

V. 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 also, to a certain extent, military items. The key elements of this legal framework are the EU's arms embargoes (addressed in section II of this chapter), the dual-use regulation, foreign and direct investment (FDI) screening regulation, the common position on arms exports, the directive on intra-Community transfers, and the anti-torture regulation. During 2022 the EU took steps to implement a new version of the dual-use regulation which was adopted in 2021. The EU and its member states also reported on steps taken to implement the FDI screening regulation, which entered into force in 2020, and continued to expand its coordination with the United States on export control issues, particularly via the work of the Trade and Technology Council (TTC). The EU also began work on a review of the common position. No major developments took place in the directive on intra-Community transfers or the anti-torture regulation. In a set of parallel developments the EU also discussed how exports of military materiel funded by the European Peace Facility (EPF) will be managed and the steps that will be taken at the EU and member state level to prevent the diversion of supplied weapons.

The EU dual-use regulation

The EU dual-use regulation covers controls on the export, re-export, brokering and transit 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 was recast as Regulation (EU) 2021/821, which was adopted by the European Parliament in May 2021 and entered into force on 9 September 2021.¹ Regulation (EU) 2021/821 introduces several new elements and consultation procedures.

¹ Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), *Official Journal of the European Union*, L206, 11 June 2021. For a detailed overview of the content of the new regulation, see Bromley, M., Brockmann, K. and Maletta, G., 'Developments in the European Union's dual-use and arms trade controls', *SIPRI Yearbook 2021*, pp. 587–96; Bromley, M., Brockmann, K. and Maletta, G., 'Developments in the European Union's dual-use and arms trade controls', *SIPRI Yearbook 2022*, pp. 620–24; and Bromley, M. and Brockmann, K., 'Implementing the 2021 recast of the EU dual-use regulation: Challenges and opportunities', Non-proliferation and Disarmament Paper no. 77, EU Non-proliferation and Disarmament Consortium, Sep. 2021.

During 2022 the EU took steps to develop guidelines to clarify how these new elements would work.

One of the most significant changes introduced by Regulation (EU) 2021/821 is a new catch-all control for non-listed cybersurveillance items. The regulation commits the Commission and the Council to producing guidelines to help exporters comply with the due-diligence requirements created by the catch-all. The initial aim had been to publish these guidelines by September 2022 following a period of stakeholder review.² During 2022 work continued in the surveillance technology experts group (STEG)—a subsidiary body of the EU Dual-Use Coordination Group—on developing these guidelines. However, as of 31 December 2022 no document had been sent out for review. Work was delayed following Russia's invasion of Ukraine and the reallocation of both European Commission and EU member state resources to the development and implementation of the related sanctions measures (see section III in this chapter).³

Regulation (EU) 2021/821 also creates new obligations for public reporting on exports of dual-use items, particularly with regard to cybersurveillance items. Here, the EU commits itself to publishing annual data on licence applications by item, origin and destination.⁴ The recast tasks the Commission and the Council with developing guidelines to clarify which data will be collected and published.⁵ Work on these guidelines began in 2022 in a new technical experts group on data collection and transparency (TEG-Transparency), a subsidiary body of the EU Dual-Use Coordination Group. 2022 also saw the first meetings of some of the new subsidiary bodies established by the regulation. This included a new Enforcement Coordination Mechanism (ECM), which is aimed at bringing together member states' licensing authorities and enforcement agencies to exchange information on 'the detection and prosecution of unauthorised exports of dual-use items' and develop 'best practices among licensing and enforcement authorities in the EU'.⁶

The EU foreign direct investment screening regulation

The EU's 2019 FDI screening regulation seeks to enable the EU and EU member states to identify and respond to cases where FDI might allow foreign companies and governments to own and control critical infrastructure,

² Farcas-Hutchinson, C., 'Export control of cyber-surveillance items in the EU', Presentation at the 2021 Export Control Forum, Brussels, 8 Dec. 2021.

³ Communication with EU member state official, 9 Feb. 2023.

⁴ Regulation 2021/821 (note 1), Article 26(2).

⁵ Regulation 2021/821 (note 1), Article 26(2).

⁶ Regulation 2021/821 (note 1), Article 25(2); and European Commission, 'Report for the Commission to the European Parliament and the Council on the implementation of Regulation (EU) 2021/821 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items', COM(2021) 716 final, 1 Sep. 2022.

or to gain access to knowledge and technology which may or may not be subject to export controls but which could benefit their defence and security capabilities. The screening regulation does not require EU member states without a screening mechanism in place to establish one. However, the regulation creates obligations for member states to share information about FDI cases that are being screened, while creating a mechanism for other EU member states to provide comments and for the Commission to issue non-binding opinions on certain cases.⁷ The FDI screening regulation is not framed as targeting any particular non-EU state. However, it was developed against a background of heightened concern about Chinese investments, while Russia's invasion of Ukraine in February 2022 led to an increased focus on investments from Russia and Belarus.

On 1 September 2022 the Commission published its second annual report on the implementation of the FDI screening regulation, covering the year 2021. The first annual report had already covered the first half of 2021.⁸ However, to move to an annual reporting cycle, the information and data provided in the second report overlaps with that provided in the first. The second report was again published together with the Commission's annual report on the implementation of the dual-use regulation, continuing to stress the two instruments' shared focus.⁹

The second annual report noted that by the end of 2021, 18 EU member states had FDI screening mechanisms in place, while 7 were in the process of 'a consultative or legislative process expected to result in the adoption of a new mechanism'.¹⁰ Only two member states (Bulgaria and Cyprus) neither had a mechanism in place nor were in the process of developing one. During 2021, three member states adopted new screening regulations while six updated existing mechanisms.¹¹ In April 2022 the Commission issued guidance for the member states concerning FDI from Russia and Belarus in the context of the sanctions measures adopted in response to Russia's invasion of Ukraine.

⁷ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, *Official Journal of the European Union*, L79 I, 21 Mar. 2019, Preamble para. 19.

⁸ European Commission, 'First annual report on the screening of foreign direct investments into the Union', Report to the European Parliament and the Council, COM(2021) 714 final, 23 Nov. 2021.

⁹ European Commission, 'Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EU) 2021/821 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items', COM(2022) 434 final, 2 Sep. 2022.

¹⁰ European Commission, 'Second annual report on the screening of foreign direct investments into the Union', Report to the European Parliament and the Council, COM(2022) 433 final, 1 Sep. 2022, p. 9.

¹¹ European Commission, COM(2022) 433 final (note 10), pp. 8–9.

As part of the guidance, the Commission again called on all member states to set up adequate FDI screening mechanisms.¹²

The second annual report noted that in 2021, member states reported 1563 requests for authorization and ex-officio cases, 29 per cent of which were formally screened, marking a considerable increase over the 2020 screening rate of 20 per cent.¹³ During 2021, member states notified the Commission of 414 transactions with the information and communications technology (36 per cent) and manufacturing (25 per cent) sectors accounting for the largest shares of notified transactions. Over 85 per cent of the cases submitted came from only five member states: Austria, France, Germany, Italy and Spain.¹⁴ Investors from Russia (<1.5 per cent) and Belarus (0.2 per cent) only accounted for a very small share of notified transactions. The largest share of countries of origin of investors in notified cases came, in decreasing order, from the USA, the United Kingdom, China, Cayman Islands and Canada.¹⁵ The Commission closed 86 per cent of notified cases after an initial review phase, while 11 per cent proceeded to the second review phase with the Commission requesting additional information from the member state. The remaining 3 per cent of notified cases were still ongoing at the cut-off time of the report. In less than 3 per cent of notified cases the Commission issued an opinion, which may include sharing relevant information with the screening member state and suggesting mitigating measures to address identified risks.¹⁶ National authorities blocked transactions in only 1 per cent of decided cases, and 3 per cent were withdrawn by the applicants.¹⁷ The second report largely confirmed the same trends outlined in the first report, including ‘the trend toward more diversification of screening among member states’—the share of screenings conducted by only four member states dropped from 86.5 per cent in the first report to 70 per cent.¹⁸

To improve consistency and completeness of notifications, the Commission updated the notification form for investors and its frequently asked questions document.¹⁹ The Organisation for Economic Co-operation and Development (OECD) published findings from an EU-funded study in 2021–22 that assessed

¹² European Commission, ‘Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions’, *Official Journal of the European Union*, C 151 I, 6 Apr. 2022, pp. 2–3.

¹³ European Commission, COM(2022) 433 final (note 10), p. 11.

¹⁴ European Commission, COM(2022) 433 final (note 10), p. 14.

¹⁵ European Commission, COM(2022) 433 final (note 10), p. 18.

¹⁶ European Commission, COM(2022) 433 final (note 10), pp. 14–16, 19.

¹⁷ European Commission, COM(2022) 433 final (note 10), p. 12.

¹⁸ European Commission, COM(2022) 433 final (note 10), p. 19.

¹⁹ European Commission, ‘Request for information from the investor for the purposes of notifications pursuant to Article 6 of Regulation (EU) 2019/452’, Apr. 2021; and European Commission, ‘Frequently asked questions on Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union’, June 2019, Update of 22 June 2021.

the EU's FDI screening regulation and ways to improve its effectiveness and efficiency. The study identified a list of issues to be addressed, including a lack of screening mechanism in some member states, gaps in coverage in others, lack of prioritization, resources, competencies and accountability, short timelines, inefficiencies in information exchange and issues with screening multi-jurisdictional transactions.²⁰ While the context of Russia's invasion of Ukraine and the continuing geopolitics and competition with China have brought additional attention to the EU's FDI screening framework, most member states are still setting up or updating their systems. The EU will likely continue to work on revisions to the screening regulation and improvements to its implementation.

European and United States cooperation on export controls

Cooperation between the USA and the EU in the field of export controls continued to deepen in 2022. The most visible manifestation of this cooperation was the adoption of aligned trade restrictions on Russia and Belarus in response to Russia's invasion of Ukraine (see section III in this chapter). The USA and the EU also conducted regular meetings of the Trade and Technology Council (TTC), whose ten working groups on a wide range of trade and technology topics include two on the 'misuse of technology threatening security and human rights' and export controls.²¹ The imposition of trade restrictions on Russia and Belarus became one of the main focuses for the work of the TTC in 2022 and the body became a key means for the EU and the USA to exchange information on their implementation. At the TTC's second ministerial meeting, held in Paris in May 2022, the EU and the USA agreed to expand the work on sanctions measures by focusing on exports of 'critical' US and EU technology, 'with an initial focus on Russia and other potential sanctions evaders'.²² At the third ministerial meeting, held in December 2022 in College Park, Maryland, the EU and the USA also agreed to 'further cooperate' on export controls on advanced technologies against Russia, 'particularly with respect to information sharing'.²³ More broadly, the TTC discussed ways in which the EU and the USA could coordinate in the

²⁰ Organisation for Economic Co-operation and Development (OECD) Secretariat, Directorate for Financial and Enterprise Affairs, Investment Division, *Framework for Screening Foreign Direct Investment into the EU: Assessing Effectiveness and Efficiency* (OECD: Paris, 2022), chapter 2.

²¹ European Commission, 'EU-US launch Trade and Technology Council to lead values-based global digital transformation', Press release, IP/2021/2990, 15 June 2021.

²² White House, 'US-EU Trade and Technology Council establishes economic and technology policies & initiatives', Fact Sheet, 16 May 2022.

²³ European Commission, 'EU-US Trade and Technology Council addresses common challenges and responds to global crises', Press release, IP/22/7433, 5 Dec. 2022.

provision of outreach and assistance efforts, expand information sharing on export licence denials, and collaborate on enforcement measures.²⁴

The EU common position on arms exports

The EU common position on arms exports (common position) covers controls on the export, transit, trans-shipment and brokering of military equipment and technology.²⁵ Discussions among EU member states on issues related to the implementation of the common position occur at a regular basis at the Council Working Party on Conventional Arms Exports (COARM), chaired by the European External Action Service (EEAS).

In 2022, COARM continued to work towards the implementation of the 2019 Council conclusions that were agreed as the outcome of the last review of the common position.²⁶ The conclusions highlighted the need to improve the level of transparency in arms exports. However, the 24th EU annual report on arms exports—which provides disaggregated data on the financial value and number of member states' export licences, the value of their actual exports, and aggregated data on licence denials in 2021—was only published in December 2022.²⁷ This represented a negative development in comparison with the progress in timeliness achieved in the previous two years, as the 22nd and the 23rd annual reports were published in November 2020 and September 2021, respectively.²⁸ Further, the annual report showed, once again, that not all EU member states were able to make a complete submission, with several still unable to deliver disaggregated data on actual exports (table 12.4).²⁹

The main development in the implementation of the 2019 Council conclusions was the launch in 2022 of a closed database for licensing officers from EU member states. The platform allows users to access relevant and open-source information on potential countries of destination of mili-

²⁴ European Commission, 'EU-US joint statement of the Trade and Technology Council', Statement 22/7516, 5 Dec. 2022.

²⁵ Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L335, 8 Dec. 2008.

²⁶ Council of the European Union, 'Council conclusions on the review of Council Common Position 2008/944/CFSP of 8 December 2008 on the control of arms exports', 12195/19, 16 Sep. 2019.

²⁷ European External Action Service (EEAS), '24th annual report on arms exports (for 2021) launched: EU is a transparent and responsible trader in arms', 19 Dec. 2022; and Council of the European Union, '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, 16 Feb. 2023 (published on 19 Dec. 2022 as Council document 16164/22).

²⁸ Bromley, Brockmann and Maletta, *SIPRI Yearbook 2022* (note 1), p. 629.

²⁹ In particular, according to the EU annual report, 'Belgium, Cyprus, Germany, Greece and Latvia do not provide these data'. Council of the European Union, 16164/22 (note 27), p. 9.

Table 12.4. Submissions of information to the European Union annual report on arms exports, 2011–21

Annual report	Year covered	No. of states obliged to make submissions	No. of states making submissions	No. of states making full submissions ^a	Proportion of states making full submissions (%)
24th	2021	27	27	22	82
23rd	2020	27 ^b	27	23	85
22nd	2019	28	28	21	75
21st	2018	28	28	21	75
20th	2017	28	27 ^c	19	68
19th	2016	28	27 ^c	19	68
18th	2015	28	27 ^c	19	68
17th	2014	28	28	21	75
16th	2013	28	27 ^c	21	75
15th	2012	27 ^d	27	20	74
14th	2011	27	27	18	67

^aA ‘full submission’ is taken to be data on the financial value of both arms export licences issued and actual exports, broken down by both destination and European Union (EU) military list category.

^bThe United Kingdom officially left the EU on 31 January 2020 and was not obliged to submit data for 2020.

^cGreece did not submit data to the 16th, 18th, 19th and 20th reports.

^dCroatia joined the EU in 2013 and was not obliged to submit data for 2012. It submitted data for the first time to the 16th report.

Sources: Council of the European Union, ‘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, 16 Feb. 2023.

tary materiel and is meant to enhance convergence in the way arms export decisions are taken across the EU.³⁰

In 2022 COARM also started preparations for the next review of the common position, scheduled to be completed in 2024.³¹ As part of this process, three focus groups will look specifically at issues related to harmonization (under the lead of Germany and Sweden), enforcement (under the lead of Italy and Czechia) and commonly produced military equipment (under the lead of France and the Netherlands).³² Further, COARM will also continue discussing the export control implications of initiatives and developments in the field of EU defence and security policy, including those related to the implementation of the EPF.³³

³⁰ Council of the European Union, 16164/22 (note 27), p. 2.

³¹ Council of the European Union, 16164/22 (note 27), p. 5.

³² Romestant, D., ‘Aux armes, citoyens?’ [To arms, citizens?], *WorldECR*, no. 114 (Nov. 2022); Saferworld, ‘European Arms Export Control in a changing European defence landscape’, Aug. 2022, p. 6; and EU official, email exchange with authors, 27 Feb. 2023.

³³ Council of the European Union, 16164/22 (note 27), p. 5.

Arms transfers to Ukraine through the European Peace Facility

The EPF, an off-budget mechanism established in March 2021, provides funding for EU external actions in the field of crisis management and conflict prevention that have military and defence implications. These actions can encompass assistance measures to strengthen the military and defence capacities of third states, including through the supply of lethal military materiel (i.e. weapons).³⁴

In February 2022, one of the measures that the EU adopted in response to the Russian invasion of Ukraine was to use the EPF to fund the transfer of military materiel to Ukrainian armed forces, including weapon systems.³⁵ This marks the first time that the EU has used this mechanism to fund the supply of lethal military equipment and the first time that arms transfers have been funded through resources pooled and managed at the EU level. At the end of 2022, EPF assistance measures providing military assistance to Ukraine were worth more than €3 billion, most of which was allocated to fund the supply of lethal military equipment by EU member states.³⁶ Additional EPF resources (€16 million) were allocated to fund the supply of weapons and ammunition, among others things, to Kyiv as part of the work of the EU Military Assistance Mission in support of Ukraine.³⁷

In this context, the EPF has been used to partially reimburse EU member states for the weapons that they have been delivering to Ukraine since the beginning of the conflict.³⁸ These requests are coordinated through a clearing house mechanism set up by the EU military staff which also allows for the matching of Ukraine's requests for equipment with what EU member states—and other like-minded states—can provide.³⁹

However, to the extent the EU, through the EEAS, is responsible for the implementation of EPF assistance measures, the establishment of this mechanism has assigned an unprecedented role to the Union in the implementation of arms export controls in both the pre- and post-licensing

³⁴ Council Decision 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528, *Official Journal of the European Union*, L102/14, 24 Mar. 2021; and Maletta, G. and Héau, L., *Funding Arms Transfers Through the European Peace Facility: Preventing Risks of Diversion and Misuse* (SIPRI: Stockholm, June 2022).

³⁵ 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, *Official Journal of the European Union*, L60, 28 Feb. 2022; and EEAS, 'EU adopts new set of measures to respond to Russia's military aggression against Ukraine', Press release, 28 Feb. 2022.

³⁶ Bilquin, B., 'European Peace Facility: Ukraine and beyond', European Parliament Think Tank, 18 Nov. 2022.

³⁷ Council of the European Union, 'Ukraine: EU launches Military Assistance Mission', Press release 953/22, 15 Nov. 2022.

³⁸ Brzozowski, A., 'EU arms fund faces reimbursement issues amid increased Ukrainian needs', EURACTIV, 14. Oct. 2022.

³⁹ Maletta and Héau (note 34), p. 6; and Bilquin (note 36).

phase, a process that the provision of military assistance to Ukraine has accelerated. In this context, the EU completed assessments of the risk and impact of such assistance and conducted at least one post-shipment on-site verification visit of the materiel delivered in Ukraine. This raises questions on how to coordinate these EU-level efforts with those at member-state level to avoid duplication, with a view to creating a harmonized approach and making best use of the resources available at both levels.⁴⁰

Conclusions

Discussions and processes concerning the content and implementation of the EU's system of dual-use and arms trade controls were dominated in 2022 by the repercussions of Russia's invasion of Ukraine and the adoption of comprehensive and wide-ranging trade restrictions on Belarus and Ukraine. Formulating and applying these controls occupied a significant amount of the working time of export control staff at both the EU and member-state levels during 2022. This diversion of resources may account for some of the delays seen in the adoption of the required measures associated with implementing the recast of the dual-use regulation. At the same time, the trade restrictions on Russia and Belarus demonstrated the relevance of the recast dual-use regulation, as well as other mechanisms and processes that the EU has developed in recent years for coordinating export control measures internally and in cooperation with the USA. These included the newly created ECM, the TTC, and the FDI screening mechanism, all of which were used to either coordinate or enforce new trade control measures on Russia and Belarus. The EU's response to Russia's invasion of Ukraine also saw it use the newly created EPF to fund significant quantities of arms transfers to Ukraine. This represents a significant departure for the EU and creates challenges concerning both preventing diversion and ensuring the effective coordination of EU and member states' resources and expertise.

⁴⁰ European Parliament, 'The war in Ukraine: Implications for arms export policies at the EU level', Hearing of the Subcommittee on Security and Defence of the European Parliament, 29 Nov. 2022.