

IV. EU export control developments

SIBYLLE BAUER AND MARK BROMLEY

The European Union (EU) is currently the only region with a common legal basis for controls on the trade in dual-use items and, to a certain degree, for controls on the arms trade. It has also developed detailed guidelines on practical implementation. The EU's dual-use control list only compiles the decisions from the annual meetings of the export control regimes (see section III), but its structure and way of reflecting the annual updates have been adopted by a number of countries, most notably in Europe and Asia. Developments in the EU therefore have repercussions beyond the region.

The EU Common Position on Arms Exports

Since the early 1990s there have been ongoing efforts at the EU level to strengthen and harmonize member states' arms export policies. The most important element of these efforts is the 2008 EU Common Position defining common rules governing control of exports of military technology and equipment.¹ The EU Common Position—like its predecessor the 1998 EU Code of Conduct on Arms Exports—aims to promote the 'convergence' of EU member states' arms export policies in line with agreed minimum standards. It creates mechanisms for consultation and information exchange in order to achieve a common interpretation of eight criteria for assessing arms transfers.

Article 15 of the Common Position states that the instrument 'shall be reviewed three years after its adoption'. The review process began in mid-2011,² and final outcome documents are expected in the summer of 2015.³ The EU and its member states have ruled out making changes to the text of the Common Position as a result of the review,⁴ but several sections of the User's Guide—which provides guidance on the implementation of the

¹ Council of the European Union, Council Common Position 2008/944/CFSP of 8 Dec. 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L335, 8 Dec. 2008. The 2008 Common Position superseded the 1998 Code of Conduct on Arms Exports. Council of the European Union, 'European Union Code of Conduct on Arms Exports', 8675/2/98 Rev. 2, 5 June 1998.

² Council of the European Union, 'Council conclusions on the review of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment', 3199th Foreign Affairs Council Meeting, Brussels, 19 Nov. 2012, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/133569.pdf>

³ EU official, Interview with author, 23 Jan. 2015.

⁴ Council of the European Union (note 2).

Common Position—are being revised.⁵ Specifically, guidelines on how criteria 2, 7 and 8 should be interpreted are being updated.⁶ These updates will take account of the minor alterations needed to bring the EU Common Position into line with the Arms Trade Treaty (ATT) (see section I in this chapter).⁷ For example, the ATT specifically mentions the threat of gender-based violence as an issue to take into account when deciding whether to permit an arms export, something that is implied by the content of criterion 2 of the Common Position but not explicitly mentioned in the User's Guide. As part of the review, EU member states have developed a new mechanism for sharing information on export licence denials via a secure online system, rather than via a CD-ROM.⁸ EU member states have also agreed to share more information on export licence denials than was previously the case.⁹

The fact that the review has taken over four years to complete partly reflects the need to take account of the outcome of the ATT process.¹⁰ Given that the text of the ATT was agreed in May 2013, however, this does not fully explain the slow pace of progress. The lack of urgency may also be due to a reduced interest in the EU Common Position on the part of EU member states. The importance of the EU Common Position in guiding EU member states' arms export policies was brought into question during 2014—in particular in the context of the deterioration in the EU's relations with Russia linked to the Ukraine crisis. During the often heated debate over whether France should cancel delivery of two Mistral warships to Russia, neither the French Government, which until mid-September 2014 had wanted to proceed with the deal, nor any other EU member states—

⁵ Council of the European Union (note 2); and EU official, Communication with author, 28 Jan. 2013. For the current version of the User's Guide see Council of the European Union, 'User's guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment', 9241/09, 29 Apr. 2009.

⁶ Criterion 2 concerns 'respect for human rights in the country of final destination as well as respect by that country of international humanitarian law', criterion 7 concerns the risk that exported 'military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions' and criterion 8 concerns the 'compatibility of the exports with the technical and economic capacity of the recipient country'. Council of the European Union 2008/944/CFSP (note 1).

⁷ For a summary and other details of the Arms Trade Treaty (ATT) see annex A, section I, in this volume.

⁸ O'Farrell, K. T., 'L'UE et les exportations d'armements: options et limites du réexamen de la Position commune' [EU arms exports: options and limits of the review of the Common Position], Group for Research and Information on Peace and Security (GRIP), Analysis note, 23 Sep. 2014, <<http://www.grip.org/en/node/1366>>, p. 9.

⁹ Swedish Government, 'Strategic export control in 2013: military equipment and dual-use items', Government communication Skr. 2013/14:114, 13 Mar. 2014, <<http://www.government.se/sb/d/574/a/243515>>, p. 13.

¹⁰ EU official (note 3).

some of which wanted France to cancel the deal—made any public reference to the criteria in the EU Common Position.¹¹

Implementation of the directive on intra-community transfers

The EU Intra-Community Transfer Directive (ICT Directive) was agreed in 2009 and forms part of a wider package of EU efforts aimed at reducing barriers to intra-EU cooperation in the defence industry.¹² It encourages EU member states to grant general or global licences that would allow their recipient to carry out certain intra-EU exports of defence-related products without the need for additional authorizations. These exports could include transfers: (a) to the national armed forces of another member state; (b) that are part of a cooperative armament programme within the EU; or (c) to a ‘certified company’ in another EU member state. The process of certifying a company is handled, in accordance with common criteria agreed at the EU level, by the national authorities of the member state where the company is headquartered.¹³ The ICT Directive also abolishes requirements for transit and trans-shipment licences for defence-related products originating in another EU member state, although reasons of public security can justify retaining such requirements. EU member states were given until 30 June 2011 to transpose the directive into their national legislation and until 30 June 2012 to apply it.¹⁴ All EU member states have transposed the ICT Directive.¹⁵

The European Commission’s initial proposals concerning the ICT Directive were altered in the face of opposition from EU member states. The ICT Directive places greater emphasis on the primacy of national competence in the field of arms export controls than was initially envisaged

¹¹ See Isbister, R. and Quéau, Y., *An Ill Wind: How the Sale of Mistral Warships to Russia is Undermining EU Arms Transfer Controls* (GRIP and Saferworld: Nov. 2014). For a more detailed analysis of the crisis in Ukraine and the Mistral sale see chapter 3 in this volume.

¹² 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, 10 June 2009. See also, Anthony, I. and Bauer, S., ‘Controls on security-related international transfers’, *SIPRI Yearbook 2009*, pp. 476–78.

¹³ Commission Recommendation of 11 Jan. 2011 on the certification of defence undertakings under Article 9 of Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence-related products within the Community, *Official Journal of the European Union*, L11, 15 Jan. 2011, pp. 62–74. Information about which companies have been certified at the national level is made available via the Certified Defence-related Enterprises (CERTIDER) database maintained by the European Commission, <<http://ec.europa.eu/enterprise/sectors/defence/certider/index.cfm>>.

¹⁴ European Commission, Directorate-General for Enterprise and Industry, ‘Defence industries: reference documents’, 2 Feb. 2012, <http://ec.europa.eu/enterprise/sectors/defence/documents/index_en.htm>.

¹⁵ Mampaey, L., Moreau, V. Quéau, Y., *Study on the Implementation of Directive 2009/43/EC on Transfers of Defence-related Products* (GRIP: Brussels, Aug. 2014), p. 6.

when the process was launched by the European Commission in 2006.¹⁶ In particular, member states insisted on retaining nationally defined lists of items that would still require export licences, even for exports to other EU member states, something that the European Commission had originally wanted to avoid. The contents of each exemption have to be made available by the EU member state and will be published by the European Commission. However, to date, information has been made available on the content of only nine EU member states' national exemptions.¹⁷ As a result, there is a lack of confidence within the European defence industry about the potential benefits of the ICT Directive.¹⁸ Only 37 companies in 13 EU member states have completed the process of becoming 'certified' by their national authorities, which allows them to benefit fully from the new system.¹⁹

A key goal of the ICT Directive was to limit or eradicate any restrictions that EU member states place on the re-export of components transferred to another EU member state for integration into a complete weapon system. However, many EU member states are still unwilling—in certain situations—to hand control over re-exports to the state in which the integrating company is based. In 2014 this was highlighted when the British Government said it would block the proposed export of Gripen combat aircraft from Sweden to Argentina by the imposition of controls on the re-export of British-manufactured components used in the aircraft.²⁰ The UK has maintained a national embargo on the export of military items and dual-use goods to the military in Argentina since April 2012.²¹

¹⁶ For example, the 2006 green paper stated that the intention of the new instrument was 'to weaken, or even abolish, the principle of prior authorisation with regard to the circulation of all defence-related products within the Community'. European Commission Directorate General Enterprises and Industry, 'Consultation paper on the intra-Community circulation of products for the defence of member states', Green Paper ENTR/C, Brussels, 21 Mar. 2006, <http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/120/120906/120906intracommunity_en.pdf>, p. 5. However, Article 1 of the ICT Directive states that '[t]he transfer of defence-related products between Member States shall be subject to prior authorisation' but that 'Member States may exempt transfers of defence-related products from the obligation of prior authorisation' in certain situations. Directive 2009/43/EC (note 12).

¹⁷ European Commission, Certified Defence-related Enterprises (CERTIDER) database, General Licence, <<http://ec.europa.eu/enterprise/sectors/defence/certider/index.cfm?fuseaction=genlics.countries>>.

¹⁸ Mampaey, Moreau and Quéau (note 15).

¹⁹ European Commission, Certified Defence-related Enterprises (CERTIDER) database, Certified Enterprise Register, <<http://ec.europa.eu/enterprise/sectors/defence/certider/index.cfm?fuseaction=undertakings.countries>>, accessed 23 Jan. 2015.

²⁰ Chuter, A., 'Argentina buying Gripens? Brits say "no way"', *DefenceNews*, 8 Nov. 2014.

²¹ British Government, 'Current arms embargoes and other restrictions', 11 Sep. 2014, <<https://www.gov.uk/current-arms-embargoes-and-other-restrictions>>.

Developments in dual-use trade controls in the EU

The EU dual-use export control system is currently undergoing its scheduled review, which takes place every five years under the EU Dual-use Regulation 428/2009 (directly applicable law within the EU).²² As part of the review process the European Commission in April 2014 adopted a communication ‘setting out concrete policy options for the modernisation of EU export controls and their adaptation to rapidly changing technological, economic and political circumstances’.²³ These options cover a broad range of issues, including: (a) the practical implementation of the new transit and brokering controls introduced by the regulation in 2009; (b) the uniform implementation of catch-all controls across the EU; and (c) the appropriateness of subjecting activities and items to control in the current trade, political and technological environment, as well as the possible expansion of controls to surveillance technology based on human rights criteria. Before proposing amendments to the legislation, the European Commission will engage with and consult the European Council and other stakeholders.

The modernization process dates back to the 2011 publication of a green paper reviewing the EU’s trade controls on dual-use products.²⁴ EU member states, the European Parliament, industry associations and other entities, such as law firms and consultancies, civil society organizations and academia, provided their views in response to the paper. Although these views can be made public only if they are put into the public domain by the author(s), they were summarized and published in a staff working document in 2013.²⁵

One point highlighted by EU member states and industry associations was that the brokering and transit control mechanisms are still relatively new and there is, therefore, limited experience with regard to their functioning in practice. Challenges were identified with regard to the implementation of catch-all provisions that seek to enable controls on unlisted items, such as ‘a certain lack of transparency of decisions, different legal requirements and divergent application of catch all controls across

²² Council Regulation 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, *Official Journal of the European Union*, L134, 29 May 2009.

²³ European Commission, ‘Communication from the Commission to the Council and the European Parliament, the review of export control policy: ensuring security and competitiveness in a changing world’, COM(2014) 244 final, 24 Apr. 2014.

²⁴ European Commission, ‘The dual-use export control system of the European Union: ensuring security and competitiveness in a changing world’, Green Paper COM(2011) 393, 30 June 2011.

²⁵ European Commission, ‘Strategic export controls: ensuring security and competitiveness in a changing world—A report on the public consultation launched under the Green Paper COM(2011) 393’, European Commission Staff Working Document, SWD(2013) 7 final, 17 Jan. 2013.

the EU'.²⁶ Many issues and challenges related to catch-all implementation are not EU-specific, but faced by governments and companies around the world. Some aspects, however, are unique to the EU single market context as they raise questions about fair competition and uniformity of application across the territory. Divergent decisions may be linked to variations in access to information, or to differing risk assessments.

The EU control list for dual-use items was amended in December 2014, finally bringing EU legislation in line with the changes made in the four export control regimes (discussed in section III) in 2012 and 2013.²⁷ The implementation of multilaterally agreed changes takes time due to the need for technical consultations and translation processes. In addition, while the different export control regimes agree changes to their respective control lists at various points in the year, the EU updates its list only once a year.

An unusually long delay in the implementation of changes in the controls occurred following the adoption of the Lisbon Treaty, which gave the European Parliament a co-decision right in the Dual-use Regulation to which the control list is an annex.²⁸ The changes made by the export control regimes in 2010 were not implemented at the EU level until 2012. Control list changes must be made swiftly to keep up with technological developments and evolving procurement methods. The implications of delays in the updating of the EU list are compounded by the fact that an increasing number of countries outside the EU—in Europe and beyond—base their control list updates on the EU changes.

To help prevent such delays in the future, in late 2011 the European Commission presented a proposal for changes to the Dual-use Regulation that would empower the European Commission to update the control list annex in line with control list amendments adopted by the export control regimes.²⁹ A mechanism delegating power to the European Commission was implemented in June 2014. This allows the European Commission to adopt control list changes by way of a delegated act pursuant to Article 290 of the Lisbon Treaty.³⁰ Changes proposed through delegated acts enter into

²⁶ European Commission SWD(2013) 7 final (note 25).

²⁷ Commission Delegated Regulation 1382/2014 of 22 October 2014 amending Council Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, *Official Journal of the European Union*, L371, 30 Dec. 2014, pp. 1–212. The Commission Regulation updating the EU list of dual-use items took effect on 31 Dec. 2014. On the Wassenaar amendments see Bauer, S. et al., 'Dual-use and arms trade controls', *SIPRI Yearbook 2013*.

²⁸ See Bauer et al. (note 27). Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed 13 Dec. 2007, entered into force 1 Dec. 2009, <http://europa.eu/lisbon_treaty>.

²⁹ European Commission, 'Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) no. 428/2009 setting up a Community Regime for the control of exports, transfer, brokering and transit of dual use items', COM(2011) 704 final, 7 Nov. 2011.

³⁰ Regulation 599/2014 of the European Parliament and of the Council of 16 April 2014 amending Council Regulation (EC) no. 428/2009 setting up a Community regime for the control of exports,

force two months after notification to the European Parliament and the European Council, unless one of the bodies has voiced objections or requested a further two-month period. The European Parliament and the European Council can revoke these delegated powers.

Surveillance technology

One key element of the review of the Dual-use Regulation concerns how EU member states should exert controls on transfers of surveillance technologies. In 2012 and 2013 certain categories of surveillance technologies were added to the Wassenaar Arrangement's control list.³¹ These items were carried across to the EU's dual-use list through the updates to the EU control list carried out in December 2014 (see above). However, under pressure from a number of members of the European Parliament and non-governmental organizations that have taken an active interest in the issue, the EU and its member states are debating whether and how to create an expanded set of controls in this area, via the Dual-use Regulation.³² This could involve restricting a broader range of items than those covered by the Wassenaar Arrangement list and developing specific guidelines on assessing export licences. A communication released by the European Commission in April 2014 raised the option of creating 'EU autonomous lists or a dedicated catch-all mechanism, without hindering the competitiveness of the EU information and communication technology (ICT) industry and its integration into global supply chains'.³³ In November 2014 Cecilia Malmström, the EU Commissioner for Trade, stated that 'the export of surveillance technologies is an element—and a very important element—of our export control policy review'.³⁴ The issue also played a prominent role in discussions to empower the European Commission to use delegated acts, and was explicitly highlighted in a 'Joint Statement by the European Parliament, the Council and the Commission on the review of the dual-use export control system', which is attached to the decision on delegated acts. It states that: 'The European Parliament, the Council and the Commission acknowledge the issues regarding the export of certain information and communication technologies (ICT) that can be used in

transfer, brokering and transit of dual-use items, *Official Journal of the European Union*, L173, 12 June 2014, pp. 79–83. Treaty of Lisbon (note 28).

³¹ See Bauer et al. (note 27); and Bauer, S. et al., 'Dual-use and arms trade controls', *SIPRI Yearbook 2014*. In the run-up to the December 2014 plenary meeting, the Coalition Against Unlawful Surveillance Exports called for an expansion of the Wassenaar Arrangement control list to capture more types of surveillance technologies. However, no new items were added to the Wassenaar Arrangement control list in 2014. 'Wassenaar changes on the cards', *WorldECR*, 3 Dec. 2014, <<http://www.worldecr.com/wassenaar-changes-cards>>.

³² See Bauer et al. (note 27) and Bauer et al. (note 31).

³³ European Commission COM(2014) 244 final (note 23).

³⁴ Malmström, C., Debate at European Parliament in Strasbourg, 24 Nov. 2014, <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//ep//text+cre+20141124+item-018+doc+xml+v0//en>>.

connection with human rights violations as well as to undermine the EU's security, particularly for technologies used for mass-surveillance, monitoring, tracking, tracing and censoring, as well as for software vulnerabilities.³⁵

³⁵ Regulation 599/2014 (note 30), p. 83.