arms exports across EU member states, the final decision on transfers of military equipment and technology from one country to another remains in the hands of the member states, which can apply stricter criteria at the national level.

On the legal basis for justifying the transfer of military equipment to Ukraine, criteria three and four of the common position state that member states shall deny an export licence for military equipment where it would 'provoke or prolong armed conflicts' or 'aggravate existing tensions or conflicts'.³⁸ This implies that export is possible in cases of armed conflicts or tensions if the export can reduce the duration of the conflict.

Criterion four further specifies that a state should deny an export licence if there is a risk that the equipment or technology to be exported might be used aggressively against another country, to assert a territorial claim or in other ways than for legitimate national security and defence.³⁹

It is however permissible for EU member states to export military technology and goods to a third country to be used for legitimate defence. This is also in accordance with the principle of self-defence in Article 51 of the UN Charter. However, interpretations of self-defence or legitimate national security and defence are not always unequivocal, and therefore generate different positions. For instance, following an Organization for Security and Co-operation in Europe (OSCE) request to interpret the arms embargo on the Nagorno-Karabakh region as a complete embargo, member states took different approaches. Germany totally prohibited arms exports to both Armenia and Azerbaijan.⁴⁰ Despite the requirement for member

³⁷ Council of the EU, 'EU adopts new set of measures to respond to Russia's military aggression against Ukraine', Press release, 28 Feb. 2022.

³⁸ Council Common Position 2008/944/CFSP (note 2).

³⁹ Council Common Position 2008/944/CFSP (note 2).

⁴⁰ Zoll.de, 'Armenien' [Armenia], [n.d.]; and Zoll.de, 'Aserbaidchan' [Azerbaijan], [n.d.].

states to satisfy the same standards and obligations under the common position and other international treaty obligations, others took a different stance.⁴¹

The transfer of lethal military equipment to a country in conflict for its self-defence generates different outcomes at the political and tactical levels. First, it helps the attacked state to counter or halt the aggression. At the same time, the country delivering the equipment is not considered a participant in the fighting as it is upholding the right to self-defence of the country under attack. Nonetheless, this latter aspect further accentuates the right of the exporter to grant licences as a strategic choice of foreign and security policy, as the transfer of equipment is intended to lead to a shortening of the conflict. This type of support also has repercussions at the level of international politics. The transfer of lethal military equipment to Ukraine has been accompanied by strong EU sanctions that aim to reduce the capacity of Russia to continue its military engagement. Adherence to such a system by other countries represents a major way to provide international political support and sustain the country under attack, which can have repercussions at the geopolitical level in terms of a shift in the balance of power. In the case of Russia, there has been a rebalancing of power, but not sufficient to isolate the country thanks to its relations with strategic partners and relative weight politically and militarily.⁴²

The uniqueness of EU member states' arms transfers to Ukraine can be identified in the concerted action that followed Russia's full-scale invasion, in terms of both bilateral transfers and transfers under the EPF. Moreover, unlike in the past, EU member states have not issued any denials of licences to Ukraine based on the criteria of the common position since the start of the war, indicating their collective agreement

that support to Kyiv is in line with their EU and international legal obligations.⁴³

This alignment has been enhanced by the strategic importance to the EU and its member states of the outcome of the war in Ukraine. The Western political and expert international community has repeatedly stated that a victory for Russia over Ukraine could trigger a fundamental change in the European security architecture that has been in place since the end of the cold war.⁴⁴

Initial reactions to supplying arms to Ukraine

The initial debate on the delivery of military heavy and light equipment was influenced by national sensitivities on the matter and generated various reactions. Some countries decided not to send military equipment to Ukraine in accordance with their neutrality policy, while others decided to send only light weapons. Some were able to transfer heavy lethal military equipment to Kyiv.⁴⁵ This highlights the lack of a strategic EU approach to sustaining a third country of strategic value for the EU.

The Ukraine war led to a change in the positions of countries on their approach to arms exports. Germany, for instance, changed its position on the provision of military equipment to parties involved in conflict. A precedent had been set by the export of weapons to sustain the Peshmerga against the Islamic State.⁴⁶ However, delivery of weapons to Ukraine was a further step towards a modified approach to exports. After some initial hesitancy, Berlin allowed the transfer of lethal equipment to Ukraine based on the fact that Russia's invasion could lead to a complete revision of the security architecture of Europe, which constitutes

⁴¹ Wezeman, P. D., Kuimova, A. and Smith, J., 'Arms transfers to conflict zones: The case of Nagorno-Karabakh', SIPRI Backgrounder, 30 Apr. 2021; and Transnational Institute (TNI), 'Smoking Guns. How European arms exports are forcing millions from their homes', 28 July 2021.

⁴² The resolutions of the UN General Assembly constitute a general condemnation of Russia's actions in Ukraine, but also demonstrate Russia's ties with countries in Asia and Africa. On the distribution of votes, see United Nations, 'UN General Assembly calls for immediate end to war in Ukraine', 23 Feb. 2023. A further demonstration of the support Russia receives is the provision of weapons to Russia. Arms transfers to Russia by North Korea received swift and strong condemnation from the international community as they constitute a transfer of arms to an attacker and also contravene the system of international sanction against North Korea.

⁴³ Duquet (note 15), pp. 72–73; and European Parliament (note 1).

⁴⁴ German Government, Policy statement by Olaf Scholz, Chancellor of the Federal Republic of Germany and Member of the German Bundestag, Berlin, 27 Feb. 2022; European Economic and Social Committee, 'The war in Ukraine is changing the world and Europe's security architecture', Newsletter, Mar. 2022; and Machi, V., 'US envoy sees European security org. as key to peace on continent', Defence News, 8 Sep. 2023.

⁴⁵ Clapp, S., 'Russia's war on Ukraine: Bilateral delivery of weapons and military aid to Ukraine', At a Glance, European Parliamentary Research Service, PE 729.431, May 2022,

⁴⁶ German Parliament, 'Bundestag unterstützt Waffenlieferungen' [German parliament supports the delivery of weapons], 1 Sep. 2014.

a severe danger to peace and security in the EU, and based on Article 51 of the UN Charter.⁴⁷

The current government's coalition agreement had already outlined an ambition to change the national export control regime and find ways to harmonize export practice among EU member states.⁴⁸ Following publication of a new national security strategy and awaiting a new law on arms exports, some argued that the German export system might include exemptions to support partners and allies where national strategic interests are at stake.⁴⁹

The Ukraine case might also trigger a change in the national re-export rules.⁵⁰ For instance, under the German export system, a country can re-export a military product acquired from Germany only after prior official approval has been sought from Berlin.⁵¹ This also applies to re-exports to Ukraine.⁵² This was the case, for example, with the transfer of Leopard 2 main battle tanks (MBTs) to Ukraine, approval for which was only granted following international peer pressure. The initial reticence to deliver Leopard 2 MBTs to Ukraine was linked to potential escalation risks. This indecisiveness also blocked other partners' deliveries of German-made MBTs.⁵³ These only received authorization for re-export following Germany's decision to transfer such equipment to Kyiv.⁵⁴ In addition to consideration of the potential escalation of the conflict, the reticence of the German

government was initially linked to adverse public opinion, which changed over time.⁵⁵

Changes to its approach to arms exports also occurred in Sweden, which took a strategic decision on the way the country understands defence and looks at the provision of military equipment to a party in conflict.⁵⁶ For the first time since Swedish support was provided to Finland following Russia's invasion in 1939, the country agreed on arms transfers for strategic purposes, in this case to Ukraine.⁵⁷ Moreover, Sweden decided to profoundly change its approach to defence, as the country decided to end its centuries-long stance of neutrality, became a North Atlantic Treaty Organization (NATO) member and received security guarantees from the organization. This decision is likely to change Sweden's arms exports policy and there are already visible signs of change. In 2019, Sweden revoked export permits to Türkiye due to events in northern Syria.⁵⁸ As a consequence of its NATO membership application, however, Stockholm decided to reconsider its position in 2022.⁵⁹ This highlights how important NATO membership is for Sweden to protect the foreign and security interests of the country, and how flexibly arms export policy standards can be interpreted.

Not all EU member states have decided to sustain Ukraine through the transfer of military equipment. In the first months of the conflict, Austria, Bulgaria, Cyprus, Hungary, Ireland and Malta decided not to deliver light or heavy weapons to Ukraine, but to sustain the Ukrainian army through the provision of soldiers' protective equipment or medical supplies.⁶⁰ Since the start of the war, some of these countries have revised their national positions, as in the case of Bulgaria which, following the election of a new

⁴⁷ Herszenhorn, D., Bayer, L. and Von Der Burchard, H., 'Germany to send Ukraine weapons in historic shift on military aid', Politico.eu, 26 Feb. 2022.

⁴⁸ SPD et al., *Mehr Fortschritt Wagen: Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit, Koalitionsvertrag 2021–2025* [Dare to make more progress: Alliance for Freedom, Justice and Sustainability, coalition agreement, 2021–2025]; and European Parliament (note 1).

⁴⁹ Giegerich, B., 'Germany's National Security Strategy previews change in arms export policy', IISS Military Balance Blog, 30 June 2023.

⁵⁰ European Parliament (note 1).

⁵¹ German Federal Ministry for Economy and Climate Protection, *Bericht der Bundesregierung über ihre Exportpolitik für konventionelle Rüstungsgüter im Jahre 2022 Rüstungsexportbericht 2022* [Report of the federal government on its export policy for conventional military equipment in 2022: Arms export report 2022], Berlin, Dec. 2023.

⁵² German Government, 'Bundesregierung kündigt Lieferung von Leopard-2-Panzern an die Ukraine an' [Federal government announces delivery of Leopard 2 tanks to Ukraine], 25 Jan. 2023.

⁵³ For more information see Clapp, S., 'Russia's war on Ukraine: Western-made tanks for Ukraine', European Parliamentary Research Service, 31 Jan. 2023.

⁵⁴ German Government (note 52).

⁵⁵ RTL, 'Ukraine-Krieg spaltet Deutschland: in Ost und West' [Ukraine war divides Germany: in East and West], 5 Sep. 2022; and ZDF, 'Mehrheit für Lieferung von Leopard-2-Panzern' [Majority for the delivery of Leopard 2 MBTs], 27 Jan. 2023.

⁵⁶ Duthois, T., 'Ukraine war: Which countries are sending weapons and aid to forces fighting the Russian invasion?', Euronews, 4 Mar. 2022.

⁵⁷ Béraud-Sudreau et al. (note 30), p. 13.

⁵⁸ Inspectorate for Strategic Products, 'Angående svensk krigsmaterielexport till Turkiet' [Regarding Swedish military equipment exports to Türkiye], 21 Dec. 2022.

⁵⁹ Inspectorate for Strategic Products, 'Tillstånd för följdleverans av krigsmateriel till Turkiet' [Authorization for follow-on deliveries of military equipment to Türkiye], 21 Dec. 2022; see also Waldwyn, T., 'Sweden's defence industry: NATO membership promises new markets but poses challenges', IISS Military Balance Blog, 4 Aug. 2023.

⁶⁰ Clapp (note 45).

government towards the end of 2022, decided to deliver a package of light weapons and ammunition to Ukraine.⁶¹ More importantly, the country's parliament approved the delivery of heavy military equipment to Ukraine in the summer of 2023.⁶² A further example is provided by Cyprus, which participated in the European Defence Agency collaborative procurement project for the delivery of 155mm ammunition to Kyiv but decided not to deliver weapons.⁶³

Main EU suppliers of arms to Ukraine

The range of military products delivered to Ukraine varies from country to country and has evolved since the start of the war. Some member states have agreed multi-annual support packages, but the majority of support is on an ad hoc basis. There are no publicly available common standards on either the definition or the amount of support provided. Many countries refer to 'support' to Ukraine without clearly defining the support provided or to be provided, or clearly specifying whether the amount of support refers to the value of the equipment, or the cost or price of acquiring such equipment new. Nor is it possible to assess the amount of military equipment delivered by EU member states with a high degree of certainty, due to different levels of transparency and sensitivity over information sharing, as well the different methods used by member states to calculate the support promised or delivered.⁶⁴

⁶¹ Kobeszko, L., 'Better late than never: Bulgaria's parliament agrees to supply weapons to Ukraine', Centre for Eastern Studies, 16 Nov. 2022. Despite the existence of a new government with a majority, the President of Bulgaria continues to try to block the transfer of heavy equipment to Ukraine by presidential veto. A veto on the transfer of armoured transport equipment was later overridden by a parliamentary vote, see Bulgarian News Agency, 'Updated: Parliament overrides presidential veto on sending armoured vehicles to Ukraine', Sofia, 8 Dec. 2023.

⁶² AP News, 'Bulgaria agrees to send heavy military equipment to Ukraine for the first time since the invasion', 22 July 2023.

⁶³ European Defence Agency (EDA), 'EDA brings together 25 countries for common procurement of ammunition', 20 Mar. 2023; and Defence Express, 'Cyprus not ready to give its Soviet weapons to Ukraine', 8 Apr. 2023.

⁶⁴ This lack of shared methodology led to Estonia being accused of overpricing equipment sent to Ukraine in order to receive financing to replace the systems under the EPF. The minister of defence stated that there are different ways equipment—and its value—can be calculated. For more information see the Estonian Ministry of Defence, 'Statement by Ministry of Defence of Estonia on claims published in today's Politico on Estonia's aid to Ukraine', 28 Mar. 2023; and Hanke Vela, J. and Camut, N., 'EU allies query Estonia's bumper refund from weapons to Ukraine', Politico, Brussels, 28 Mar. 2023.

The sensitivity of the information is treated differently in member state capitals, ranging from countries that consider the information too sensitive to be released to those which publish the type and quantity of lethal military equipment provided.

Despite these difficulties, transparency is said to have improved since February 2022 as more countries publish more detailed information on their national websites.⁶⁵ This is the case for the Netherlands, which in April 2023 decided to publish a list of equipment to be provided in order to enhance public debate and strengthen political support for Ukraine.⁶⁶ The transparency of the data is important from an accountability perspective and constitutes an obligation on arms exporters under the ATT and the EU common position. The support member states provide to Ukraine is also important for understanding the political weight EU member states assign to sustaining Ukraine.

Germany and Denmark are examples of the provision of multiannual national packages. After initial indecision on the delivery of military assistance to Ukraine, German military support has been consistent and increased over time. This recently led to the approval of a four-year (2024–27) military support package worth €10.5 billion from federal government funds for security capacity building. The package adds to the €7.4 billion support Germany provided to Ukraine in the period 2022–23.⁶⁷ The funding is to be used for military assistance to Ukraine and to replace the equipment delivered to Ukraine bilaterally and through the EPF.⁶⁸ Germany's commitment to support Ukraine was confirmed in a 2024 financial law (Bundeshaushalt) in which €8 billion in direct bilateral aid has been allocated for arms deliveries to Ukraine.⁶⁹

⁶⁵ Trebesch, C. et al., 'The Ukraine Support Tracker: Which countries help Ukraine and how?', Kiel Institute for the World Economy, KIEL Working Paper no. 2218, Feb. 2023.

⁶⁶ Dutch Ministry of Defence, 'Defence to publish more information about deliveries to Ukraine', 13 Apr. 2023.

⁶⁷ German Government, 'Military support for Ukraine', 13 Sep. 2023; and German Government, 'Military support for Ukraine', 4 Jan. 2024. The German Government website does not specify whether the value refers to the value of donated equipment or the cost of replacing weapon systems donated to Ukraine.

⁶⁸ German Government (note 67). Not all countries include EPF allocations in their national support packages to Ukraine.

⁶⁹ German Federal Ministry of Finance, 'Pressestatements zur Vereinbarung zum Bundeshaushalt 2024' [Press conference on agreement of the federal budget, 2024], 13 Dec. 2023.

Of this, €7.1 billion is for ‘military assistance’.⁷⁰ Germany authorized export licences for equipment to Ukraine to a total value of €2.25 billion in 2022, which constituted the largest destination for German materiel in that year.⁷¹

By the end of 2023, Denmark had provided Ukraine with €3.8 billion in military support.⁷² This is in line with the goal of continuing to support Ukraine mentioned in its Foreign and Security Policy Strategy.⁷³ Denmark created a Ukraine fund and allocated an additional €2.45 billion for the period 2023–24.⁷⁴ It is unclear how much of this funding has already been allocated.⁷⁵ Funding was further increased in November 2023 when the Danish government announced an additional €3.1 billion for the assistance fund until 2027.⁷⁶

A lack of publicly available databases prevents any comparison of data and the methodologies used for its collection. Nonetheless, the EU has recently announced that it and EU member states have provided around €28 billion in support for the Ukrainian armed forces.⁷⁷ The available information on the distribution of military support suggests a strong imbalance among member states’ contributions. According to the Kiel Institute, as of July 2023 German support accounted for 49 per cent of bilateral military support to Ukraine by EU member states, followed by Denmark (10 per cent), Poland (8.6 per cent) and the Netherlands (7.1 per cent). Together, this represents almost three-quarters of all EU bilateral contributions.⁷⁸ However, in terms of support provided to Ukraine as a share of

gross domestic product (GDP), the Baltic states and the countries of Eastern Europe are thought to be contributing the most.⁷⁹ Nevertheless, this data can only be considered as providing a tentative estimation of what member states actually provided or have committed to provide to Ukraine. This is due to the above-mentioned differences and lack of clarity on member states transfers to Ukraine. Consequently, data from the Kiel Institute, despite its commendable work on collecting and analysing data, is partly based on open-source and variegated secondary information that might increase the margin of error of the estimations.

The European Peace Facility

Use of the EPF to fund the transfer of lethal and non-lethal military equipment to Ukraine constitutes a considerable change in the usual EU posture with regard to funding the delivery of military equipment from member states to a third country. This has given the EU a new role in the risk assessment of arms exports. This historic change was possible thanks to the 2021 Council decision establishing the EPF, which was initially planned to improve support for the CSDP.

The EPF supersedes the Athena Mechanism for the financing of military CSDP missions and the African Peace Facility for supporting peace and security in Africa. In a reflection of its history, it comprises two pillars: an operational pillar and an assistance measure. The former is used to finance the common costs of military missions and operations under the CSDP framework. The assistance measure is devoted to the provision of assistance to third countries, be that financial, technical or material. This enhances the flexibility of its contribution to peace and stability, allowing the provision of all types of equipment and infrastructure to partner countries, something excluded from the former funding mechanisms.⁸⁰

The EPF has also extended the range of action of the previous instruments, as its activities are not bound to any geographical region or the presence of ongoing activities in the countries requesting support under the assistance measure pillar.⁸¹ Most importantly, it gives the EU the potential to deliver ‘military

⁷⁰ German Government, ‘Agreement on security cooperation and long-term support between the Federal Republic of Germany and Ukraine’, Berlin, 16 Feb. 2024.

⁷¹ German Federal Ministry for Economic Affairs and Climate Action, ‘The Federal Government’s policy on exports of military equipment in 2022’, Press release, 4 Jan. 2023.

⁷² Danish Ministry of Foreign Affairs, ‘Danish support for Ukraine’, updated 22 Dec. 2023.

⁷³ Danish Ministry of Foreign Affairs, *Foreign and Security Policy Strategy, 2023*.

⁷⁴ Danish Ministry of Foreign Affairs, ‘Danish support for Ukraine’, 1 Sep. 2023.

⁷⁵ Radio Free Europe, ‘Denmark pledges aid to Ukraine’s military of more than \$3 billion’, 19 June 2023.

⁷⁶ These funds comprise funding for civil support. For more information see Danish Ministry of Defence, ‘The Danish Government plans to boost the Defence Agreement and its Ukraine Assistance Fund’, 7 Nov. 2023.

⁷⁷ Council of the EU, ‘EU solidarity with Ukraine’, updated 13 Feb. 2024.

⁷⁸ Trebesch et al. (note 65).

⁷⁹ Trebesch et al. (note 65).

⁸⁰ EEAS, ‘The European Peace Facility’, Apr. 2024.

⁸¹ For more information see Council of the EU, ‘European Peace Facility’, [n.d.].

equipment, or platforms, designed to deliver lethal force' (Article 5(3)) to third countries, an activity that has never previously been contemplated.⁸² Article 41.2 of Treaty on European Union precludes use of EU resources and budgets to fund operations with military or defence implications.⁸³ Financing the transfer of military equipment to a third country through the EPF is possible because the EPF is an off-budget instrument of the EU that runs alongside the regular EU budget. Nonetheless, the transfer of any item included on the EU Common Military List must comply with the requirements of the common position, other international obligations and the UN Charter.

Less than three months into the war, by mid May 2022, EU member states had agreed to make available €1.5 billion through the EPF to fund assistance measures and support the capabilities and resilience of Ukraine.⁸⁴ By February 2024, this figure had reached €5.6 billion.⁸⁵ Of this amount, €3.6 billion was dedicated to military equipment support, €2 billion to provide and jointly procure ammunition, €61 million for the EU Military Assistance Mission in Support of Ukraine (EUMAM), and €31 million for other support equipment.⁸⁶ The level of financial support to Ukraine further increased thanks to the creation of a €5 billion Ukraine Assistance Fund under the EPF. The support the EPF gave to Ukraine is particularly high, given that the initial EPF allocation for the period 2021–27 was €5.8 billion, which was later increased to €17 billion.⁸⁷ The rules of the EPF could also be changed to fund production rather than reimburse transfers.⁸⁸ This would require a clear and common mechanism for arms exports to Ukraine.

⁸² Council Decision (CFSP) 2021/509 of 22 Mar. 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528, *Official Journal of the European Union*, L102/14, 24 Mar. 2021.

⁸³ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C115, 9 May 2008, Article 41.

⁸⁴ European Parliament Research Service, 'Russia's war on Ukraine: Bilateral delivery of weapons and military aid to Ukraine', 24 May 2022.

⁸⁵ Council of the EU, 'Infographic: EU solidarity with Ukraine', Updated 1 Mar. 2024.

⁸⁶ The financial allocation for EUMAM was increased in Nov. 2023 to €255 million. Council of the EU, 'European Peace Facility: Council greenlights further funding for training of the Ukrainian Armed Forces under EUMAM Ukraine', Press release, 28 Nov. 2023; and EEAS, 'The European Peace Facility', Aug. 2023.

⁸⁷ Council of the EU, 'European Peace Facility'.

⁸⁸ Foy, H., 'German opposition to reform of EU fund risks delaying arms to Ukraine', *Financial Times*, 5 Feb. 2023.

Member states' contributions to the EPF vary according to their level of gross national income (GNI). In absolute terms, Germany (25.7 per cent), France (17 per cent), Italy (12.5 per cent) and Spain (8 per cent) are the four largest contributors.⁸⁹ With the exception of Germany, however, this does not make these countries the highest contributors in terms of the bilateral provision of military equipment, as highlighted above. Austria, Ireland and Malta decided to exercise their right to constructive abstention on the decision to deliver lethal military equipment to Ukraine through the EPF. They therefore only contribute to the facility for the provision of non-lethal military equipment.⁹⁰

In the EPF, third countries can contribute to a particular project or action (under Article 30), provided that their contributions are accepted by the Political and Security Committee and formalized in an administrative arrangement.⁹¹ Among the third countries that contribute most to CSDP deployments, Norway has also decided to voluntarily contribute to the EPF to support EUMAM and the provision of military equipment to Ukraine.⁹²

In line with the obligations of member states under the common position and the ATT to assess the risk of diversion, Article 6 of Decision 2022/338 on the assistance measure to Ukraine includes requirements for monitoring and post-shipment controls on the goods transferred through the EPF.⁹³ These are also mentioned in the initial concept note for an assistance measure to Ukraine.⁹⁴ Controls are undertaken using the integrated methodological framework, which sets out guiding principles and the methodology to be used to assess assistance measures to third countries.⁹⁵ An

⁸⁹ Trebesch et al. (note 65).

⁹⁰ Mills, C., 'Military assistance to Ukraine since the Russian invasion', Commons Library Research Briefing no. 9477, House of Commons Library, 24 Feb. 2024.

⁹¹ Council Decision (CFSP) 2021/509 (note 82).

⁹² Council of the EU, 'European Peace Facility'; and Council of the EU, 'Norway: Second Norwegian financial contribution to the European Peace Facility', Press release, 25 July 2023.

⁹³ Council of the EU, Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment and platforms designed to deliver lethal force, 13 Apr. 2023.

⁹⁴ Council of the EU, 'Concept Note for an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment and platforms designed to deliver lethal force', 6661/22, 27 Feb. 2022.

⁹⁵ EEAS, 'Questions and answers on the European Peace Facility's Integrated Methodological Framework', 22 Mar. 2021.

additional aim of the methodological framework is to provide indications of measures that would allow improved governance and hands-on management of the military equipment transferred, including on the stockpiling, traceability and physical security of the materiel transferred.⁹⁶ Some argue that the lack of transparency by some member states on sharing the amount and type of support provided to Ukraine, either bilaterally or through the EPF, might have a negative effect on the capacity of non-state actors to carry out post-shipment monitoring.⁹⁷ Furthermore, the data available in the 25th EU annual report on arms exports does not provide any detailed information on exports to Ukraine under the EPF. There are tables showing the transfer of equipment to Ukraine by country.⁹⁸ However, the data is aggregated, and it is not possible to get a detailed picture of either the exports or the total financial support provided through the instrument. Moreover, some member states, such as Estonia, have decided to delay the transmission of data on equipment transferred to Ukraine.⁹⁹

Responsibility for conducting a risk assessment before the delivery of equipment remains in the hands of EU member states, which still have the power to attach special conditions to export licences for products under the EPF assistance measure. Under the EPF, the EEAS also conducts pre-licensing risk and impact assessments, as well as regular coordination meetings, raising questions about duplication of efforts.¹⁰⁰

IV. A NEW EUROPEAN APPROACH TO ARMS EXPORTS?

The main impediment to establishing a new EU approach to arms exports is that arms export policy remains a national prerogative of member states. Arms exports are ultimately part of the foreign policy of a country, used to delineate strategic partnerships with third countries and to sustain the national defence industry, albeit to varying degrees. It is therefore fair to

say that arms exports can be a function of the foreign policy priorities of a state.¹⁰¹

Resistance to an EU-wide system comes from countries that take different approaches to arms exports. Taking France and Sweden as examples, neither government regards a more Europeanized system favourably, but from different perspectives. The French preference is to have a bottom-up approach to the definition of new export policy that includes agreements like the Franco-German-Spanish agreement on the *de minimis* clause, but does not provide additional powers to the EU.¹⁰² In the Swedish case, opposition to a potential EU approach is justified by the fact that, from a Swedish perspective, an EU system would weaken its national export policy. Sweden is currently considered to have a more restrictive approach than other EU member states, particularly since the introduction of the 2017 democratic principle and increased attention on respect for human rights.¹⁰³

From an industrial perspective, exports are a vital tool for ensuring continuity of investment in research and development and sustained industrial capacity, while also allowing the reduction of costs and improved competitiveness.¹⁰⁴ Industry could therefore be vocal in sustaining or preventing a more Europeanized approach. With respect to existing legislation, industries have put in place codes of conduct and compliance programmes to ensure proper application of the regulatory frameworks.¹⁰⁵ However, they also recognize the need for convergence and the simplification of export practices, particularly for equipment purchased or transferred from or to other EU member states and for components required for EDF projects. Convergence on arms export policy is understood as supporting the strengthening of the EDTIB.¹⁰⁶ Industry has welcomed enhanced

¹⁰¹ See e.g. Béraud-Sudreau et al. (note 30); and Erikson (note 7), pp. 209–34.

¹⁰² According to the agreement, each of the parties can proceed with the export of jointly produced items without prior authorization from the other states if the percentage of technological components originating from the partner countries is less than a specific percentage, in this case 20%. Béraud-Sudreau et al. (note 30).

¹⁰³ Béraud-Sudreau et al. (note 30).

¹⁰⁴ Aerospace and Defence Industries Association of Europe (ASD Europe), 'The importance of exports for the European defence industry', ASD Note, [n.d.].

¹⁰⁵ ASD Europe, 'Sustainability and the European defence industry', 27 Jan. 2022.

¹⁰⁶ Cops and Duquet (note 24), p. 9.

⁹⁶ EEAS (note 95).

⁹⁷ Trenkov-Wermuth, C. and Zack, J., 'Ukraine: The EU's unprecedented provision of lethal aid is a good first step: But more must be done to bolster Ukraine's defense and European security', United States Institute of Peace, 27 Oct. 2022.

⁹⁸ Council of the EU (note 12).

⁹⁹ Council of the EU (note 12).

¹⁰⁰ European Parliament (note 1).

implementation of both the common position and the Intra-Community Transfer directive through simplified procedures.¹⁰⁷ Moreover, industry is positive about the potential to devise different procedures for the export of products jointly produced under cooperative EU frameworks.¹⁰⁸

Similarly, the European Commission has called on member states to work towards further harmonization of their export practices and is positive about streamlining procedures, particularly for capabilities developed under the EDF. The Commission has also invited:

Member States to seek an approach according to which, in principle, they would respectively not restrain each other from exporting to a third country any military equipment and technology developed in cooperation. This could apply to intended exports of equipment or technology incorporating components from another Member State exceeding a certain de minimis threshold.¹⁰⁹

The goal of harmonizing arms export policies without giving the EU new roles is also shared by civil society organizations, which continue to recognize the need to harmonize procedures, but not at the potential expense of standards.¹¹⁰

Potential technical difficulties

As mentioned above, the political limitations on a truly EU export policy are particularly difficult to overcome. In addition to being an aspect of a country's foreign, security and defence policy, export practice is so influenced by social, political and economic considerations that are state-dependent and specific that the creation of a truly EU-wide arms export policy is hard to imagine.¹¹¹

To work towards such an end goal the EU should finally have a single foreign and security policy and understanding of the security threats and economic interests, which in such a federated system would be both common and shared. The downside of a

¹⁰⁷ ASD Europe, 'Considerations on the European Commission's Defence Action Plan', 4 July 2016.

¹⁰⁸ ASD Europe, *Position Paper on Commission Contribution to European Defence*, 21 Apr. 2022.

¹⁰⁹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission contribution to European defence, COM(2022) 650 final, 15 Feb. 2022.

¹¹⁰ Cops and Duquet (note 24).

¹¹¹ Erikson (note 7), pp. 209–34.

truly EU-wide arms export policy is represented by the necessity to renounce to decision making at the national level and accepting the transfer of this capacity to the supranational level. Member states' positions would be considered in the discussions on the direction the foreign policy of the EU should take, but the burden of the actual implementation would fall under the EU institutions.

Were member states to agree to give the EU extended powers on arms exports, technical difficulties could arise. The development of a new EU system should first address questions such as where the burden of control lies and with which personnel.

In a truly European system, controls on proper implementation of the system would be transferred to the EU institutions. The question of which EU body should be considered accountable for controls remains open. Currently, COARM, chaired by the EEAS, facilitates coordination among the member states. The implementation and control capacity of the EEAS, however, is very limited, as member states maintain control over the entire process. Nonetheless, within the framework of EPF assistance, risk assessment and monitoring of the lethal equipment provided to a third country is part of the responsibilities of the EEAS, which conducts these controls both prior to approval of the Council decision and throughout the duration of the assistance provided.¹¹²

In a scenario in which control is centralized at the EU level, the EEAS seems to be the only entity that could carry out this role, as under the current institutional framework, the Commission could not be assigned this role, given it is not concerned with matters of EU foreign policy. Furthermore, the EEAS already has knowledge of the system and is developing skills in the performance of risk assessment and monitoring under the EPF. To enhance the EEAS to implement a truly Europeanized system, member states would need to first agree to transfer decision-making powers to the supranational level and enhance the EEAS to be the sole director of the export policy.

The personnel issue could represent a major problem with the operationalization of an EU-wide system. In 2021, almost 32 000 licences were issued by

¹¹² Maletta, G. and Héau, L., *Funding Arms Transfers Through the European Peace Facility: Preventing Risks of Diversion and Misuse* (SIPRI: Stockholm, 2022), p. 5.

member states and a few hundred were denied.¹¹³ The centralization of these efforts in a single body would require a considerable amount of administrative and human resources to ensure proper implementation, in order not to cause crucial delays in the processing of requests. Therefore, the multiannual budget of the EEAS would need to be increased to satisfy this additional economic, structural and human resources requirement.

V. CONCLUSIONS AND RECOMMENDATIONS

Common Position 2008/944/CFSP is a legally binding part of the CFSP and therefore under the control of EU member states. Different interpretations of the position by national governments or courts have led to varying export practices across the EU that respond to different national priorities and dynamics.

The decision to provide Ukraine with lethal and non-lethal military equipment has reinvigorated discussions on export policy in the EU as this is the first time that EU member states have jointly provided military equipment to a third country. The differences in the provision of equipment to Ukraine are a reflection of the different capacities of EU member states to provide military equipment, but also of the absence of a strategic EU approach to supporting a third country that is of strategic value or interest to the EU.

The war in Ukraine has also triggered a renewed impetus for EU initiatives to jointly develop and produce military equipment and to reinforce the EDTIB, making modification of the export system in the EU a pressing need.

This paper has shown that there is little appetite among member states to opt for a truly Europeanized arms export system, despite the benefits of such a system in enhancing cooperation on capability development. It also highlights how transposition of the common position at the national level has differed from country to country.

An option for policymakers would be the extension of agreements on the *de minimis* clause along the lines of the Franco-German-Spanish Agreement on export controls. There are some signs of developments in

this direction, such as the joint declaration by France and the Netherlands of April 2023, in which the two countries state their determination to increase convergence of positions on arms exports and to work towards the potential inclusion of the Netherlands in the Franco-German-Spanish Agreement. In such a case, however, there will need to be discussions among all EU member states on the appropriate minimum percentage to include in the agreement.

The paper further highlights the problems linked to the misalignment in timelines between prevention of the issuing of export licences and the halting of exports in the case of EU arms embargoes. In this regard, a modification to the system to resolve this misalignment should be introduced not only, but in particular for products jointly developed within EU frameworks. This would avoid equipment produced with the support of the EU being exported to countries that do not comply with international standards on respect for human rights or the final use of the equipment, where they are also affected by embargoes or restrictive measures, as in the case of Yemen.

Finally, the data shared in the most recent EU annual report on arms exports is not harmonized, as member states provide information on exports and licences in varying degrees of detail. In view of the commercialization of jointly developed equipment, if a communitarized system is impossible, member states should increase the amount of data exchanged on exports and, most importantly, focus on harmonizing practices.

The possibilities for changes to the system of arms exports in the EU are numerous, as are the benefits of a revised system, but these will need to come to terms with the intrinsically national character of arms export policy.

¹¹³ Twenty-Fourth Annual Report According to Article 8(2) of Council Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment, *Official Journal of the European Union*, C59/1, 16 Feb. 2023.

ABBREVIATIONS

ATT	Arms Trade Treaty
CFSP	Common Foreign and Security Policy
COARM	Working Party on Non-Proliferation and Arms Exports' Subgroup on Conventional Arms Exports
CSDP	Common Security and Defence Policy
EEAS	European External Action Service
EDF	European Defence Fund
EDTIB	European Defence Technology Industrial Base
EPF	European Peace Facility
EU	European Union
MBT	Main battle tank
NATO	North Atlantic Treaty Organization



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A EUROPEAN NETWORK

In July 2010 the Council of the European Union decided to support the creation of a network bringing together foreign policy institutions and research centers from across the EU to encourage political and security-related dialogue and the long-term discussion of measures to combat the proliferation of weapons of mass destruction (WMD) and their delivery systems. The Council of the European Union entrusted the technical implementation of this Decision to the EU Non-Proliferation Consortium. In 2018, in line with the recommendations formulated by the European Parliament the names and the mandate of the network and the Consortium have been adjusted to include the word 'disarmament'.

STRUCTURE

The EU Non-Proliferation and Disarmament Consortium is managed jointly by six institutes: La Fondation pour la recherche stratégique (FRS), the Peace Research Institute Frankfurt (HSFK/PRIF), the International Affairs Institute in Rome (IAI), the International Institute for Strategic Studies (IISS-Europe), the Stockholm International Peace Research Institute (SIPRI) and the Vienna Center for Disarmament and Non-Proliferation (VCDNP). The Consortium, originally comprised of four institutes, began its work in January 2011 and forms the core of a wider network of European non-proliferation and disarmament think tanks and research centers which are closely associated with the activities of the Consortium.

MISSION

The main aim of the network of independent non-proliferation and disarmament think tanks is to encourage discussion of measures to combat the proliferation of weapons of mass destruction and their delivery systems within civil society, particularly among experts, researchers and academics in the EU and third countries. The scope of activities shall also cover issues related to conventional weapons, including small arms and light weapons (SALW).

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