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## **EU arms export policy: achievements and current challenges**

Efforts in the EU for coordination in the field of arms export controls under the Common Foreign and Security Policy (CFSP) pillar of the Maastricht Treaty resulted in the 1998 Code of Conduct. In 2008 the Code was transformed into a legally binding Common Position, amended in 2019. More than 20 years since the operation of this common regime for conventional arms exports, the EU can look back with pride to its achievements in terms of policy convergence, increased transparency and international influence. However, as decision-making remains national, expectations are not fulfilled and challenges must be addressed in order to preserve the cohesion, effectiveness and credibility of EU policy in a domain which is central to international peace and security.

### **The EU regime for conventional arms exports**

The activities under arms export licensing include, beyond arms sales, licensed production, brokering, transit and transshipment as well as intangible transfers of technology. Export authorisations by Member States must be judged against eight common criteria: 1) respect of international obligations 2) respect for human rights 3) the internal situation in the destination country 4) regional peace and stability 5) national security of the Member States 6) international behaviour of the destination country 7) the risk of diversion or re-export to unintended end-users 8) the technical and economic capacity of the destination country. A Council working party (COARM) was created to oversee the implementation and further development of the common regime; a User's Guide was agreed to assist officers in implementing the operative provisions and operationalising the eight criteria to achieve greater consistency; an EU Common Military List is the basis of reporting; COARM publishes an annual report to secure transparency of the national decisions (EEAS 2021).

An initial motivation for the Code of Conduct was to avoid the risk of 'undercutting', in other words avoiding that the denial by a Member State be circumvented through the authorisation by another

Member State of an essentially identical request; in that case, a bilateral consultation is mandatory. In addition to industrial interests, 'undercutting' would undermine a common position in a given international situation. The EU regime is a peculiar construction in the sense that the rules and criteria are common and binding on Member States, but the licensing decisions remain national. The European Parliament (EP) in its initiative reports and resolutions has been for years asking stronger EU involvement, but so far to no avail.

The EU regime consists, in addition to the Common Position, of the 2014 Directive on intra-Community transfers and EU arms embargoes (UN-led or autonomous), complemented by: the 1998/2002 Joint Action on Small Arms and Light Weapons (SALW); the 2003 Common Position on arms brokering; the 2009/2021 Dual-use Regulation; the 2009 Firearms Regulation and the 1991/2008 Firearms Directive; and the 2005 Anti-torture Regulation. The EU has supported the negotiation, adoption and implementation of the Arms Trade Treaty (ATT), in force since 2014. The EU promotes its own standards in international fora and through capacity-building programmes in third countries. (EP 2018)

### **Current challenges**

"The aim of the Common Position remains to ensure the responsible export of arms by Member States, namely that the latter does not contribute to internal repression, regional instability or international aggression, serious violations of human rights or of International humanitarian law. A responsible arms trade policy contributes to the maintenance of international peace and security. Also, the strict application of the Common Position is designed to prevent the diversion of arms to unintended end-users." This quotation from the annual report covering 2019 stresses the importance of criteria 2,3,4 and 7 and highlights the ambition to contribute directly or indirectly to peace and security.

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This statement must be seen in the light of actual trends in international arms trade. According to the latest report (SIPRI 2021) the combined arms exports of EU Member States accounted for 26% of global exports in 2016–20 (as in 2011–15). The top five European arms exporters—France, Germany, the UK, Spain and Italy—together accounted for 22% of global arms exports in 2016–20 (21% in 2011–15). Discussions in recent years focused on restricting arms exports to Egypt due to human rights concerns, Saudi Arabia because of its involvement in the Yemen conflict and grave breaches of humanitarian law or Turkey for several reasons. Concerns intensified since arms imports by states in the Middle East were 25% higher in 2016–20 than in 2011–15; their share in global imports rose from 26% to 33%. Four of the top 10 arms-importing states in 2016–20 are Middle East countries: Saudi Arabia, Egypt, Qatar and the UAE. Among the recipients of European arms exports figure prominently these countries plus Oman and Turkey. Obviously, export controls should have priority in a region which is the biggest buyer of weapons per capita in the world; but divisions among Member States and narrow commercial interests tend to breed ineffective and incoherent policies (Otte 2021).

### The case of Turkey

Belligerent declarations, threats and aggressive actions of Turkey against two Member States, Greece and Cyprus, intensified in the course of 2020, giving rise to renewed interest in the EU arms export policy. We will focus on this case because Turkey is a candidate country for EU accession and a NATO member. Already fraught with difficulties, the accession process came to a halt due to serious backsliding in terms of democracy, rule of law, fundamental rights and the independence of the judiciary, especially since the July 2016 failed coup d'état. The latest enlargement report highlights these developments and the fact that Turkey's foreign policy increasingly collided with EU priorities under CFSP (European Commission 2020). EP Resolution (EP 2020) condemns Turkey's destabilising role in Eastern Mediterranean and beyond and calls on Member States to fully implement the Common Position.

Based on information contained in the COARM reports, we can observe a clear deteriorating trend of Turkey's access to weapon systems from EU countries. Since the early 2000s only few denials were registered each year; the number increased sharply in 2016 to 24 and remained at high levels since (2017: 16, 2018: 8, 2019: 20). The motivation of the denials is revealing; in earlier years criterion 7 prevailed, while more recently criteria 2, 3 and 4, occasionally also 1, are those most often invoked to justify a denial. A related indicator is the number of consultations following a denial; from the early 2000s only 1–2 cases each year concerned Turkey; in 2016 the number increased to 6, in 2018 to 8 and in 2019 to 15 (119 consultations in total). The number of granted licences followed a rising trend up to 2013 and is falling since; the average value of licences has been falling until 2011 and rising since.

Criterion 5 has been rarely invoked. It is worth recalling two historic precedents where arms exports were stopped when fellow Member States so requested. In the Falklands war of 1982 France and Germany agreed to an arms embargo against Argentina at the request of the UK. A more recent case is the aborted delivery of two French Mistral helicopter carriers to Russia in 2014 because Poland and the Baltic states feared this equipment might be used against them (Kamaras 2020). In both cases, security interests / threat perceptions of Member States and their ensuing requests led to the annulation of contracts in a clear sign of solidarity. Berlin, Rome and Madrid did not follow up Athens' request (e-Kathimerini\_2020) to refrain from the delivery of weapons which could be used by Turkey in a confrontation in East Mediterranean or the Aegean Sea. By the end of 2020 Turkey had outstanding deliveries for six submarines from Germany, five anti-submarine warfare aircraft from Italy and one amphibious assault ship from Spain (SIPRI 2021).<sup>1</sup> This attitude is even more puzzling as Germany has banned since 2018 arms exports to Saudi Arabia and tightened the rules on SALW. Such inconsistency is difficult to understand, not only in Greece and Cyprus.

While the number and value of export licences are published by all Member States, this is not the case for actual exports; a previously authorised transaction may lead to deliveries spread over several years,

<sup>1</sup> Berlin argued that the delivery of the six 214-class submarines, co-produced locally, cannot be stopped because contracts were based on licences granted in 2009 and covered by public export guarantees of 2.49 billion euro to TMS (SZ 2019).

executed only partially or not at all. Important arms producers such as Germany do not issue figures of actual exports, thus limiting the usefulness of COARM reports. Export figures are published by SIPRI (measured in trend indicator values, TIV). According to SIPRI the five biggest exporters of weapons to Turkey were the US, South Korea, Italy, Spain and Germany.<sup>2</sup> For both Italy and Spain, Turkey is an important export market (1st and 3rd customer respectively); for Germany figures are lower, while the UK and France had no exports in the 2016-20 period.

Turkey's arms imports have been declining since their peak in the late 1990s. From an average of 1713 million TIV in 1996-2000 they fell to 417 million in 2016-20; in 2016-20 the US, Italy and Spain were the major suppliers. The declining trend may be partly due to denials by EU Member States or embargoes by other countries. At the same time, this trend also reflects the increasing capacity of Turkey to produce locally. The Turkish defence industry expanded strongly since the 1990s, helped by institutional arrangements, targeted investment and political ambition (Côte Réal-Pinto 2017). Defence industries typically try to expand their markets through exports. Turkey (with UAE and South Korea) is among the three fastest rising arms suppliers in the period since 2000. Turkish arms exports rose 15-fold since 1996-2000 to reach 210 million TIV in 2016-20; 90% went to Gulf countries, Pakistan, Turkmenistan, Azerbaijan and Malaysia (SIPRI 2020).

The expansion of the defence industry accompanied the militarisation of Turkish foreign policy which uses arms exports as an instrument of influence.<sup>3</sup> In recent years, Turkish defence industry has proved capable of producing a variety of weapon systems. President Erdogan declared that Turkey plans to eliminate all dependency on foreign suppliers for its defence industry by 2023. In reality, Turkey is still heavily reliant on foreign sources for all major programmes (vessels, attack helicopters, battle tanks, artillery guns, aircraft engines) and will remain so for the foreseeable future (Forbes 2020). Turkey has ex-

tensively used offsets for the development of its defence industry. Arms imports have been facilitated by Turkey being a NATO member. European or American defence companies may have used licensed production in Turkey to bypass the criteria for arms exports, either EU or ATT<sup>4</sup>. In the past, Turkish defence industry was helped by NATO programmes, but given current doubts about the reliability of Turkey as an ally this may be discontinued. The extensive use of armed drones in military interventions in several theatres (North Iraq, Syria, Libya, Nagorno-Karabagh) shows that militarisation can run against Western interests.

To sum up, the case of Turkey shows the inconsistencies of an arms export policy based on fragmented decision-making, strong focus on industrial interests and the absence of strategic perspective. As Turkey has pursued the militarisation of its foreign policy and destabilises further a region burdened with conflicts, restricting arms exports (including components and licensed production) can be a powerful instrument of containment. The embargo imposed by Canada for critical components used for the production of armed drones is a good example (Le Monde 2020). "Given that defence capability is one of the prerequisites... for the militarization of foreign policy, the EU could make more effective use of the instrument of arms embargo.... Sanctions against the defence industry is another instrument that the EU could consider." (Adar, Toygür 2020)

### **Strengthening the effectiveness and preserving the credibility of EU arms export policy**

The Common Position is a useful instrument, in particular for transparency of arms exports; but this is a hybrid system based on common criteria and commitments whereas decision-making remains a national prerogative. Yet, EU credibility requires that export authorisations are fully in accordance with the legally binding Common Position which implies stopping arms exports to third countries under certain

2 Over a longer period (1996-2020) the US accounted for about 2/3 of Turkey's imports. US arms exports to Turkey fell sharply by 81% between 2011-15 and 2016-20 and Turkey dropped from being the 3rd largest to the 19th largest recipient of US arms exports. In 2019 the US halted deliveries of the F-35 combat aircraft after Turkey imported air defence systems from Russia.

3 Arms exports come in addition to military deployments, bases or occupations. Some deployments were contributions to multilateral operations, led by EU, NATO or the UN; others were based on inter-government agreements; other foreign interventions were carried out without the agreement or in opposition to the governments concerned (Berghezan 2021a, 2021b).

4 Turkey has signed the ATT in 2013, but has not ratified it, thus it is not state party.

conditions. The current unsatisfactory situation requires that a mechanism to scrutinise national decisions against the EU criteria be established. Article 24 TEU stipulates that the Court of Justice does not have jurisdiction with respect to CFSP provisions.<sup>5</sup> Thus, it is not possible to launch an infringement procedure in case of a clear contravention of the Common Position by a Member State.<sup>6</sup> Still, steps must be taken to align national arms export decisions and preserve EU credibility.

Persistently, EP (non-binding) Resolutions on the COARM reports make detailed and innovative suggestions to remedy the situation. Resolution (EP 2017) favours a stronger role for EU institutions, for example create an arms control supervisory body or issuing EU opinions in addition to the mandatory bilateral consultations; an EU embargo against a third country should automatically revoke licences already granted; independent checks and a mechanism sanctioning Member States not complying with the Common Position; all Member States should submit full information; a standardised verification and reporting system should provide information when exports violate the criteria; data generated by customs authorities could be used; strict application of the Common Position regarding licensed production in third countries; the recipient country's attitude and status with regard to the ATT should be considered. In the 2020 Resolution the EP recommended manda-

tory reporting requirements and a searchable online database; it underlined the absence of a corrective mechanism and the need for a new instrument.

Other suggestions include: explicitly establish that existing licenses can be suspended or revoked; help Member States implement stronger 'end-use' controls using EU intelligence capabilities; a joint commitment of France and Germany to strictly abide by the export criteria would set a precedent for others (Besch 2019). The EU could condition arms exports to the recipient country being party to international export control instruments.

In conclusion, the Common Position constitutes a pioneering and valuable instrument of the EU foreign and security policy; it nevertheless requires further improvement to render it more effective while preserving EU credibility as an international actor. This becomes even more urgent as the EU has embarked upon intensifying defence cooperation (Permanent Structured Cooperation, European Defence Fund). Only the strict application of the common regime will create the necessary trust required for progress in integrating the defence sector; and this progress will tend to reduce the export-dependence of European defence industries.

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<sup>5</sup> However, legal scrutiny by national courts is possible.

<sup>6</sup> According to article 346 TFEU Member States can invoke essential interests of their security in order to not abide by the common rules; but this can be challenged.

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