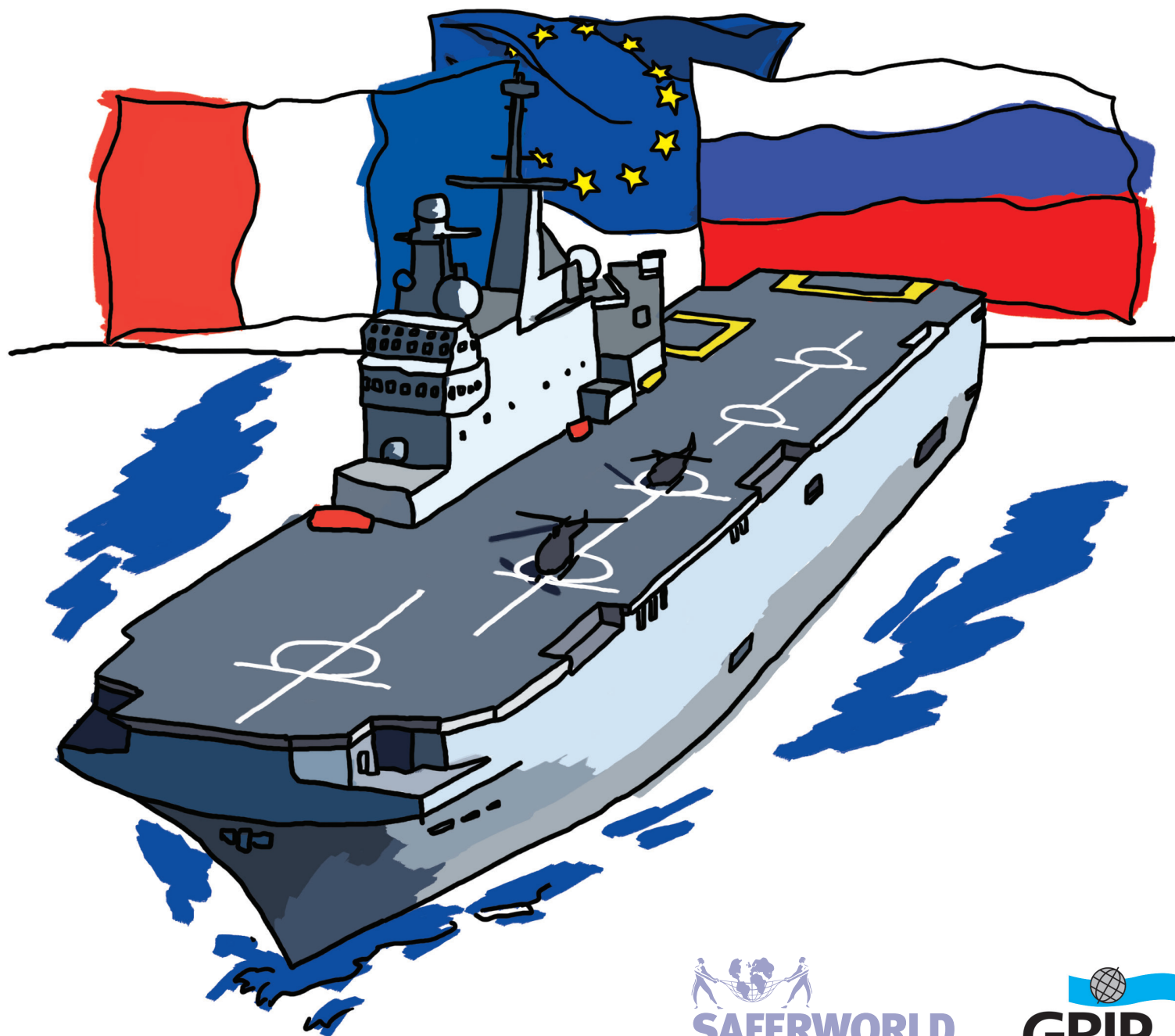


An ill wind

How the sale of Mistral warships to Russia is undermining EU arms transfer controls



Acknowledgements

This briefing was written by Roy Isbister of Saferworld and Yannick Quéau of GRIP. The authors wish to thank Daniel Bertoli of Saferworld for his extensive research support. This briefing was made possible by the generous support of the Joseph Rowntree Charitable Trust.

Executive summary

In 2011 France agreed a contract to supply Russia with two Mistral-class amphibious assault ships with an option for two more to follow. This was the first major arms sale to Russia by a North Atlantic Treaty Organisation (NATO) state. Controversial at the time it was agreed, the recent deterioration in relations with Russia because of the Ukrainian crisis has returned the Mistral sale to the spotlight, with forthright opposition to the deal from around the European Union (EU). Until recently France has appeared determined to proceed, apparently for economic reasons and because of fears that, if it were to cancel, this would damage its reputation as a 'reliable supplier' of military equipment. Even an EU arms embargo on Russia, introduced on 31 July 2014, failed to prevent the sale as it does not apply to pre-existing deals.

Recent comments from French President François Hollande, to the effect that for the ships to be delivered there will need to be a ceasefire established in eastern Ukraine and a "political settlement" found to the crisis, suggest that France is feeling the pressure from allies. These comments did not, however, amount to a cancellation or even suspension of the deal.

Notably absent from the Mistral debate has been reference to the foundation stone of the EU arms transfer control system, the legally binding EU Common Position 2008/944/CFSP, even among those in the EU who oppose the deal.

This briefing argues that the sale of the Mistral raises serious questions about the way the EU system works in practice. The Common Position was designed to ensure responsibility and to promote convergence among Member States with regard to arms transfers. Where they ignore the Common Position and thereby fail to meet their legal obligations, especially in high profile, high-value and/or strategically significant cases, Member States undermine the basic credibility of the EU system, as well as broader credibility of the EU when promoting a law-based system of arms transfer controls internationally.

In order to address this fundamental failing, this briefing makes a series of recommendations.

With regard to the specifics of the Mistral sale to Russia:

- France should explicitly apply the EU Common Position to the deal and either justify or cancel it in this context.
- Other EU Member States that have commented publicly on the deal should share and publish their own assessments of how it fares against the Common Position.
- Parliaments in France and other EU Member States should question their respective governments regarding their positions on the sale, again in the context of the Common Position.

With regard to longer term and more general EU arms transfer control policies and practices, EU Member States should:

- Apply arms and dual-use embargoes as a matter of course to contracts agreed before an embargo is put in place.
- Recommit to apply the Common Position to all export licensing decisions, regardless of the nature or scale of the proposed transfer, and also to ensure that debates about arms exports and individual licensing decisions are cast in terms that reference and reflect their legal obligations.

An ill wind: How the sale of Mistral warships to Russia is undermining EU arms transfer controls

Introduction

In 2011 France agreed a contract to supply Russia with two Mistral-class amphibious assault ships with an option for two more to follow. This decision was opposed at the time (and during the negotiating phase) by several other European Union (EU) Member States, most notably in the Baltics, on political and strategic grounds that it increased Russia's force-projection capability and technological capacity. The US was also clear at the time that it was troubled by the deal, which was the first major arms sale to Russia by a North Atlantic Treaty Organisation (NATO) state.

The recent deterioration in relations with Russia has returned the Mistral sale to the spotlight, with opposition to the deal growing around the EU. However, despite some signs of discomfort, France appears determined to continue as originally agreed. And while the EU has put in place an embargo on new arms sales to Russia, it does not apply to existing contracts; with the transfer of the first ship potentially imminent, France continues to argue that it is therefore within its rights to proceed with the sale.

Recent comments from French President François Hollande, to the effect that for the ships to be delivered there will need to be a ceasefire established in eastern Ukraine and a "political settlement" found to the crisis,¹ suggest that France is feeling the pressure from allies. The comments did not, however, amount to a cancellation or even suspension of the deal but rather were presented as an explanation of the conditions that would need to be met for delivery to go ahead. On 29 October 2014 Russian Deputy Prime Minister Dmitry Rogozin said, "Rosoboronexport has received an invitation to arrive [in France] for the handover of the Vladivostok warship and to attend the floating out ceremony for the second vessel."² Meanwhile, the training by the French of Russian personnel to sail the Mistrals continues apace.

Notably absent from the Mistrals debate has been reference to the foundation stone of the EU arms transfer control system, the EU Common Position 2008/944/CFSP,³ even among many who oppose the deal. The Common Position, adopted during the 2008 French Presidency of the EU, contains a set of eight, legally binding criteria – including respect for human rights and international human rights law; preservation of regional peace, security and stability; and the national security of friendly and allied countries – the rigorous application of which would seem to oblige France to cancel the contract. It has long been of concern that EU Member States apply the Common Position selectively, with strategic and economic concerns given priority as the stakes increase. The Mistrals sale raises serious questions about the way the EU system works in practice.

¹ 'Livraison du Mistral à la Russie: Paris décidera fin octobre', *Le Parisien*, 4 September 2014, www.leparisien.fr/economie/emploi/contrat-mistral-suspendu-deux-manifestations-rivales-dimanche-a-saint-nazaire-04-09-2014-4109525.php.

² 'Rosoboronexport to attend handover of first Mistral warship on November 14: Rogozin', *RIA Novosti*, 29 October 2014, <http://en.ria.ru/russia/20141029/194788209/Rosoboronexport-to-Attend-Handover-of-First-Mistral-Warship-on.html>.

³ 'EU Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment' (Common Position) 8 December 2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:335:0099:0103:EN:PDF>.

The deal

In 2009 Russia entered into discussions with France to buy up to four Mistral-class amphibious assault ships. Part of the interest from Russia appeared to stem from perceived shortcomings of their military engagement during the August 2008 war over South Ossetia, specifically their failure to effectively control the Georgian coast.⁴ In addition, there appear to have been concerns that Russia was falling behind the technological curve when it came to shipbuilding, and that a purchase of ships from Western Europe could provide for crucial technology and skills transfers.

As is often the case with deals of this sort, contract negotiations proved long and complicated, with issues such as the number of ships to be built (anything from two to four), the division of labour/production between French and Russian facilities, the level and type of technology transfer, and price all proving difficult. A further complication was the response to the sale from several of France's allies and EU partners.

Just as the Georgian conflict proved a motivating factor for Russia to pursue the purchase, so it prompted opposition to the deal from the US and several EU states that felt threatened by the possibility of a more assertive or expansionist Russia, most notably the Baltic states but also other of the newer Member States such as Poland.

Despite these complications and concerns, discussions continued between France and Russia, and in December 2010 Russian President Dmitry Medvedev approved the purchase by state arms-exporter Rosoboronexport of two Mistral ships (the Vladivostok and the Sevastopol), with the option to purchase two more, to be manufactured by a consortium of United Shipbuilding Corporation (USC) of Russia and DCNS of France.⁵ A pre-contract general agreement between the French and Russian governments was signed in January 2011.⁶

As contract details were worked through in the first half of 2011, reports surfaced of disagreement between France and Russia regarding the transfer of French technologies, such as the SENIT-9 combat system and SIC-21 fleet command system.⁷ In June of that year the two countries signed a formal agreement for two ships, though a number of details remained unclear, including the final decision regarding technology transfer, the precise split between France and Russia regarding manufacturing, price and delivery dates. The total project cost was estimated at around €1.7 billion, with expected delivery in 2014 and 2015.

The opposition

The Mistral sale was controversial from day one, with dissatisfaction expressed at a high level, particularly from the US and from Russia's immediate neighbours. Anxieties were fanned by Russian comments regarding end-use, such as the remark attributed to Russian naval chief Admiral Vladimir Vysotsky, that if Russia had possessed Mistrals in 2008 it would have won its war against Georgia in "40 minutes instead of 26 hours",⁸ and the then-Prime Minister Vladimir Putin telling journalists in Paris in November 2009 "that if we purchase this armament, we will use it wherever deemed necessary."⁹

⁴ 'Russia's Mistral Amphibious Assault Ship Buy: Caught in a Storm', *Defence Industry Daily*, 3 September 2014, www.defenseindustrydaily.com/russia-to-order-french-mistral-lhds-05749/; Isabel Gorst, 'Russia to buy warships from France', *Financial Times*, 26 May 2011, www.ft.com/cms/s/0/9bc0930c-87b8-11e0-a6de-00144feabdc0.html#axzz3GxWkgw7x.

⁵ 'Russian, French shipbuilders form consortium', *RIA Novosti*, 1 November 2010, http://en.ria.ru/military_news/20101101/161170512.html.

⁶ The agreement was signed by Russian Deputy Prime Minister, Igor Sechin, and French Defence Minister, Alain Juppé, in the presence of French President, Nicolas Sarkozy (See 'Russia, France sign warship agreement (Update 3)', *Rianovosti*, 25 January 2011, http://en.ria.ru/military_news/20110125/162296245.html).

⁷ 'Moscow, Paris signed Mistral protocol of intent, not final deal', *RIA Novosti*, 14 June 2011, http://en.ria.ru/military_news/20110614/164605853.html.

⁸ 'Mistral Blows', *The Economist*, 17 May 2014, www.economist.com/news/europe/21602291-why-france-insists-going-ahead-selling-warships-russia-mistral-blows.

⁹ Edward Cody, 'Critics say proposed sale of French Mistral ship to Russia will harm region', *Washington Post*, 2 February 2010, www.washingtonpost.com/wp-dyn/content/article/2010/02/02/AR2010020203508.html.

From Mistral class to Vladivostok class¹⁰

The Mistral BPC (*bâtiment de projection et de commandement*) is a Diesel powered 21,300 tonne amphibious assault, command and force-projection ship, also variously described as a Landing Helicopter Dock (LHD) or a Landing Helicopter Assault (LHA) ship. DCNS, the French state-owned military shipyard, which designed the ship and the combat systems, is the system integrator; Thales is responsible for the radar and communication systems.

The hull of the ship is built according to commercial standards, so in this sense the Mistral cannot be compared to frigates or other classes of combat vessels. However, the 16 to 30 helicopters and the four landing barges or two medium hovercraft it can carry to deliver armoured vehicles and soldiers to shore allow the vessel to project significant military force and to complete a wide range of missions. Moreover, and crucially, its high-performance communication systems make the ship suitable for command in case of military deployment. The ship can also operate as a naval hospital (69 beds with a fully-equipped operating room).

At the tactical level, LHA are designed to control littoral regions, at home or abroad. Russia's capabilities are, at the moment, limited in this domain, as suggested by the comment attributed to Russian naval chief Admiral Vladimir Vysotsky that had Russia possessed Mistrals in 2008, it would have won its war against the Republic of Georgia in "40 minutes instead of 26 hours."¹¹

It is Russia's stated intention that the Vladivostok Class should carry up to 30 helicopters, mainly the Kamov Ka-29K utility helicopters (troop transport and assault role), the navalised Ka-52K Alligator coaxial scout/attack helicopters (armed with short-range air-to-air missiles), and other anti-submarines helicopters and unmanned aerial vehicles (UAVs). This, however, is probably over-ambitious; a more realistic estimate would be around 20 units.¹² The Mistral's amphibious capabilities offer some flexibility in monitoring coasts. With a storage capacity of 2,650 square metres, the Mistral can carry 60 wheeled armoured vehicles, or 46 such vehicles plus 13 Russian T-90 medium tanks, or 40 tanks plus associated munitions.

Apart from the helicopters and the UAVs,¹³ the LHA's defensive systems are quite limited. The *Vladivostok* would probably rely on two 30mm guns (AK-630), four anti-saboteur grenade launchers (DP 65), and two very short-range anti-aircraft missiles systems (SA-N-10/Gibkha 3M-47). The key capabilities of the ships are not the weapons, but the electronics, that is, the radar, the combat systems and the fleet command systems.

In December 2009 six US Senators, including John McCain, wrote a letter to the French Ambassador in Washington, Pierre Vimont, complaining about the sale,¹⁴ while US Congresswoman Ileana Ros-Lehtinen of the House Committee on Foreign Affairs introduced a bill to express the sense of Congress that "France and other member states of the NATO and the EU should decline to sell major weapons systems or offensive military equipment to the Russian Federation."¹⁵ During a visit to Paris in February 2010, the then-US Defence Secretary Robert Gates expressed further concern about the deal.¹⁶

Considerable apprehension was also expressed among Baltic states, with Latvian Defence Minister, Imants Liegis, proposing that "before concluding strategic deals, EU member countries should hold internal consultations on items that may call into question the security of other members."¹⁷ Lithuania's Defence Minister, Rasa Juknevičienė, described the deal as a "mistake"¹⁸ and "astonishing" and pledged to raise it at a meeting of EU Defence Ministers.¹⁹

Georgia likewise was very concerned about the sale, with then-President Mikheil Saakashvili noting in February 2010 that it was "very risky" and that it would "reward" Russia's continued

¹⁰ For more details on the specifications of the ship see 'Russia's Mistral Amphibious Assault Ship Buy: Caught in a Storm', *Defense Industry Daily*, 3 September 2014, www.defenseindustrydaily.com/russia-to-order-french-mistral-lhds-05749/, and 'Mistral Class, Amphibious Assault', France, Naval Technology, www.naval-technology.com/projects/mistral/.

¹¹ 'Mistral Blows', *The Economist*, 17 May 2014, www.economist.com/news/europe/21602291-why-france-insists-going-ahead-selling-warships-russia-mistral-blows.

¹² *Defense Industry Daily*, loc. cit.

¹³ There is a wide range of possibilities concerning the UAVs depending on the type of system (take-off and landing requirements, size, weight), which would be used principally to monitor the coast and for scouting missions.

¹⁴ *Ibid.*

¹⁵ Josh Rogin, 'Proposed French arms sales to Russia faces mounting opposition on Capitol Hill', *The Cable*, 18 December 2009, http://thecable.foreignpolicy.com/posts/2009/12/18/proposed_french_arms_sale_to_russia_raising_eyebrows_on_capitol_hill.

¹⁶ Tom Shanker, 'Gates voices concern about Warship sale to Russia', *New York Times*, 8 February 2010, www.nytimes.com/2010/02/09/world/europe/09gates.html?_r=1&.

¹⁷ 'Latvia and Lithuania Propose Stricter EU Rules to Stop Mistral Sale', *ITAR-TASS*, 28 February 2010, www.atlanticcouncil.org/blogs/natosource/latvia-and-lithuania-propose-stricter-eu-rules-to-stop-mistral-sale.

¹⁸ 'Baltic states fault France's warship deal with Russia', *Agence France-Presse*, 28 December 2010, www.defencetalk.com/baltic-states-fault-frances-warship-deal-with-russia-30858/.

¹⁹ 'Comment by the Lithuanian Minister of National Defence on France agreement to sale a Mistral-class ship to Russia', *Ministry of National Defence Republic of Lithuania*, 9 February 2010, www.kam.lt/en/news_1098/current_issues/comment_by_the_lithuanian_minister_of_national_defence_on_france_agreement_to_sale_a_mistral-class_ship_to_russia.html.

military presence in Georgia's breakaway provinces, in violation of a French-brokered ceasefire agreement after the 2008 war.²⁰

Following the initial outcry, the deal faded from public and obvious diplomatic attention. It returned to the spotlight with Russia's annexation of Crimea, which on 6 March 2014 was condemned in a joint statement of EU Heads of State or Government, including President Hollande, as an "unprovoked violation of Ukrainian sovereignty and territorial integrity."²¹

Certain EU Member States acted unilaterally to restrict arms exports to Russia. In the UK, Foreign Secretary William Hague announced on 18 March 2014 that the UK was "[suspending] all extant licences and application processing for licences for direct export to Russia for military and dual use items destined for units of the Russian armed forces or other state agencies which could be or are being deployed against Ukraine."²² Also in March, Germany suspended the construction by Rheinmetall of a €120 million training facility for Russian infantry.

At the EU level, a series of progressively tighter restrictive measures were applied against Russia; all the while the Mistral sale was seen as increasingly controversial, both within the EU and further afield.

In early June 2014, the BBC reported that US President Barack Obama had urged France to reconsider its position, stating: "I think it would have been preferable to press the pause button", and that the then-Polish Foreign Minister Radek Sikorski had called on France to cancel the deal because "Russian generals have already said what these ships will be used for: to threaten Russia's neighbours in the Black Sea and that means Europe's partners."²³ At the beginning of July, Estonian Prime Minister, Taavi Rõivas, stated that Estonians were concerned that the transaction would have a clear impact on the European security situation.²⁴

Japan has also objected to the sale, which may reflect the fact that Russia has stated it intends to deploy the ships to its Pacific Fleet, with Japanese Defence Minister, Itsunori Onodera, reported as saying: "We want them to stop the deal."²⁵ On the same day, Admiral Katsutoshi Kawano, chief of staff of the Japan Maritime Self-Defence Forces, observed that "the Mistral is a warship with very high capabilities; should the ship deploy to Vladivostok, it will certainly have an impact on us."²⁶

Following the downing of Malaysian Airlines flight MH17 over Ukraine on 17 July 2014, UK Prime Minister David Cameron said: "Frankly in this country it would be unthinkable to fulfil an order like the [Mistral sale]."²⁷ Several EU Foreign Ministers spoke out against the sale ahead of a 22 July 2014 EU summit. Latvian Foreign Minister, Edgars Rinkēvičs, said: "It is very difficult to explain ... that we are selling ships, but not only ships, but also other kinds of military technology, to the country that has been behind ... providing anti-aircraft missiles to terrorists and separatists. That has to stop." Linas Linkevičius of Lithuania said: "It is not logical we're not doing [an arms embargo] with a country we're accusing of conducting aggression. There are some deals we can explain economically, but we cannot understand [the Mistral contract]." Swedish Foreign Minister Carl Bildt said: "To deliver arms in this situation is somewhat difficult to defend, to put it mildly."²⁸

20 Valentina Pop, 'Georgian leader warns Europe against Russia warship deal', *EU Observer*, 19 February 2010, <http://euobserver.com/defence/29507>.

21 'Statement of the Heads of State or Government on Ukraine', *European Council*, 6 March 2014, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/141372.pdf.

22 'Notice to Exporters 2014/06: UK suspends all licences and licence applications for export to Russian military that could be used against Ukraine', Export Control Organisation, 18 March 2014, <http://blogs.bis.gov.uk/exportcontrol/uncategorized/notice-to-exporters-201406-uk-suspends-all-licences-and-licence-applications-for-export-to-russian-military-that-could-be-used-against-ukraine/>. Note that this decision was widely reported as being in effect a unilateral arms embargo on Russia, but in fact only 34 of 285 extant UK licences were suspended under this decision.

23 'Obama warns France on Russia Mistral ship deal', *BBC News*, 5 June 2014, www.bbc.co.uk/news/world-europe-27722256.

24 'Rõivas in France: Estonia concerned about deal to sell Mistral vessels to Russia', *Baltic Course*, 8 July 2014, www.baltic-course.com/eng/baltic_states/?doc=93763.

25 Bruno Waterfield, 'EU sanctions on Russia agreed putting City of London in front line', *The Telegraph*, 29 July 2014, www.telegraph.co.uk/news/worldnews/europe/eu/10998798/EU-sanctions-on-Russia-agreed-putting-City-of-London-in-front-line.html.

26 Kosuke Takahashi and James Hardy, 'Japan asks France to stop Mistral sale to Russia', *Jane's Defence Weekly*, 29 July 2014, www.janes.com/article/41308/japan-asks-france-to-stop-mistral-sale-to-russia.

27 'UK's Cameron questions France's sale of Mistral warships to Russia', *Reuters*, 21 July 2014, <http://in.reuters.com/article/2014/07/21/ukraine-crisis-sanctions-britain-eu-idINS8N0PQ00I20140721>.

28 Hugh Carnegie and Peter Spiegel, 'Row erupts over French warship ahead of European sanctions talks', *Financial Times*, 22 July 2014, www.ft.com/cms/s/0/36d15660-1163-11e4-a17a-00144feabdc0.html#axzz3E7zSE8Re.

Germany had taken a very cautious position on arms sanctions against Russia; however, after MH-17 was shot down, Chancellor Angela Merkel suggested France should halt the export of the Mistral regardless of whether the sanctions regime allowed it.²⁹

Then, at the end of July, the EU imposed an embargo on any new contracts to export arms or dual-use items to Russia.³⁰ The embargo did not apply to existing contracts, a decision widely regarded to have been due to French unwillingness to give up on the Mistral sale. It should be noted, however, that this was not the only issue that complicated EU States' efforts to act in concert, with concerns about the implications for financial markets and energy supplies, for example, also limiting Member States' appetite for strong measures.³¹

Shortly thereafter, on 4 August 2014, Germany announced that the previously suspended Rheinmetall contract was being cancelled. Sigmar Gabriel, Germany's Vice Chancellor, said he was acting out of concern at the growing violence following the shooting down of the Malaysian flight MH17 over eastern Ukraine.³²

The Mistral and Member States' legal obligations

EU Member States may have been almost universally opposed to the Mistral deal since its inception, yet they have virtually without fail avoided discussing the sale in the context of their legal obligation to apply the EU Common Position to all proposed arms exports.

This is all the more remarkable given that the contract raises concerns to a varying extent under at least six of the Common Position's eight criteria, most notably criteria 4, 5, and 7.

Criterion 4 requires that a transfer is refused where there is a clear risk that it would undermine regional peace, security and stability. Criterion 5 requires the exporting state to take account of the risk that the transfer would undermine the national security of friendly and allied countries. And while this criterion also contains a permissive element in that it refers to "the potential effect of the military technology or equipment to be exported on [the exporter's] defence and security interests", it goes on to state that "this factor cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability".³³ Under criterion 7 the exporting state is obliged to consider the risk of diversion within the buyer country, as well as the risks that any of the technology being transferred might later be re-exported to other "undesirable" destinations or reverse-engineered.

Note that of these three criteria, only criterion 4 includes an *obligation to refuse* the transfer in the event of clear risk. Over the last three years for which complete figures are available (2010–12), EU Member States have refused 231 licence applications under criterion 4; however, deeper analysis of this figure is difficult as most EU Member States provide little information on individual denials. The Netherlands and Spain are exceptions: Spain has reported that over the period 2010–13 it refused a transfer of unmanned aerial vehicles (UAVs) and related equipment to Taiwan; the Netherlands has reported that it refused around 10 licences for items such as armoured vehicle components to Taiwan, image intensifiers to Pakistan, and image intensifiers, parts of training simulator howitzers and wind-tunnel test data to Israel. While this is only a very small sample of all the transfers refused under criterion 4, the nature of the items refused does point to the oddity of France's reluctance to cancel the sale of complete assault ships to a country under an EU arms embargo.

Under criteria 5 and 7, the obligation is limited to taking the relevant factors into account; nevertheless, Member States are expected to apply the spirit as well as the letter of the Common

29 'Merkel suggests France should halt Mistral sale', *EU Observer*, 18 July 2014, <http://euobserver.com/tickers/125043>.

30 'Adoption of agreed restrictive measures in view of Russia's role in Eastern Ukraine', *Council of the European Union*, 31 July 2014, http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/144205.pdf.

31 Valentina Pop, 'Finland most vulnerable to Russian gas cut-off', *EU Observer*, 3 September 2014, <http://euobserver.com/economic/125441>; Bruno Waterfield, 'EU sanctions on Russia agreed putting City of London in front line', *The Telegraph*, 29 July 2014, www.telegraph.co.uk/news/worldnews/europe/eu/10998798/EU-sanctions-on-Russia-agreed-putting-City-of-London-in-front-line.html.

32 Stefan Wagstyl and Kathrin Hille, 'Germany cancels defence contract with Russia', *Financial Times*, 4 August 2014, www.ft.com/cms/s/0/3a76e912-1bde-11e4-9db1-00144feabdc0.html#axzz3GxWkgw7x.

33 Common Position, Article 2.5 (a), *op. cit.*

Position, and a significant number of licence applications are refused on the basis of these two criteria (30 and 582 respectively, over the same three years).³⁴ Note also that these criteria, as well as criterion 4, require an assessment of risks as they apply to the specific item(s) to be transferred, rather than making an overall assessment of the proposed recipient state.

Questions are also raised under criteria 2 and 3, which refer to the risk that the items transferred could be used in breach of international humanitarian or human rights law, or to provoke or prolong internal conflict in the country of final destination, respectively. With regard to the Mistrals these are probably subordinate risks, in that they would most likely come into play in a 'criterion 4 situation', but Member States would still be required to assess the risks that the ships would be used as the launch platforms for troops or equipment which might then be used in breach of law.

Additional consideration would need to be given to criterion 6, which calls upon the exporting state to make a general assessment (rather than a case-by-case assessment as is the case for the other criteria mentioned) regarding *inter alia* the buyer country's "attitude to terrorism, the nature of its alliances and respect for international law".

Note that while the Common Position explicitly provides that "Member States may ... take into account the effect of proposed exports on their economic, social, commercial and industrial interests" – which is clearly a key concern in the case of the Mistrals sale – "*these factors shall not affect the application of the ... criteria.*"³⁵

Related to considerations around the Common Position are the complementary and overlapping obligations that attend the recently negotiated Arms Trade Treaty (ATT). Although the Treaty will not enter into force until 24 December 2014, and until then France will not be obliged to implement its specific provisions, France has ratified the ATT and is therefore bound by the Vienna Convention on the law of treaties not to defeat its object and purpose.³⁶ It is unhelpful to the smooth and effective introduction of a legally binding global framework for managing arms transfers if EU Member States, which have been among the ATT's strongest supporters throughout and since its negotiation, are seen to be discounting their existing regional legally binding instruments.

Public discourse and the Common Position

In 2014, we have to look to Ukraine to find mention of the Common Position in the context of the Mistrals. Kostiantyn Yeliseiev, Ukrainian Ambassador to the EU, noted in July that "[r]equirements for the supply of the military weapons to third countries [are] enshrined in the EU Code of Conduct on Arms Exports from 1998, which in 2008 were confirmed in the ... Common Position."³⁷ He went on to suggest that the Mistral deal could be challenged by EU courts, arguing that even without detailed analysis of the EU legislation, the war in Georgia in August 2008, the annexation of the Crimea, and Russia's destabilising campaigns in the eastern regions of Ukraine were clear evidence of Russia's non-compliance with at least three of the Common Position criteria.³⁸

Ironically, even Russia has referred to the Common Position in a related context, objecting to possible Hungarian arms sales to Ukraine on the grounds that they would breach the Common Position (and the ATT).³⁹

³⁴ In 2012 (the last year for which full figures are available), EU Member States refused 93 licences under criterion 4, nine licences under criterion 5 and 163 under criterion 7. In 2011, they refused 68 licences under criterion 4, 12 licences under criterion 5 and 183 under criterion 7; in 2010, they refused 70 licences under criterion 4, nine licences under criterion 5 and 236 under criterion 7. See the 15th, 14th and 13th Annual Reports According to Article 8(2) of Council Common Position 2008/944/CFSP Defining Common Rules Governing Control of Exports Of Military Technology and Equipment, all available at http://eeas.europa.eu/non-proliferation-and-disarmament/arms-export-control/index_en.htm.

³⁵ Common Position, *op. cit.*, Article 10, emphasis added.

³⁶ 'Vienna Convention on the Law of Treaties', 23 May 1969, Article 18, <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

³⁷ 'Ukrainian ambassador: French Mistral contract violates EU rules', *EurActiv.com*, 15 July 2014, www.euractiv.com/sections/global-europe/ukrainian-ambassador-french-mistral-contract-violates-eu-rules-303474.

³⁸ *Ibid.*

³⁹ 'Hungary's arms supplies to Kiev violate Budapest's legal obligations – RF Foreign Ministry', *ITAR-TASS News Agency*, 16 August 2014, <http://en.itar-tass.com/russia/745284>.

Mistral deployment

There is uncertainty over where Russia plans to deploy the two Mistral-class amphibious assault ships. The official line has largely been that the ships are destined for the Pacific fleet, though other possibilities have also been put forward. For example, Russian Defence Minister Anatoly Serdyukov was reported in May 2010 as saying that the first two ships would be deployed in the Northern and the Pacific fleets.⁴⁰ It is unlikely, however, that either ship would be deployed to the north, as without hull modification the Mistral-class ships are unsuited to the Arctic and the strategic purpose is unclear. Locating a ship in the Baltic Sea would seem unnecessarily provocative and again serve little strategic purpose.

Deployment of both ships to the Pacific fleet would be France's preferred outcome and, as mentioned, has been the usual official position. In March a Russian Navy representative was quoted as saying: "There are no corrections to the earlier plans to deploy the Mistral-class helicopter carriers with the Pacific Fleet. No decisions to deploy these vessels in Black Sea have been made."⁴¹ It should be noted, however, that although something may have been lost in translation, this is not quite the same as saying that a decision has been taken not to deploy in the Black Sea, while rumours and unconfirmed reports suggest that consideration is being given to basing them there.⁴²

Analysis by the Centre for Eurasian Strategic Intelligence has concluded that the ships are most likely to be based according to their names, that is, as part of the Pacific fleet in Vladivostok and the Black Sea fleet in Sevastopol respectively, taking into account infrastructural basing requirements and capabilities, and existing strategic and combat-capability gaps.⁴³

To the East, the US 'pivot' to Asia, rising tensions between China and its neighbours, and numerous national ambitious military procurement plans have put pressure on the Russian Navy to be prepared for military interventions in the region if need be. The current situation in Ukraine has however changed the strategic calculus and Moscow may now decide to base at least one of the ships in the Black Sea to preserve its interests in Crimea and elsewhere in the neighbourhood (such as Transnistria and Georgia).⁴⁴ Developments in Syria and the Mediterranean Sea more generally might also be shaping new deployment planning. Moscow may see the Mistral-class ships as having a role in helping to deter Western military intervention in Syria against ally Bashar al-Assad, for example.

Taking into account the practical issues and the current strategic environment, the two areas where Russia might most likely be considering deployment are: 1) the Black Sea and the Mediterranean Sea; and 2) the Asia-Pacific region. But ultimately, as President Putin has intimated, Russia can be expected to deploy the ships wherever they regard them as most needed and most useful.⁴⁵

Outside of government circles, it is again from Ukraine where most references to the Common Position appear. Mikhail Samus of the Ukrainian think tank Center for Army, Conversion and Disarmament Studies argues that the sale is in breach of five of the Common Position criteria,⁴⁶ while the Euromaidan Press website has on several occasions referred to the Common Position as grounds for stopping the transfer.⁴⁷

For an EU-sourced comment on the Mistral sale and the Common Position, we have to go back to 2010, and a statement by Dainius Žalimas, legal advisor to the Lithuanian Defence Minister, who stated "[w]e think that the ... sale is inconsistent with criteria 2, 3, 4, 5 and 6 of Article 2 of [the] ... Common Position."⁴⁸ However the Defence Minister herself, Rasa Juknevičienė, speaking on the same subject at the same time, made no such reference.⁴⁹

Given that in this instance it would appear in the interests of EU Member States to refer to the Common Position, two possible explanations for its invisibility suggest themselves. The first is ignorance about the Common Position on the part of decision-makers and political figures.

⁴⁰ 'Russia's Mistral Amphibious Assault Ship Buy: Caught in a Storm', *Defence Industry Daily*, 26 May 2010, www.defenseindustrydaily.com/russia-to-order-french-mistral-lhds-05749/.

⁴¹ 'Russian Navy Not to Deploy Mistral Ships in Black Sea', *Xinhua*, 27 March 2014, <http://english.cri.cn/6966/2014/03/27/3441s819225.htm>.

⁴² Stephen Blank, 'Mistral Ship sale to Russia will shipwreck EU', *The Moscow Times*, 10 June 2014, www.themoscowtimes.com/opinion/article/mistral-ship-sale-to-russia-will-shipwreck-eu/501845.html.

⁴³ Alex Kraus, 'Probable areas of deployment of the Mistral class ships', *Centre for Eurasian Strategic Intelligence*, 14 August 2014, www.youtube.com/watch?v=Xlbu0h2KYq8.

⁴⁴ *Op. cit.*, Stephen Blank.

⁴⁵ *Op. cit.*, Edward Cody.

⁴⁶ Mikhail Samus, 'Mistral sale Putin violates the EU – expert', *Liga.Net*, 7 September 2014, http://news.liga.net/news/politics/2463644-prodazha_mistralej_putinu_narushaet_normy_evrosoyuzu_ekspert.htm.

⁴⁷ See, for example, Guil Sho, 'Why France should cancel the Mistral deal with Russia', *Euromaidan Press*, 26 July 2014, <http://euromaidanpress.com/2014/07/26/why-france-should-cancel-the-mistral-deal-with-russia/>; and 'Ukrainian MFA calls upon France to suspend Mistral deal – briefing', *Euromaidan Press*, 6 August 2014, <http://euromaidanpress.com/2014/08/09/ukrainian-mfa-calls-upon-france-to-suspend-mistral-deal-briefing/>.

⁴⁸ 'Comment by the Lithuanian Minister of National Defence on France agreement to sale a Mistral-class ship to Russia', *Ministry of National Defence Republic of Lithuania*, 9 February 2010, www.kam.lt/en/news_1098/current_issues/comment_by_the_lithuanian_minister_of_national_defence_on_france_agreement_to_sale_a_mistral-class_ship_to_russia.html.

⁴⁹ *Ibid.*

The second is more cynical: that those same decision-makers and political figures prefer not to draw attention to the Common Position, in the expectation that they may themselves in future approve problematic arms sales on the basis of economic or perceived foreign policy advantage. Both explanations are plausible, with similar if not so controversial examples existing from around the EU, often concerning sales that are particularly large and/or to the Middle East. Both explanations are disturbing, and if accurate would serve to undermine the agreed legal foundation of the EU transfer control system on an ongoing basis.

France's uncomfortable position

The proposed sale of Mistral ships to Russia has positioned France on the horns of a dilemma. On the one hand it is desperate to maintain its reputation as a 'reliable supplier' of military equipment and to support French jobs and manufacturing, while on the other it is under significant pressure from allies to cancel the sale. Moreover, and despite France's apparent unwillingness to consider the fact, it has a legal obligation to apply the Common Position. With France tying itself in knots attempting to manage this predicament, the deal has exposed the limits of an industrial strategy based on arms exports and should be seen as a warning to other countries tempted to follow this path. It was France's decision to sell weapons to whomever in the aim to develop and/or to preserve its military-industrial key capabilities which paved the way to this situation.⁵⁰

The dominant domestic narrative is that France must fulfil its obligations to Russia in full. Central to this position has been the issue of strategic autonomy,⁵¹ with attention focused on four related negative impacts of cancellation.

1. Concern that jobs would be lost.⁵² STX, the naval shipyard in charge of the construction of the first ship, is relying on the contract to preserve its activities at Saint-Nazaire.⁵³ For DCNS the Mistral sale is less critical but still welcome.
2. Concern that not only would France lose the financial benefit of the sale but also cancellation could result in having to pay as much as €1 billion in financial penalties.⁵⁴
3. A fear that the reputation of the country as a reliable arms supplier would be damaged.⁵⁵ Acquisition programmes imply a long-term commitment; buyers want guarantees that their purchases will not be threatened by possible evolution of the international security environment. France is afraid to see its position in India with regard to a sale of Rafale fighter aircraft at risk, for instance.⁵⁶
4. With many important transfers of technology already having taken place, a cancellation at this late stage may have implications for Moscow's attitude towards respect for intellectual property, creating a risk that Russia could work to reverse-engineer already-transferred French equipment and technology without any regard to French objections.⁵⁷

50 Dominique Gallois, 'Défense: la difficile conquête des marchés d'export', *Le Monde*, 8 September 2014, www.lemonde.fr/economie/article/2014/09/08/defense-la-difficile-conquete-des-marches-d-export_4483958_3234.html?xtmc=mistral&xtcr=8.

51 'La suspension de la vente du Mistral suscite un concert de réactions disparates', *Les Échos*, 4 September 2014, www.lesechos.fr/industrie-services/air-defense/0203747635588-la-suspension-de-la-vente-du-mistral-suscite-un-concert-de-reactions-disparates-1039082.php?68Cr1uC2Ro1PBuVq.99; Jacques Sapir, 'Jacques Sapir: en suspendant la livraison du Mistral Hollande met la France hors jeu', *Le Figaro*, 4 September 2014, www.lefigaro.fr/vox/economie/2014/09/04/31007-20140904ARTFIG00374-jacques-sapir-en-suspendant-la-livraison-du-mistral-hollande-met-la-france-hors-jeu.php.

52 Le Figaro with AFP, 'Mistral: "stupefaction" pour les ouvriers FO', *Le Figaro*, 3 September 2014, www.lefigaro.fr/flash-eco/2014/09/03/97002-20140903FILWWW00432-mistral-stupefaction-pour-les-ouvriers-fo.php.

53 Vincent Jauvert, 'Mistral: enquête sur un contrat qui dérange', *Le Nouvel Observateur*, 9 August 2014, <http://tempsreel.nouvelobs.com/l-enquete-de-l-obs/20140806.OBS5698/mistral-enquete-sur-un-contrat-qui-derange.html>.

54 Benoist Fechner, 'A quel prix la France pourrait-elle annuler la vente de Mistral à la Russie', *L'Express*, 4 September 2014, http://l'expression.lexpress.fr/actualite/monde/europe/a-quel-prix-la-france-pourrait-elle-annuler-la-vente-des-mistral-a-la-russie_1572951.html; Dominique Gallois, 'Mistral: quelles conséquences après la suspension de la vente aux Russes?', *Le Monde*, 4 September 2014, www.lemonde.fr/economie/article/2014/09/04/mistral-un-enjeu-de-taille-pour-saint-nazaire_4482013_3234.html.

55 Jean-Dominique Merchet, 'Ventes-d-armes: sous l'affaire du mistral l'exportation du rafale', *L'Opinion*, 3 September 2014, www.lopinion.fr/blog/secret-defense/ventes-d-armes-l-affaire-mistral-l-exportation-rafale-15937.

56 Thomas Hofnung, 'Mistral et diplomatie, le double jeu de Paris', *Libération*, 17 July 2014, www.liberation.fr/monde/2014/07/17/mistral-et-diplomatie-le-double-jeu-de-paris_1065799.

57 Michel Cabirol, 'Russie: pourquoi une annulation du contrat mistral serait préjudiciable à la France', *La Tribune*, 20 March 2014, www.latribune.fr/entreprises-finance/industrie/aeronautique-defense/20140320trib000821075/russie-pourquoi-une-annulation-du-contrat-mistral-serait-prejudiciable-a-la-france.html.

Russian military production capacity and the Mistral

With the post-Cold War cuts in its defence budgets, Russia has fallen behind technological advances by Western countries, not least with regard to new Command, Control, Communications, Computers, Intelligence, Surveillance and Reconnaissance (C4ISR) and stealth technologies, most notably in land and sea systems. Russian shipyards have struggled to maintain, let alone improve, their production capacities, as illustrated by the delays and failings associated with refurbishing the aircraft carrier *Admiral Gorshkov* for the Indian navy.⁵⁸

To address this problem Russia had basically two options: 1) indigenous development of the necessary skills to bridge the gap, a costly and hazardous solution considering the challenges; or 2) selective opening of its defence market to foreign suppliers while insisting on significant offsets, which is common practice in emerging countries. The second option was favoured for the acquisition of the LHA.

The two ships are being built in France, but the Russian shipyard OSK (Baltic Sea) is also involved in the production of elements of the stern of the ships. Construction has included training in France, with significant transfers regarding engineering and project management expertise.

The extent of technology transfer is, however, uncertain. The STX shipyard in Saint-Nazaire has confirmed transfers regarding the hull⁵⁹; additional technology may have been transferred in connection with the SENIT-9 combat system designed by DCNS and the SIC-21 fleet command system produced by Thales. According to DCNS, the radar of the *Vladivostok* is French, the on-board combat system will be Russian, while the communication systems will integrate both Russian and French components.⁶⁰ These tasks do not necessarily involve transfers of technologies, but it is probably the case to some extent because of the integration process and the training, notably regarding operations and maintenance. The French trade union grouping the Confédération Française Démocratique du Travail (CFDT) expressed concerns at the time the Mistral deal was signed about the transfers of technology implied.⁶¹

Added to this is the feeling in Paris that France is being punished for its links to Moscow whereas other EU states are not. In this light, French Minister of Foreign Affairs Laurent Fabius' statement about enlarging the scope of EU sanctions on Russia from arms transfers to other strategic sectors such as finance or energy can be read as a message to, for example, the UK and Germany respectively.⁶² A sense that some other NATO members have played a role in the unfolding Ukrainian crisis where France has not has increased the sense of unfairness felt by Paris.⁶³

The alternative argument is that France has an international responsibility to cancel the contract because Paris has misread the evolution of Russian strategic and geopolitical goals and underestimated Russia's willingness to reshape its security environment by force if necessary.⁶⁴ Rather than boosting Russian military capability, France should be providing security reassurances to its partners (for example by sending Rafale fighter aircraft to the Baltic States).⁶⁵ Cancellation could help regain some of the country's lost credibility in Eastern European states, and help regain access to their defence markets. A case in point is Poland, where the sale of the Mistral is an issue and puts at risk French arms-manufacturing companies' ability to compete for Polish contracts, notably for an anti-missile programme.⁶⁶ However, the obligation on France to consider its legal position regarding the sale has, as mentioned, been notably absent from the domestic debate.

Recently, responding to external pressure, Paris has tried to buy time. On 3 September 2014, President Hollande announced that "Russia's recent actions in eastern Ukraine violate the

⁵⁸ The initial cost of the purchase in 2004 was US\$ 974 million, but by 2010 this had increased to US\$ 2.3 billion. 'Gorshkov Deal Finalized at US\$ 2.3 billion', *The Hindu*, 10 March 2010, www.thehindu.com/news/national/gorshkov-deal-finalised-at-usd-23-billion/article228791.ece. See also 'NS Vikramaditya: India's New Carrier', *Defense Industry Daily*, 1 September 2014, www.defenseindustrydaily.com/russia-to-order-french-mistral-lhds-05749/.

⁵⁹ 'Mistral: pas de transfert de technologie à la Russie?', *Rianovosti*, 27 June 2014, http://fr.ria.ru/presse_russe/20140627/201647910.html.

⁶⁰ DCNS is quoted in 'Russia's Mistral Amphibious Assault Ship Buy: Caught in a Storm', *Defense Industry Daily*, 3 September 2014, www.defenseindustrydaily.com/russia-to-order-french-mistral-lhds-05749/.

⁶¹ *Op. cit.*, Vincent Jauvert.

⁶² Reuters, 'France tells UK look to London oligarchs before damning Mistral', *Reuters.com*, 22 July 2014, www.reuters.com/article/2014/07/22/us-ukraine-crisis-france-idUSKBN0FR27V20140722.

⁶³ Yann Brault, 'L'Ukraine à TLMEP: ce dont on n'a pas parlé', *Le Huffington Post*, 26 April 2014, http://quebec.huffingtonpost.ca/yann-breault/ukraine-situation-tlmepe_b_4848705.html.

⁶⁴ 'La Russie est susceptible d'utiliser les Mistral contre nos alliés directs', *Le Point*, 22 March 2014, www.lepoint.fr/editos-du-point/jean-guise/etienne-de-durand-la-russie-est-susceptible-d-utiliser-les-mistral-contre-nos-allies-directs-22-03-2014-1804063_53.php. François Heisebourg, 'Vente de Mistral à la Russie: un acte honteux et imprudent', *Ouest France*, 19 June 2014.

⁶⁵ Alain Barluet, 'Des avions Rafale dans le ciel balte pour rassurer les pays de l'OTAN', *Le Figaro*, 29 April 2014, www.lefigaro.fr/international/2014/04/29/01003-20140429ARTFIG00255-des-avions-rafale-dans-le-ciel-balte-pour-rassurer-les-pays-de-l-otan.php.

⁶⁶ Michel Cabirol, 'Mistral: comment la Pologne met la pression sur la France pour empêcher leur livraison', *La Tribune*, 30 September 2014, www.latribune.fr/entreprises-finance/industrie/aeronautique-defense/20140930trib000851044/mistral-comment-la-pologne-met-la-pression-sur-la-france-pour-empêcher-leur-livraison.html.

principles of European security. The President of the Republic observes that despite the prospects for ceasefire, which has yet to be achieved and implemented, present circumstances do not allow the delivery of the first helicopter carrier by France.”⁶⁷ This statement came as a surprise, as since the start of the Ukrainian crisis, with the contract still on track, French officials had been careful to avoid the topic.

However, the meaning of this statement is ambiguous. The actual position seems to have been that the minimum condition to withhold delivery would be the absence of a ceasefire. A ceasefire was announced on 4 September 2014, but then two weeks later, while the President insisted again on this condition, he also specified that for the Mistral to be delivered the “settlement process” would need to be completed.⁶⁸ The challenge for France, then, if the contract is to be filled, is not only to be sure the ceasefire is respected,⁶⁹ but to encourage a quick diplomatic solution between Kiev and Moscow.

Nevertheless, technically, the contract has not been suspended; this remains merely an option. Meanwhile, the Russian military continue training on the ship in Saint-Nazaire where they have been based since June 2014.

Time, however, is now running out. There is very little space to avoid a choice that will inevitably leave a bitter taste in French officials’ mouths whatever the final decision between strategic autonomy and international (and legal) responsibility. President Hollande is about to have to decide whether to upset France’s European and North American allies, by ignoring the Common Position, or offend Moscow, face contract cancellation penalties, and possibly lose control of parts of the technology involved in the deal.

The irony of France’s situation is that had it applied the Common Position from the beginning, it need never have ended up in this position.

⁶⁷ Nathalie Guibert, Frédéric Lemaître and Dominique Gallois, ‘Paris promet de ne pas livrer les Mistral à Moscou pour le moment’, *Le Monde*, 4 September 2014, www.lemonde.fr/international/article/2014/09/04/paris-promet-de-ne-pas-livrer-les-mistral-pour-le-moment_4481611_3210.html.

⁶⁸ ‘Hollande: les Mistral pourraient être livrés ‘si le cessez-le feu est respecté’, *Libération*, 18 September 2014, www.liberation.fr/politiques/2014/09/18/hollande-les-mistral-pourraient-etre-livres-si-le-cessez-le-feu-est-respecte_1103455.

⁶⁹ ‘Ukraine: des drones français et allemands pour surveiller le cessez-le-feu’, *Le Monde* (with AFP and Reuters), 5 October 2014, www.lemonde.fr/europe/article/2014/10/05/ukraine-des-drones-dans-les-prochains-jours-pour-surveiller-le-cessez-le-feu_4500844_3214.html.

Conclusion

The French contract to supply Russia with Mistral-class amphibious assault ships was controversial when first agreed and has become more so since Russia's annexation of Crimea, with many EU states making their opposition clear through forthright public pronouncements. The EU arms embargo on Russia has reinforced Member States' position that it is inappropriate to send military or dual-use equipment to Russia at the moment, even equipment that would provide relatively little difference to Russian military capabilities or that has no offensive application, let alone complete ships with significant force-projection capacities. The embargo does not, however, apply to deals agreed before its imposition; in this sense France is within its rights to persist with the sale.

However, France is also legally bound by the EU Common Position. A careful examination of the Mistral sale against the criteria of the Common Position creates a compelling argument for a cancellation of the contract. Yet the Common Position has been completely ignored by EU Member States' criticisms of the deal, despite the fact that their opposition, expressed as concern about aggressive and expansionist Russian policies, is completely consistent with a cancellation of the deal on the basis of the Common Position.

The French Government meanwhile has focused on the consequences of cancellation on its economy and its reputation as a 'reliable supplier' of military equipment. The obvious conclusion is that France is not in this case implementing the Common Position as legally required.

If this ongoing refusal to consider the transfer in the context of the legally binding Common Position is due to Member States' concern that they tomorrow may find themselves in a similar position to France today, this would have serious implications for the ongoing credibility of the EU arms transfer control system and the broader credibility of the EU when promoting a law-based system of arms transfer controls internationally.

If confidence is to be restored in the EU control system, France needs to give a detailed public explanation of its ongoing support for the Mistral sale, in particular in the context of the Common Position, while other Member States should similarly refer to the Common Position when explaining their own positions regarding the sale. Over the longer term, Member States need to recommit to apply the Common Position to all export licensing decisions, regardless of the nature or scale of the proposed transfer, and also to ensure that debates about arms exports and individual licensing decisions are cast in terms that reference and reflect their legal obligations. In so doing, Member States would go some way to restoring the credibility of an export control regime that has been seriously undermined by the case of the Mistrals.

ANNEX: The criteria of the EU Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment

Criterion 1: Respect for the international obligations and commitments of Member States, in particular the sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations

An export licence shall be denied if approval would be inconsistent with, *inter alia*:

- a) the international obligations of Member States and their commitments to enforce United Nations, European Union and Organisation for Security and Cooperation in Europe arms embargoes;
- b) the international obligations of Member States under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;
- c) the commitment of Member States not to export any form of anti-personnel landmine;
- d) the commitments of Member States in the framework of the Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement and The Hague Code of Conduct against Ballistic Missile Proliferation.

Criterion 2: Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law

Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States shall:

- a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;
- b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe.

For these purposes, technology or equipment which might be used for internal repression will include, *inter alia*, technology or equipment where there is evidence of the use of this or similar technology or equipment for internal repression by the proposed end-user, or where there is reason to believe that the technology or equipment will be diverted from its stated end-use or end-user and used for internal repression. In line with Article 1 of this Common Position, the nature of the technology or equipment will be considered carefully, particularly if it is intended for internal security purposes. Internal repression includes, *inter alia*, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, Member States shall:

- c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.

Criterion 3: Internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts

Member States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

Criterion 4: Preservation of regional peace, security and stability

Member States shall deny an export licence if there is a clear risk that the intended recipient would use the military technology or equipment to be exported aggressively against another country or to assert by force a territorial claim. When considering these risks, Member States shall take into account *inter alia*:

- a) the existence or likelihood of armed conflict between the recipient and another country;
- b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;
- c) the likelihood of the military technology or equipment being used other than for the legitimate national security and defence of the recipient;
- d) the need not to affect adversely regional stability in any significant way.

Criterion 5: National security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries

Member States shall take into account:

- a) the potential effect of the military technology or equipment to be exported on their defence and security interests as well as those of Member State and those of friendly and allied countries, while recognising that this factor cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability;
- b) the risk of use of the military technology or equipment concerned against their forces or those of Member States and those of friendly and allied countries.

Criterion 6: Behaviour of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law

Member States shall take into account *inter alia* the record of the buyer country with regard to:

- a) its support for or encouragement of terrorism and international organised crime;
- b) its compliance with its international commitments, in particular on the non-use of force, and with international humanitarian law;
- c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to in point (b) of Criterion 1.

Criterion 7: Existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions

In assessing the impact of the military technology or equipment to be exported on the recipient country and the risk that such technology or equipment might be diverted to an undesirable end-user or for an undesirable end use, the following shall be considered:

- a) the legitimate defence and domestic security interests of the recipient country, including any participation in United Nations or other peace-keeping activity;
- b) the technical capability of the recipient country to use such technology or equipment;
- c) the capability of the recipient country to apply effective export controls;
- d) the risk of such technology or equipment being re-exported to undesirable destinations, and the record of the recipient country in respecting any re-export provision or consent prior to re-export which the exporting Member State considers appropriate to impose;
- e) the risk of such technology or equipment being diverted to terrorist organisations or to individual terrorists;
- f) the risk of reverse engineering or unintended technology transfer.

Criterion 8: Compatibility of the exports of the military technology or equipment with the technical and economic capacity of the recipient country, taking into account the desirability that states should meet their legitimate security and defence needs with the least diversion of human and economic resources for armaments

Member States shall take into account, in the light of information from relevant sources such as United Nations Development Programme, World Bank, International Monetary Fund and Organisation for Economic Cooperation and Development reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They shall consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid.

Founded in 1979, the Group for Research and Information on Peace and Security (GRIP) emerged in the specific context of the Cold War. Since the nineties, GRIP has acquired a recognised expertise in armament and disarmament issues (production, legislation, transfer control, non-proliferation), conflict prevention and crisis management (particularly in Africa), European integration in the area of defence as well as in strategic challenges in the Asia-Pacific region.

Saferworld is an independent international organisation working to prevent violent conflict and build safer lives. We work with local people affected by conflict to improve their safety and sense of security, and conduct wider research and analysis. We use this evidence and learning to improve local, national and international policies and practices that can help build lasting peace. Our priority is people – we believe that everyone should be able to lead peaceful, fulfilling lives, free from insecurity and violent conflict.

Cover illustration by Virpi Oinonen.



Saferworld
The Grayston Centre
28 Charles Square
London N1 6HT, UK
Phone: +44 (0)20 7324 4646
Fax: +44 (0)20 7324 4647
Email: general@saferworld.org.uk
Web: www.saferworld.org.uk
Registered charity no. 1043843
A company limited by guarantee no. 3015948



Groupe de recherche et d'information
sur la paix et la sécurité (GRIP)
467 chaussée de Louvain
B-1030 Bruxelles
Tél.: +32.2.241.84.20
Fax.: +32.2.245.19.33
Email: admi@grip.org
Web: www.grip.org