

IV. European Union export control developments

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The European Union (EU) is currently the only region with a common legal basis for controls on the export, brokering, transit and trans-shipment of dual-use goods, software and technology and, to a certain degree, also military items. It has also developed detailed implementation guidelines.

The EU Common Position on Arms Exports

The 2008 EU Common Position defining common rules governing control of exports of military technology and equipment is the cornerstone of efforts to strengthen and harmonize EU member states' arms export control policies.¹ It has eight criteria for states to use when assessing arms export licences as well as mechanisms for consultation and information sharing. 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 and the final outcome document was issued in July 2015.² The process has not led to any changes in the text of the Common Position but several sections of the user's guide—which provides guidance on the implementation of the Common Position with regard to licensing assessments and information sharing obligations—have been revised.³ Specifically, additional sources of information were added to the guidelines for criteria 2 and 7 for export licensing officials to use when making assessments, and language was included to reflect the arms export guidelines in the Arms Trade Treaty (ATT).⁴ For example, references to gender-based violence and an attempt to define the scope of the concept were added to the guidance on criterion 2. The ATT states that the threat of gender-based violence is an issue to take into account when deciding whether to grant an export licence, something that was not mentioned

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 The 2008 Common Position superseded the 1998 Code of Conduct on Arms Exports.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 Bauer, S. et al., 'Dual-use and arms trade controls', *SIPRI Yearbook 2015*; and Council of the European Union, 'Council conclusions relating to the review of Common Position 2008/944/CFSP on arms exports and the implementation of the Arms Trade treaty (ATT)', 20 July 2015.

³ For the revised 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', 10858/15, 20 July 2015.

⁴ Criterion 2 concerns 'respect for human rights in the country of final destination as well as respect by that country of international humanitarian law'; and criterion 7 concerns the risk that exported 'military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions'. Council of the European Union, Council Common Position 2008/944/CFSP (note 1).

in the user's guide. As part of the review, EU member states also developed a new information technology system for sharing information on export licence denials.⁵ EU member states plan to further develop the system so that it can be used to share more detailed information on arms exports to specific destinations.⁶

Developments in dual-use trade controls in the EU

The EU Dual-use Regulation, which provides a common legal basis for controlling the export, transit, trans-shipment and brokering of dual-use goods and technology for its 28 member states, is currently undergoing a review.⁷ This process started in 2011 and is unlikely to be completed before 2017. A number of steps have been taken under the review. In 2014 a European Commission communication was issued setting out proposals, following on from an earlier green paper and stakeholder consultation process.⁸ In 2015 comments on these proposals were sought from governments, the private sector and other stakeholders, such as academia, in a public consultation.⁹ Also in 2015, SIPRI and Ecorys conducted a data and information collection and analysis project for the Commission concerning the current and potential impact of the Dual-use Regulation.¹⁰ Both the public consultation and the data collection project will feed into an assessment of the social, economic and environmental impacts of the current regulatory system and any potential changes that the Commission is required to conduct under such a review process. The Commission has announced that it will present the impact assessment report in the first half of 2016 followed by a draft regulatory proposal. The regulatory proposal will undergo a potentially lengthy legislative process involving the Council of Ministers and the European Parliament.¹¹ The review process could lead to practical changes to smoothen and enhance implementation and enforcement as proposed in the 2014 Commission Communication. Fundamental changes to the definition of dual-use items and an expansion of the concept to encompass uses in violation of human rights are

⁵ Council of the European Union, 'Council conclusions relating to the review of Common Position 2008/944/CFSP on arms exports and the implementation of the Arms Trade treaty (ATT)', 20 July 2015.

⁶ Council of the European Union (note 5).

⁷ 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.

⁸ 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.

⁹ European Commission, 'EU Export Control Policy Review: online public consultation report', 23 Nov. 2015.

¹⁰ SIPRI and Ecorys, 'Final report: data and information collection for EU dual-use export control policy review', European Commission, Brussels, 6 Nov. 2015.

¹¹ European Commission, Presentation at the 2015 Export Control Forum, Brussels, 5 Dec. 2015.

also being considered. The regulatory proposal will probably seek to adapt the regulation to changes in trading patterns, business routines and technologies, such as increased reliance on intangible technology transfers. The legislative proposal that the European Commission is expected to put forward in 2016 is likely to include expanded controls on transfers of information and communication technology surveillance technologies. It could also lead to a shift beyond the civilian-use or military-use paradigm that frames the range of goods controlled by dual-use export controls to encompass systems used by intelligence agencies and law enforcement agencies.¹²

¹² For more information see Bauer, S. and Bromley, M., 'The dual-use export control policy review: balancing security, trade and academic freedom in a changing world', EU Non-Proliferation Consortium, Non-Proliferation Paper no. 48, Mar. 2016.