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# For a Europeanisation of Arms Export Controls

## More power for Brussels will lead to a stronger Common Foreign and Security Policy of the EU

by Jan Grebe

**In addition to a European defence industry, the EU also needs coherent and coordinated arms export controls. To this day, the EU member states are still insisting on their sovereignty in this area of politics, and national parliaments only play a limited role when it comes to export controls. However, a strengthening of the Common Foreign and Security Policy, which is so often called for, will also require a Europeanisation of arms export controls. Although there may still be a long way to go, four considerations could help in deciding the direction and pace of the next steps to be taken.**

### Requirements for a coherent EU policy on arms export controls

The security environment of the past few years, brought about by the changes in Eastern Europe and the ongoing crises in Africa and the Middle East, has clearly accelerated the discussion on a *Europeanisation* of the three core areas of national sovereignty: armed forces, defence industry, and arms exports. However, in view of the current growing scepticism among EU member states against handing more competences to Brussels, the implementation of any concrete measures has been extremely slow. The establishment of a genuine European army still seems a long way off because there is no consensus among the EU member states as to how this idea should be implemented. The implementation of PESCO (*Permanent Structured Cooperation*) has been another important step towards establishing a defence union and deeper cooperation in this area.<sup>1</sup> There is still some fundamental conceptual disagreement, however, as to how a European defence architecture should be structured.

One area where there have been some concrete results is the Europeanisation of the defence industry. Apart from the European Defence Agency, which was founded in 2004 to promote cooperation in this sector, companies such as Airbus and the new Franco-German tank manufacturer KNDS<sup>2</sup> are further examples of increased cooperation between European arms manufacturers. So far, however, there are only very limited regulations in place in Europe when it comes to arms export controls. In this respect, the EU member states have made a point of insisting on their sovereignty and refusing to delegate any decision-making powers. Although some regulations were put in place since the early 1990s, their concrete implementation remains the responsibility of the EU member states. This has resulted in the individual states pursuing very different approaches to the export of arms.

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<sup>1</sup> For further information on this topic, see [Security Policy Working Paper, No. 18/2017](#) by the Federal Academy for Security Policy.

<sup>2</sup> KNDS stands for the German company “KMW” and its French counterpart “NEXTER Defence Systems”.

While there now is increased cooperation between the armed forces of individual nations, and Brussels was granted more powers regarding the defence industry, the area of export controls has been largely excluded from any Europeanisation. In order to achieve a coherent European foreign and security policy, however, it is crucial to establish a common European system of arms export controls. The EU member states have been referring to EU legislation, which stipulates that every member state can take the measures it deems necessary to protect its essential security interests, as far as the production of and trade in weapons, ammunition and other war materials is concerned.<sup>3</sup>

For years the EU member states have been unable to agree on a common approach. This was readily apparent during the disagreement over arms exports to Egypt in 2013, which had come under criticism following domestic conflicts and human rights violations. At the time, the EU states did agree to stop all exports of military equipment and weapons to Egypt that could be used for internal repression. But the European Council could not provide a legally binding decision due to reservations and opposition by the United Kingdom, which needed Egypt as an important customer. The Yemen conflict is a more recent example: In view of the activities of the military alliance led by Saudi Arabia, the EU member states are struggling to find a common position on the export of weapons and ammunition to the Saudi kingdom. The *EU Common Position*, which has been in force since 2008, rules out all exports to states that are involved in conflicts. There have been explicit calls in the EU Parliament for a Europe-wide ban on exports to Saudi Arabia. Whereas some states, such as the Netherlands, have imposed an export ban following pressure from their national parliaments, other states such as the United Kingdom apparently have no interest in doing so. Germany's position in this matter is unclear, partly due to conflicting statements made during the exploratory talks between the CDU/CSU parties and the SPD party concerning the formation of a new government at the turn of the year 2017/18. Since exports to Saudi Arabia are profitable for the national arms industry, the government of the federal state of Mecklenburg-Western Pomerania, for instance, has been pushing for a previously approved shipment of patrol boats to Saudi Arabia to be allowed. This is also because this federal state is home to the shipyard that builds these boats. The examples of Saudi Arabia and Egypt thus clearly show that the EU member states are continuing to insist on their rights and are defining arms exports as a purely sovereign activity.

### **The beginning harmonisation of arms exports in the EU**

As early as the end of the Iraq-Iran war in the late 1980s, the European Community began to understand that, in order to prevent the potential misuse of weapons, a stronger coordination of arms export policies would be in its own interest. At the time, a number of European states – such as Germany, France and the United Kingdom – were supplying weapons to warring parties and arming the respective region regardless of the impact this would have on regional stability. A number of meetings within the European Community consequently resulted in the adoption of the *EU Code of Conduct on Arms Exports* in 1998 – a politically binding set of rules for the export of military equipment, which specifies eight criteria for the granting of licenses.<sup>4</sup> Even then, the increasing consolidation and Europeanisation of the defence industry was the driving force towards a more coherent and better coordinated arms export policy among the EU member states.

From then on, the 1998 Code of Conduct was used as a guideline document for coherent EU arms export controls. The criteria it set forth were seen as the minimum standard for all decisions on arms exports. In 2008 the Code was upgraded to a *Common Position*. Although this is a legally binding instrument, there is no independent authority inside the EU that monitors and supervises the activities of the states or their interpretation of the criteria. This means there is no coherent EU arms export policy or export control.

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<sup>3</sup> See Article 346 (b) of the Treaty on the Functioning of the European Union (TFEU).

<sup>4</sup> These criteria include, for instance, the human rights situation in the recipient country, the conflict situation throughout the region, and the danger of illegal proliferation.

Although there has been some progress, several examples from the past few years, such as the French arms export deals with Russia, the delivery of German tanks to Indonesia, and the numerous exports to Libya under the Gaddafi regime, illustrate that arms deals are primarily guided by national interests and commercial considerations. The example of Russia shows that the security interests of smaller EU states bordering Russia take second place behind the economic interests of large exporting nations. It is evident that a weakly coordinated arms export policy is detrimental to the EU's Common Foreign and Security Policy. It follows that although the Common Position is a sound and well considered set of rules, it is not sufficiently rigorous in practice because the EU member states frequently fail to comply with the individual rules. However, the Common Position can provide starting points for the establishment of a European arms export control regime that would prevent countries from once again purely pursuing their own national interests, as it has recently been the case.

#### **Four considerations for a common EU arms export policy**

During their exploratory talks on the formation of a new government in the winter of 2017/2018, the CDU/CSU and SPD parties agreed to strengthen European arms export controls. This is a positive development. Representatives of other political parties as well as the science and industrial communities – for instance from the Federation of German Security and Defence Industries (BDSV) – are also urging the government to push ahead with the implementation of a harmonised European arms export policy. Given its political and economic weight, Germany can be the driving force behind the development of such a policy within the EU. It would therefore be helpful if Germany outlined its own interests in the area of arms export policy. Berlin cannot do this alone, however, and should cooperate with Paris in this respect. The two states have the largest defence industries in the EU and have repeatedly initiated joint large-scale projects. They must therefore find a common line for handling arms exports that can also lead the way towards a harmonised export policy within the EU. This may obviously be painful for both sides. Whereas France will scarcely accept the degree of restriction adopted in Germany, the German government will find it hard to implement a partial relaxing of arms export policy at the level of domestic politics. The two sides must find a compromise. It should at least be evident for Germany that there needs to be a reliable political framework, for instance in the form of country lists, if there is to be closer cooperation with France. Paris on the other hand must accept that there will be political reservations in Berlin with regard to some of the recipient countries.

At present, however, it remains unclear how such an overarching project for harmonised EU export controls could be designed. The opinions on this question range from support for increased intergovernmental cooperation to advocacy of handing key powers of control to Brussels – depending on which ideas and plans the member states have regarding Europe. The discussion is in its early stages, and it is unclear what level of integration should or can be achieved on the way to a common arms export policy. In order to move forward, there are four key considerations that should be taken into account:

**1. Future activities must follow a *strategic framework* for a common arms export policy.** This framework should be based on the criteria specified in the Common Position, as well as on the Common Foreign and Security Policy and the European Security and Defence Policy. The strategic framework can comprise different dimensions: it can either have a narrow scope and thus provide clear guidelines, or it can function as an overarching objective that prescribes harmonisation, while leaving the interpretation mostly up to the individual states. While the first option can be seen as a curtailment of sovereign powers, the second option may only be a slightly advanced variation of the Common Position beyond the criteria. The solution might be the development of an arms export strategy that uses the European Security Strategy as a starting point and defines specific groups of countries for arms exports. This would undoubtedly lead to political controversy. While deliveries to EU and NATO states – as well as to NATO-equivalent states – will usually not present a problem,<sup>5</sup> third countries could be categorised into different groups that each trigger different consultation and participation mechanisms at the EU level. In the case of less problematic countries, the exporting country must inform

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<sup>5</sup> Most recently, for instance, Turkey's intervention in Syria sparked a new discussion on how to deal with arms deliveries to this NATO member.

other states beforehand. The export can then be authorised if there are no substantial objections. With problematic states, the exporting country must explain the export in the context of the EU's security and foreign policy and show that the shipment does not violate the criteria of the Common Position. Cooperation projects within the EU that involve export to non-member states must be subject to clear export rules from the very beginning. Since there are many different interests, drawing up a list of states based on the country groups mentioned above would be one possible way to create a clear and standardised framework. However, this list would need to be dynamic and adaptable so that responding to current developments remains possible.

**2. We need to outline a *European arms export control regime*.** The above-mentioned Article 346 (b) of the TFEU, which grants member states extensive rights to export arms unilaterally, will inevitably have to be reviewed. Once again, there are two options: either the EU is granted direct decision-making powers, or it could take on a supervisory role with the power to impose sanctions for infringements. The role of the European Commission would need to be clarified because these issues affect areas of foreign trade. The European Commission already has far-reaching powers in the area of intra-European arms trade and has also played a major part in shaping new regulations via the Directive on intra-EU-transfers of defence-related products. The European Commission recently issued warnings to a number of member states for violating EU public procurement rules in the defence sector. In the area of export controls, however, there are still numerous unanswered questions, such as: to what extent will the Council of Ministers be involved in the decisions? Should the EU go so far as to establish a “European Office for Export Controls”? And if so, should it be controlled by the European Commission or the European External Action Service? If the answer to even some of these questions is yes, it would have to be decided how the various entities and institutions should work together. Which decisions would need to be taken, and where? Who would review these decisions? Who would check whether and at which point there has been an infringement of the criteria of the Common Position?

A suggestion was made in the European Parliament to establish a supervisory arms control body under the supervision of the First Vice-President of the Commission or the High Representative of the Union for Foreign Policy and Security Policy. An earlier report by the European Parliament had mentioned a “European Arms Control Authority”. An arms exports control body such as this could report on potential violations of the criteria of the Common Position by the member states, but would also need suitable instruments to intervene in national decisions in order to enforce a coherent application of the Common Position. In addition, the EU delegations in the receiving countries could play an important role in evaluating the local situation, providing an assessment of the end user, and delegating embassy personnel to assist with on-site inspections of weapon stockpiles. This would also allow the standardisation of end-use controls, especially for smaller EU states. The permanent “Working Group on Conventional Arms Exports” of the European External Action Service has already reflected on how the Service could be integrated into the systematic examination and discussion of the situation in the recipient country and of the end user in order to achieve a consistent evaluation of the situation on the ground.

**3. The Europeanisation of arms export controls requires *effective and transparent monitoring*.** The role of the European Parliament must therefore be clearly defined and it must be given powers that enable it to carry out the associated monitoring and control functions. However, the aim should not be to essentially transform the European Parliament into an authorising agency. It should instead be given the powers necessary to review critical export decisions and to demand that they are explained in the context of the Common Foreign and Security Policy by the EU and the member states (obligation to justify decisions). The European Parliament already explicitly pointed out in 2015 that the Common Position is “being applied loosely and interpreted inconsistently”. It also noted that there are no mechanisms for penalties in case of violations or any independent checks when it comes to interpreting the criteria.

The European Parliament could assume this function and monitor the consistent interpretation of the criteria. The advantage of *ex ante control* would be that it enables political influence to be exerted regarding export decisions, although it would also essentially transform the European Parliament into a licensing authority, which would be hard to reconcile with the parliament's controlling function. *Ex post control* would therefore be a more suitable alternative for the European Parliament. In this case, the parliament itself could decide on the timing and scope of the control, and it could also influence the future design of the political framework. It would no longer be able to influence export decisions that have already been taken, however.

**4. There is an urgent need to consolidate the European defence industry in order to *reduce export pressure*.**

The fact that exports to states outside the EU have grown considerably in recent years is also owed to economic pressure and declining demand in Europe. Even if this were to change in view of the current security situation in Europe, for instance due to extensive procurements by the Bundeswehr or by member states in Eastern Europe, this would not be sufficient to use the excess capacities that exist in certain areas of Europe. The economic pressure can only be alleviated through more cooperation, joint armaments projects, and a consolidation of the defence industry. This would have a positive effect on the design of a common EU arms export strategy that would also strengthen the Common Foreign and Security Policy of the EU as a whole.

The system of European arms exports crucially needs to be adjusted – this has also been acknowledged by the parties that will form the next German government. It will not be possible for the new government to avoid the painful political debates or the necessary adjustments. These debates must not only take place in Germany, but also together with the European partners in Brussels.

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