Notes from civil society-COARM workshop on the review of Common Position 2008/944/CFSP

Berlin, 8 November 2018

Summary

- Where member states determine that any new or amended element of European Union (EU) arms transfer controls should be binding, this must be included in the Common Position rather than in the User's Guide.
- Implications for changes to national legislation of individual member states should not be a determining factor in whether changes to the Common Position should be adopted.
- Introduce language explicitly establishing an obligation to suspend or revoke extant licences where member states become aware of new circumstances or new information that would lead them to conclude their original assessment was no longer valid and that the transfer(s) would be in breach of the criteria.
- Introduce a section in the Common Position which defines important terms (e.g. 'risk' and 'facilitate').
- Safeguard the discretion of national officials to deny a licence on the basis of risk and not on the basis of having to prove likelihood of future misuse 'beyond reasonable doubt' or to a similar standard.
- Clarify and elaborate in the Common Position enhanced reporting obligations in terms of both substantive detail and timeliness.
- Introduce into the Common Position language on post-export controls that promotes current member state best practice, including with regard to post-export inspections.

Legal status of and relationship between the Common Position and the User's Guide

There is a need for a common understanding among member states (MS) on the legal force of the Common Position (CP). After ten years, there still seems to be some confusion over this point despite the fact that, as stated on the EU website, "A 'decision' is binding on those to whom it is addressed (e.g. an EU country or an individual company) and is directly applicable."

Furthermore, the Working Party on Conventional Arms Export (COARM) has referred to this previously in its annual report on EU arms exports – for example its 15th Annual report (covering the calendar year 2012) reads: "With the adoption of the legally-binding Common Position 2008/944/CFSP, the fundamental elements of a common approach to the control of conventional arms exports by member states have been identified."

The User's Guide (UG), by contrast, is guidance only, and as such does not carry legal weight. Member states are free to apply its guidance or not, as they see fit. Much of the language of the UG does not easily lend itself to a legally-binding document, and there is little appetite for changing its status.

There are two schools of thought about whether elements currently in the UG should be shifted over to the CP. The first is that if it is in the UG already then it is not necessary to add it to the CP; the second is that if it is already in the UG, MS have clearly agreed that it is necessary and therefore it makes sense to include it in the CP.

The above point about the 'lower' status of the UG makes it clear that this is not merely a procedural issue but is in fact substantive. Inclusion in the CP creates an *obligation* on MS, and so the argument that including an element in the UG is 'good enough' is unpersuasive. Where MS determine that an element should be binding, this must find expression in the CP.

Article 346 of the Lisbon Treaty[1] (and suspension and revocation of licences)

MS have raised Article 346 of the Lisbon Treaty as a limiting factor on changes they might be able to make to the CP. It was suggested that Article 346 meant that any changes to the CP which would require changes to national legislation would be next to impossible – the example of creating an obligation on MS to suspend or revoke existing licences was raised in this context.

The logic for this is unclear, but in any event the initial adoption of the CP had legal implications for MS and yet this post-dated the Lisbon Treaty, which would seem to fundamentally undermine this argument.

With regard to suspension or revocation specifically, again this argument appears to fly in the face of the way Article 346 operates. As now clearly established by the European Court of Justice, Article 346 is to be applied only in exceptional and clearly-defined cases and must therefore be interpreted strictly.[2] The CP should therefore include an obligation on MS to suspend or revoke licences when they become aware of new circumstances or new information that would lead them to conclude their original assessment was no longer valid and that the transfer(s) would be in breach of the criteria, or at the very least an explicit statement that MS have the *right* to suspend or revoke licences in light of changing circumstances or new information. Article 346 would continue to exist as a 'safeguard' where there were a specific determination that to not to suspend or revoke would be necessary to protect essential security interests. This would be in keeping with the general tenor of the CP and with its primary goals and objectives, and as such should not be problematic.

It should be noted that while neither the CP nor the UG makes any reference to suspension or revocation of licences, Article 7(7) of the Arms Trade Treaty (ATT) encourages a state party to reassess an authorisation if it subsequently becomes aware of new relevant information. In addition,

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[1] Article 346 of the Treaty on the Functioning of the EU (the Lisbon Treaty) reads:

> 1. The provisions of the Treaties shall not preclude the application of the following rules:
> (a) no member state shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
> (b) any member state may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.
> 2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

[2] See, for example, Vincenzo Randazzo, 'Article 346 and the qualified application of EU law to defence', *EU Institute for Security Studies*, July 2014, https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_22_Article_346.pdf.

suspension of licences was raised as an obligation in paragraph 8 of the 2013 council conclusions on Egypt with respect to export licences for "any equipment which might be used for internal repression". It is therefore a glaring oversight that these issues are not addressed at all in the EU's overarching governing documents on arms exports.

Definitions of terms

There is a variety of terms used in the CP (and UG) that are or should be of central importance to the functioning of the EU system but that are not clearly defined. This includes terms absolutely fundamental to the functioning of the system, e.g. 'risk' (for more on this see the next section). This is not conducive to the effective operation of a legally-binding system, and can be seen as one of the potential reasons why practice across the EU is in some cases so divergent, running counter to the stated objectives of the CP. It therefore needs to be addressed.

Examples include:

Internal repression

Internal repression is a key term in Article 2, criterion 2 of the Common Position, but it is not defined under international law. There is reference in criterion 2 to a range of actions included under internal repression for the purposes of the CP, but this is not sufficient. The CP would be much improved if it were instead to refer to international human rights law and, in this regard, mirror the language in criterion 2 on international humanitarian law, i.e. state explicitly that MS "shall 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 human rights law."

Facilitate

If as expected the CP is updated to incorporate new legal obligations that apply to all MS as States Parties to the ATT, it will need to refer for the first time to the concept of 'facilitation'. Under Article 7(1), States Parties are obliged to

> assess the potential that the conventional arms or items [to be exported] … could be used to:
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> (i) commit or *facilitate* a serious violation of international humanitarian law;
> (ii) commit or *facilitate* a serious violation of international human rights law;
> (iii) commit or *facilitate* an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting state is a party; or
> (iv) commit or *facilitate* an act constituting an offence under international conventions or protocols relating to transnational organised crime to which the exporting state is a party.

The current language in the CP on international humanitarian law – for example in Article 2, criterion 2 referred to above – is therefore inadequate, as it limits the risk to be considered to the risk that "the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law."

There is currently no reference to 'facilitate' or 'facilitation' in the CP. There are a number of references in the UG, which seem at least in part designed to address the language of the ATT; but as mentioned above this is not sufficient given the lower status of the UG. In addition, the UG makes no effort to address what these terms actually mean. Informal discussions with officials from different MS suggest there is no common understanding, nor anything approaching one. This cannot be an appropriate basis for effective implementation.

If the CP is to meet its stated objective to reinforce cooperation and promote convergence in this area, it is vital that key terms are effectively defined so that MS properly understand how controls should be applied. Moreover, as is standard practice in national legislation, these definitions should be set out in the legally-binding CP, and not relegated to the UG where MS would be free to discount them where they choose.

Grounds for denial

It has been observed previously and now in the context of the CP review that different MS are required to meet different legal standards to deny a licence. In some MS, authorities have a great deal of (indeed we would argue excessive) room to manoeuvre. But in others officials require a lot of legal certainty to refuse to authorise a licence, and face the prospect of an appeal by the company concerned. Setting the bar this high, given the nature of the challenge of making forward-facing risk-based assessments considering a wide range of variables based on imperfect knowledge, would appear to run counter to the objectives of the CP.

The ways in which regional (or international) obligations intersect with national legal traditions are not always straightforward. With this in mind, MS should look at how the language relating to the CP criteria could be amended to make it clearer that assessing licence applications involves the application of judgement. As part of this, there should be explicit recognition that decisions to deny licences can be taken on the basis of a calculation of risk in circumstances of imperfect knowledge, not on the basis of being able to prove likelihood of future misuse 'beyond reasonable doubt' or to a similar standard.

This would suggest that the new CP includes an elaborated definition of the term 'risk'.

Transparency and reporting

There is a general acknowledgement that the current standard of reporting on arms transfers is inadequate. Timeliness of the EU annual report is a major weakness, as is the quality and consistency of national reporting across the EU (with implications for the value of the EU report). Problems of substance are many and significant, including some countries –such as Germany and the UK – not reporting on deliveries, France 'over-reporting' on licences granted, or a general lack of transparency around the items that can be exported under open, global or general licences. In recent years, we have had the situation of states not reporting at all (Cyprus) or only on denials (Greece). Moreover, the presentation of the data does not lend itself to easy manipulation for analysis, relying on old, outmoded technology.

There is an urgent need for this situation to be addressed, and for MS to increase and improve transparency.

It has been suggested that more transparency runs the risk of introducing new ambiguities into the provided data. Ambiguity and problems with comparability are inevitable in this situation where 28 countries (or 27 post-Brexit) operating distinct national systems are providing quantitative data to a central repository, but by following this logic the answer would be to stop reporting completely. To the contrary, greater transparency with more opportunity to interrogate the data, allows for better understanding of state policy and practice. Furthermore, by being far more explicit in the CP about the information required and timelines for the provision of data, the level of ambiguity could be reduced. A proposal to introduce a peer-review process for reporting could also be useful and should be given serious consideration.

End-use and post-export controls

Recent years have seen positive developments in some MS with regard to end-use and post-export controls, but there are arguments that end-use certification and assurances do not provide a level of protection against misuse and diversion that they could, and that more could be done after items have reached the named recipient.

Unfortunately, the CP is completely silent on these issues. There is relevant language in the UG, but it is weak. Section 1.3 mentions that MS *might* like to consider introducing limitations on re-export, while section 3 contains even weaker language on post-shipment measures – for example, it notes that "on-site inspections … are [a particularly useful tool] to help prevent diversion".

It would be useful to include new language encouraging MS to make end-use assurances legally binding and requiring them to post information regarding end-use problems or concerns on the COARM online system. Then, where an end-use concern or problem logged by one MS is relevant to a licence application received by another MS, there could be an obligation to consult (as is currently the case with denial notifications, though in this case it would seem sensible to apply the consulting obligation to more than only 'essentially identical transactions'). This consultation would then be taken into account as part of the new licensing assessment.

Also noteworthy and meriting emulation are recent moves by Germany and Sweden to establish national practices relating to post-export inspections. Not as routine practice, which would carry a major administrative burden, but in cases of particular concern. Spain reports that it is considering the same. Other MS include re-export conditionality as standard. These positive examples are not universally followed, however, with others taking a more *laissez-faire* approach.

Good practice in individual MS is clearly running well ahead of the regional framework. The CP review is an opportunity to address this, by including references to the current best practice mentioned above, and the ideas around information-sharing and consultation as measures that MS should adopt.

Company responsibilities

The CP or the UG should include language on the responsibility of arms manufacturers and exporters in a developing field of normative standards on corporate responsibilities to respect human rights. Arms manufacturing is among the business activities where negative human rights impacts are most probable. Yet, regulations on arms exports so far do not sufficiently reflect the highly hazardous nature of the goods produced or exported and the role that companies play in this regard.

The CP or UG should take into account the legal developments most notably in the United Nations and the Organisation for Economic Co-operation and Development frameworks with their respective standards for corporate due diligence.[3] CP or UG should reference these documents and establish that companies incur a responsibility to assess the risk of their products being used to commit or facilitate human rights and international humanitarian law violations. Where an assessment, based on relevant information from international and local sources, indicates risks of violations, companies should inform the relevant licensing authority. They should also do everything they can to mitigate such risks. Where this proves impossible or of limited effect, they should consider refraining from the respective business activity.[4]

[3]The OECD guidelines for multinational enterprises, which are recommendations addressed by governments to multinational enterprises operating in or from adhering countries, can be found at http://mneguidelines.oecd.org/mneguidelines/. The UN Guiding Principles on Business and Human Rights (UNGP), can be found at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[4] See UNGP principles 11, 12, 13 and 19.