IV. Developments in the European Union's dual-use and arms trade controls

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The European Union (EU) is currently the only regional organization with a common legal framework for controls on the export, brokering, transit and trans-shipment of dual-use items and, to a certain extent, also military items. The key elements of this legal framework are EU arms embargoes, the EU Dual-use Regulation, the EU Common Position on Arms Exports (EU Common Position), the Intra-Community Transfers Directive and the Anti-Torture Regulation.[1]

Developments in EU arms embargoes are addressed in section II. This section focuses on developments with regard to the EU Dual-use Regulation and the EU Common Position, which were both the subject of review processes in 2018. In both cases attempts were made by non-governmental organizations and the European Parliament to expand the scope of the instruments—particularly by strengthening their language on human rights and international humanitarian law—but these were opposed by some EU member states.

The EU Dual-use Regulation

The EU Dual-use Regulation covers controls on the export, transit, trans-shipment and brokering of dual-use goods, software and technology. The regulation is directly applicable law in EU member states but is implemented and enforced via their national control systems. The regulation has been under review since 2011. As part of this process, the European Commission published the draft of a new version of the regulation in the form of a 'recast' proposal in September 2016.[2]

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[1] 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*, L 134, 29 May 2009; 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*, L 335, 8 Dec. 2008; 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*, L 146, 10 June 2009; Regulation (EU) 2016/2134 of the European Parliament and of the Council of 23 Nov. 2016 amending Council Regulation (EC) 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, *Official Journal of the European Union*, L 338, 13 Dec. 2016.

[2] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast)', COM(2016) 616 final, 28 Sep. 2016. See also Bauer, S. and Bromley, M., 'Developments in the EU Dual-use and arms trade controls', *SIPRI Yearbook 2017*, 612–15.

The Commission's proposal would make significant changes to the content of the Dual-use Regulation. Many of these are targeted at modernizing EU controls to reduce the regulatory burden they place on exporters, including by the creation of new EU General Export Authorizations (EUGEAs) for, among other things, low-value shipments, goods that employ cryptography and intra-company transfers of 'technology'.[3]

However, the Commission's proposal also included changes that would give more central roles to protecting human rights and international humanitarian law and 'contributing to the fight against terrorism' in EU member states' dual-use export controls and would also expand controls on exports of so-called cyber-surveillance technology. The term 'cyber-surveillance technology' refers to 'the software and hardware used by intelligence agencies and LEAs [law enforcement agencies]—or by network operators acting under their direction—to covertly monitor and/or exploit communications data that is stored, processed or transferred via information and communications technologies'.[4] The proposal would widen the definition of dual-use goods to include cyber-surveillance technology, create an 'autonomous' EU control list for items not included in the control lists agreed at the multilateral export control regime level, and introduce a new 'catch-all control' for unlisted dual-use items that may be used in violation of human rights or international humanitarian law, or for acts of terrorism. Following revelations in 2011–12 about the supply of cyber-surveillance technology to states in the Middle East by EU-based companies, the Commission and the European Parliament sought to ensure that stronger controls on transfers of such items would be created by the review process.[5]

In accordance with EU legislative procedures, the Commission's proposal will go through a process of 'trilogue' involving the Commission, the European Parliament and the Council of the EU before a final version is adopted. In order to establish their negotiating positions, the European Parliament and the Council of the EU must first each agree a set of proposed amendments to the Commission's proposal.

On 17 January 2018 the European Parliament adopted a set of 98 amendments that had been drafted by its Committee for International

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[3] An EUGEA is a type of open licence agreed at the EU level that allows exporters to carry out multiple shipments under a single licence. Since the 1990s, systems that employ a certain standard of cryptography have been covered by Category 5 of the Wassenaar Arrangement's dual-use list which—together with the control lists produced by the other export control regimes—forms the basis of the EU dual-use list. Saper, N., 'International cryptography regulation and the global information economy', *Northwestern Journal of Technology and Intellectual Property*, vol. 11, no. 7 (fall 2013).

[4] Bromley, M., *Export Controls, Human Security and Cyber-surveillance Technology: Examining the Proposed Changes to the EU Dual-use Regulation* (SIPRI: Stockholm, Dec. 2017), p. 7.

[5] Bromley, M., 'Human rights, the European Union and dual-use export controls', *SIPRI Yearbook 2017*, pp. 616–26.

Trade (INTA).[6] The amendments either supported or expanded the proposed measures on trade facilitation. In particular, they endorsed all of the Commission's proposals on EUGEAs and called for a complete lifting of all restrictions on the export of items that employ cryptography, arguing that such systems are essential for effective information technology (IT) security and secure communications and should not be covered by dual-use export controls.[7] The amendments also endorsed the adoption of an autonomous EU list and the proposal for a new catch-all control but sought to restrict their potential scope, in particular by seeking to ensure that systems used for IT security would not be covered. Finally, they increased the range of human rights considerations that member states would need to take into account when deciding whether a particular export should be approved or whether a non-listed item should be covered by the new catch-all control, by including references to 'the right to privacy, the right to free speech and the freedom of assembly and association'.[8] In adopting its resolution, the European Parliament made clear that the main objective of the review should be to fill 'dangerous gaps' and close 'loopholes' in the EU controls.[9] The member of the European Parliament in charge of coordinating the drafting of the amendments also noted that this would involve 'supplementing' the existing export control regimes which, he argued, have resisted meaningful change in the past.[10]

In contrast, despite over two years of discussions, the Council of the EU had as of the end of 2018 failed to adopt a set of proposed amendments to the Commission's proposal.[11] EU member states appear to be in favour of creating mechanisms for facilitating the movement of dual-use items but were unable to reach agreement on their precise scope and content. Several new EUGEAs were proposed—all of which were narrower in scope than those proposed by the Commission but considered too 'far reaching' and 'risky' by other EU member states.[12] Meanwhile, although there appears to be interest among EU member states in simplifying the controls on cryptography, there is also broad opposition to the European Parliament's idea of dropping them completely.

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[6] European Parliament, 'Amendments adopted by the European Parliament on 17 January 2018 on the proposal for a regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast) (COM(2016)0616—C80393/2016—2016/0295(COD))', 17 Jan. 2018. The motion was adopted by 571 votes to 29, with 29 abstentions.

[7] European Parliament (note 6), amendments 13 and 15.

[8] European Parliament (note 6), amendments 26 and 62.

[9] European Parliament, 'Europe should not help dictators spy on their own citizens', Press release, 17 Jan. 2018.

[10] Buchner, K., Rapporteur, European Parliament, Committee for International Trade, 'Opening remarks', EU Export Control Forum, 2018, Brussels, 13 Dec. 2018.

[11] Göstl, C., Austrian Federal Ministry for Digital and Economic Affairs, Austrian Presidency of the Council of the European Union, 'Opening remarks', EU Export Control Forum, 2018, Brussels, 13 Dec. 2018.

[12] Göstl (note 11).

In particular, many governments value the controls on cryptography for their ability to provide oversight of the trade in technologies that are of potential relevance to national security.[13]

EU member states appear to be divided over the creation of an autonomous EU list for cyber-surveillance technologies and increasing the range of human rights considerations that states would consider in their export licensing procedures. In January 2018 a group of 11 EU member states issued a working paper that gave qualified support for both proposals.[14] However, in May 2018 a group of nine EU member states issued a second working paper that rejected both ideas, arguing that they could have a 'detrimental impact' on EU-based companies by making them subject to controls that companies outside the EU would not have to comply with.[15] Both documents rejected the proposal for a new catch-all control. In addition, in contrast to the European Parliament's focus on 'supplementing' the international regimes, both documents emphasized that the main role of EU Dual-use Regulation should remain 'compiling and enforcing the results achieved in the international export control regimes'.[16]

EU member states have indicated that they will continue to try to adopt a set of amendments in the first half of 2019.[17] However, even if they succeed, it seems likely that the amendments will be distant from the ambitions set by the Commission and the Parliament, which may create challenges for the trilogue process.

The EU Common Position on Arms Exports

In early 2018, 10 years after the adoption of the EU Common Position, the European External Action Service (EEAS) and the EU member states began a process of assessing its implementation and 'the fulfilment of its objectives'.[18] This is the second time that the EU Common Position has been reviewed, following the first assessment conducted in 2011–15. On that occasion, the text remained unchanged but several sections of the User's Guide, which

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[13] Bromley, M., Brockmann, K. and Maletta, G., 'Controls on intangible transfers of technology and additive manufacturing', *SIPRI Yearbook 2018*, pp. 437–47.

[14] Council of the European Union, 'Working paper: EU export control, recast of the EU regulation 428/2009', WK 1019/2018 INIT, 29 Jan. 2018.

[15] Council of the European Union, 'Paper for discussion: For adoption of an improved EU Export Control Regulation 428/2009 and for cyber surveillance controls promoting human rights and international humanitarian law', WK5755/2018 INIT, 15 May 2018.

[16] Council of the European Union (note 14).

[17] Ciupitu, G., Dual Use Division, Department for Export Controls-ANCEX, Romanian Ministry of Foreign Affairs, 'The Council's long-debated position on the modernization of EU export controls', EU Export Control Forum 2018, Brussels, 13 Dec. 2018.

[18] 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.

provides guidance on how the instrument should be applied, were amended and measures were adopted to improve information exchange between EU member states.[19] The second review of the Common Position is happening at a time when controversial arms exports by EU member states to the Middle East are once again at the forefront of European and national public debate.

In particular, some EU member states responded to the deteriorating situation in Yemen by blocking, suspending or halting certain arms exports to Saudi Arabia and the UAE (see also section II).[20] The Netherlands and the Belgian region of Flanders did so in 2016, and Germany and the Belgian region of Wallonia followed in early 2018.[21] After the killing of the Saudi Arabian journalist Jamal Khashoggi in October 2018, Denmark and Finland also placed tighter restrictions on arms transfers to Saudi Arabia while Germany further enhanced those already in place.[22] However, major arms exporters, particularly the United Kingdom, Italy and France, maintained that their arms exports to Saudi Arabia were in compliance with national and European standards. It is notable that legal challenges have been initiated in all these states aimed at demonstrating that the government's decision-making on arms exports to Saudi Arabia is not in compliance with these provisions and at forcing a change in policy.[23] The contrasting national licensing policies illustrate the continuing difficulty in reaching meaningful convergence in this area among EU member states. This has often been highlighted as one of the major flaws in the EU arms export controls regime and as worthy of consideration during the review process.[24]

Unlike in the case of the EU Dual-use Regulation, the European Parliament has no formal role in the drafting of the EU Common Position. However, since July 2000 the parliament's Committee on Foreign Affairs has published regular responses to the EU annual report on arms exports,

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[19] 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', 20 July 2015; and Bauer, S. and Bromley, M., 'European Union export control developments', *SIPRI Yearbook 2016*, pp. 768–69.

[20] On the armed conflict in Yemen, see chapter 2, section V, in this volume.

[21] Bromley, M. and Maletta, G., 'The conflict in Yemen and [the] EU's arms export controls: Highlighting the flaws in the current regime', SIPRI Essay, 16 Mar. 2018.

[22] Finnish Ministry of Foreign Affairs, 'No foundations for arms export authorisations to Saudi Arabia or the United Arab Emirates', 22 Nov. 2018; Danish Ministry of Foreign Affairs, 'Udenrigsministeriet suspenderer godkendelser af eksport af våben til Saudi-Arabien' [Ministry of Foreign Affairs suspends arms exports to Saudi Arabia], Press release, 22 Nov. 2018; and 'Merkel: No German arms exports to Saudi until killing cleared up', Reuters, 22 Oct. 2018.

[23] 'French government faces legal pressure over arms sales to Saudi, UAE', Reuters, 6 May 2018; Campaign Against Arms Trade (CAAT), 'Saudi Arabia: Legal challenge', 27 July 2018; and MacAskill, E., 'Italian officials and German firm face legal action over Saudi arms sales', *The Guardian*, 18 Apr. 2018.

[24] Bauer, S., Bromley M. and Maletta, G., 'The implementation of the EU arms export control system', Workshop Summary Report, Directorate General for External Policy, European Parliament, May 2017; and Bauer, S., Bromley M. and Maletta, G., 'The further development of the Common Position 944/2008/CFSP on arms exports control', External Study, Directorate General for External Policy, European Parliament, July 2018.

including assessments of the steps taken and recommendations on future action.[25] The most recent report calls on EU member states and the EEAS to address a number of specific issues in the current review.[26] These include improving the quality and quantity of information on how to conduct risk assessments, for example by turning the User's Guide into 'an interactive online resource'; turning the annual report into an 'open and public online database'; and strengthening the language on diversion.[27] More generally, the European Parliament has also invited EU member states and the EEAS to use this occasion to conduct an assessment of how the Common Position is being implemented at the national level, including with reference to licensing procedures.[28]

Discussions in the Council Working Party on Arms Exports (COARM) on the content of the current review process have been structured around four 'task forces', each of which addresses a specific issue and is chaired by an EU member state.[29] Poland is responsible for the task force on the User's Guide, Belgium for that on transparency and reporting, Germany is leading the task force on technical issues and the Netherlands has been asked to look into other issues of possible relevance.[30]

The review of the EU Common Position was still ongoing as of 31 December 2018.

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[25] On the annual report see chapter 5, section IV, in this volume.

[26] European Parliament, 'Report on arms exports: Implementation of Common Position 2008/944/CFSP (2018/2157(INI))', A8-0335/2018, 16 Oct. 2018.

[27] European Parliament (note 26).

[28] European Parliament (note 26).

[29] On COARM see Council of the European Union, 'Working Party on Conventional Arms Exports (COARM)', 9 Nov. 2017.

[30] Cops, D., 'Strengthening EU arms export controls through increased information exchange', Policy Brief no. 1, Flemish Peace Institute, 2018, p. 2.