Towards Europeanized arms export controls?

Comparing control systems in EU Member States

REPORT

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Colophon

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ABBREVIATIONS

ADS	Aerospace, Defence, Security and Space sector (UK)
AEO	Authorised Economic Operator
ASD	AeroSpace and Defence Industries Association of Europe
BAFA	Bundesamt für Wirtschaft und Ausfuhrkontrolle
BSDI	Belgian Security and Defence Industry
CAAT	Campaign Against Arms Trade
CAEC	Committees on Arms Export Controls
CDIU	Centrale Dienst Invoer en Uitvoer van de Douane
CFSP	Common Foreign and Security Policy
CIDEF	Conseil des Industries de Défense Françaises
CIEEMG	Comité Interministérielle pour l'Etude de l'Exportation de Matériels de Guerre
COARM	Working Party on Conventional Arms Exports
dCSG	Dienst Controle Strategische Goederen (Flanders)
DEU	Declarations of End-Use (Sweden)
DGA	Direction Générale de l'armement (France)
DGAIED	Direcção-Geral de Armamento e Infra-Estruturas de Defesa (Portugal)
EC	European Community
EEC	European Economic Community
ECO	Export Control Organisation
EEAS	European External Action Service
EEA	European Economic Area
EMPORDEF	Empresa Portuguesa de Defesa (Portugal)
ENAAT	European Network Against Arms Trade
ERA	European Research Area
EU	European Union
EUC	End-Use Certificate
EUU	End User Undertaking
GDP	Gross Domestic Product
GRIP	Group de Recherche et d'Information sur la Paix et la sécurité
IAEA	International Atomic Energy Agency
IHL	International Humanitarian Law
IIC	International Import Certificate
IMCO	Internal Market and Consumer Protection Committee in the European Parliament
ISP	Inspektionen för Strategiska Produkten (Sweden)
SME	Small to Medium-Sized Enterprises

NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
OGEL	Open General Export Licenses (UK)
SEDE	Security and Defence subcommittee in the European Parliament
SIPRI	Stockholm International Peace Research Institute
WMD	Weapons of Mass Destruction

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Arms export controls and the EU: reconciling economy, security and human rights

01

In 2017 the EU celebrated 60 years of European integration. European cooperation in the field of defence and security has however long been kept out of the European political realm. Member States traditionally considered foreign, security and defence policy as their exclusively national prerogative. Moreover, collective security of the European countries was seen to be primarily guaranteed by NATO membership, and not by the EU. The failure to set up a European Defence Community in the 1950s is indicative of this.

Recent geopolitical evolutions have been triggering significant changes in the European security environment and have created additional momentum for the development of a European Defence Union. In December 2013, the European Council emphasised in its biannual meeting the need for military cooperation within the EU.[1] Likewise, the European Parliament voted a resolution on November 22th 2016 on the European Defence Union and called upon the EU Member States and the European Council to stimulate the development of this Defence Union.[2] Statements from US president Donald Trump on the re-evaluation of the US's involvement and investments in NATO, the continuing expansion of Russian military expenditures, and the dramatic events in the Middle East and North Africa, has fundamentally changed security perceptions among European countries.

As a bloc, the EU is, after the US, the second biggest spender worldwide on defence, with an annual investment of about €35 billion in 2014 on equipment and Research & Development.[3] Likewise, the defence industry in the EU is on a global level a significant player, with the EU as a bloc being responsible for approximately 25-30% of the global arms trade. However, these general numbers risk to obfuscate the highly significant differences between the EU Member States in military spending and the size of domestic defence industry. These aspects – military procurement and the defence industrial basis – remain to be strongly nationally oriented. Cooperation,

consultation and convergence between the different Member States of national policies and practices in these domains, still are restricted by national preferences and priorities.

As a result, the EU is developing several initiatives to develop and strengthen its common defence, security and foreign policy. In trying to combine both aspects – the strengthening of the European Defence Industrial Basis and the common external security of the EU – EU institutions have been taking several initiatives in order to further develop a European Defence Union, such as funding for European defence-related research and innovation, stimulation of collaborative defence procurement processes, and downplaying the existing thresholds for the intra-EU trade in military equipment to stimulate the development of a Europeanised defence industry.

In this study, we focus more specifically on the topic of **the regulation of the international trade in military equipment, both within the EU and to non-EU countries.**

Since the start of the 1990s the EU has been working on converging and harmonising the arms export control systems of the various EU Member States. To stimulate this convergence, the EU has developed two regulatory initiatives. The first is the introduction of the Common Criteria for controlling arms exports to non-EU countries in order to harmonise the arms export policies of EU Member States. First formulated by the European Council in 1991, these criteria became increasingly formalised and are currently made legally binding for Member States through **Common Position 2008/944** 'defining common rules governing control of exports of military technology and equipment'. A second initiative aims to facilitate intra-EU trade in conventional arms. **Directive 2009/43** 'on the transfers of defence-related products within the Community' of 6 May 2009 imposed rules and procedures on EU Member States regarding intra-EU trade in defence-related goods in order to guarantee the appropriate functioning of the internal EU market.

However, although EU guidelines shape national arms export control systems in many ways, national governments still remain exclusively responsible for decisions on licence applications. In other words, the processing, evaluation and issuing of licences for arms exports – both within and outside the EU – still constitute an exclusively national prerogative.

In this study we therefore aim to **identify the extent to which European regulatory initiatives have succeeded in increasing the level of European harmonisation**

of national arms export control systems. The added value of this research with regard to the Europeanisation of arms export (control) policies is twofold.

Firstly, our research differs from previous studies on European arms export controls by integrating both the relevant EU regulatory frameworks that EU institutions have developed to harmonise Member States' arms export control systems. Previous analyses focused exclusively on only one aspect of the EU's arms export policy, with a strong preference for arms exports to non-EU countries. As a consequence, several studies have focused on the impact of the Common Criteria on the arms export policies of EU Member States, while analyses of the national implementation of Directive 2009/43 on simplifying the intra-EU arms trade are less prominent.

Our study, in contrast, analyses the impact of both EU regulatory frameworks on national systems for arms export controls. This study is therefore the first to examine the national implementation of both Directive 2009/43 and Common Position 2008/944.

The second added value follows from the first element. We argue that the organisation of a national arms export control system needs to be seen as a logical and coherent *system*, i.e. a set of interrelated and interacting elements. Such a systemic approach has several advantages:

1. It is somewhat artificial to analyse separate elements of arms export controls in isolation. Although such an approach may offer relevant insights into how specific aspects are implemented, it ignores the interconnectedness of the various elements of the global system. Our systemic approach explicitly allows the integration of the links between the various aspects of an arms export control system.

2. A systemic approach allows the rationale behind choices made in the development of the arms export control system to be more fully integrated.

3. Such an approach allows the influence of the national context to be taken into account: both national political-cultural principles and the outlook of a domestic defence industrial base will inevitably shape national arms export control systems.

As a consequence, our analytical framework differs from previous studies. While traditionally EU regulatory frameworks have been used to determine the approach of such studies, our current analysis starts from the different generic elements of an

arms export control system. For each aspect, therefore, the relevant provisions in related EU documents are identified.

Objectives and research questions

The objectives of the study are twofold. Firstly, the study adopts a descriptive perspective and aims to identify how national arms export control systems have been influenced by two important EU legislative frameworks, i.e. Directive 2009/43 and Common Position 2008/944. This analysis will allow similarities between and differences in the national implementation of these European instruments to be identified. The research questions central to the first part of the study are therefore:

1) How are Directive 2009/43 and Common Position 2008/944 implemented by EU Member States?

2) Which differences and similarities can be identified in this implementation process among the selected EU Member States?

3) What are the implications of these similarities and differences for the objectives of these European legislative initiatives?

In a second step, the results of the comparative analysis will then be used to evaluate EU policy on arms export controls and assess how EU stakeholders reflect on these differences and similarities between Member States and how this feeds back into EU policy- and law-making. In this second part the following research questions will guide our analysis:

4) How do the relevant European stakeholders assess the current state of affairs with regard to the implementation of these European legislative instruments?

5) What are the implications for EU policy and legislation?

As a consequence of these goals and research questions, several choices in the demarcation of the broad domain of the arms trade and arms controls can be made.

The first relates to the material scope of the study. Military equipment or strategic goods contain very diverse goods: weapons of mass destruction (WMD), conventional military arms, dual-use goods and civilian firearms. The principles and basic assumptions guiding the control regimes for these types of goods differ

significantly. In this study we specifically analyse the foreign trade in conventional military equipment. Regimes put in place to control or even prohibit the development, proliferation or trading of other types of strategic goods are therefore not studied.

A second limitation relates to the types of transaction we focus on. Foreign trade in conventional arms includes different types of transactions that are the subject of governmental scrutiny: import, export, transfer, transit, transshipment and brokering. Although most arms control systems contain principles governing all or several aspects of the foreign trade in military equipment, in this study we focus only on the rules and procedures guiding the export of such equipment.

Structure and content of the report

The *second chapter* describes the general framework of the international arms trade. Knowledge of the size and nature of the international trade in conventional military equipment is useful for a deeper understanding of recent trends in European and national arms export control policies. This introductory chapter then discusses the international regulatory initiatives that are relevant to the foreign trade in military equipment. Here we will focus in more detail on the initiatives undertaken by the relevant EU institutions.

In the third chapter of this report we conduct a systematic and in-depth comparison of the legal framework and policy dealing with arms export controls in EU Member States. For practical reasons we will not study all 28 EU Member States in the analysis, but have selected eight for in-depth analysis and comparison. Taking the size of the various national defence industries and countries' geographical diversity into account, we selected *Belgium, France, Germany, Hungary, Portugal, the Netherlands, Sweden* and the *UK* for study. The chapter starts with a brief description of the sources of and methodology used in our comparative analysis. We also sketch out the national political-cultural context and the size and nature of the national defence industry for each of the eight selected Member States. The second part of this chapter consists of a systematic comparison of the arms export control systems in EU these Member States. For each aspect we discuss the relevant principles in both EU regulatory frameworks and analyse how these aspects are implemented in the respective national export control systems.

In the *fourth chapter* the views of the various relevant stakeholders are discussed. After a description of how these stakeholders were selected and the research methodology used, relevant European stakeholders discuss the findings from the comparative analysis and reflect on the feasibility and desirability of possible EU

initiatives in this regard. Representatives of the European defence-related industry, the relevant EU institutions (the European Commission, European External Action Service and European Parliament) and civil society are interviewed to evaluate current EU policy in this regard and to determine their views on how to overcome current problems and shortcomings.

In the *fifth and final chapter*, the general conclusions of this research project are discussed. Here we focus on the general findings of the comparative analyses and the interviews that have been conducted. Building on these findings and on the explanations forwarded for the current situation on European harmonisation, we conclude this chapter with some reflections on possible ways forward for the EU in its process to working towards convergence in the arms export control systems of its Member States.

Putting the international arms trade and arms export controls in context

02

Throughout most of the 20th century and across the world, the foreign trade in conventional military equipment regularly caught the imagination of public opinion. This is perhaps strange in view of the limited share of this type of trade in the global flow of goods. However, the interconnectedness of the foreign arms trade with national foreign policy, and the idea that exported arms systems exert a fundamental influence on international peace and security partly explain why the international trade in arms regularly attracts political and public attention.

In this chapter, we briefly set out the wider context of the foreign arms trade. Because this study focuses on the influence of the EU, we concentrate mainly on the international arms trade from within the EU.

Firstly (sec. 2.1), we describe (recent) evolutions in the size and nature of the foreign arms trade, which the end of the Cold War significantly influenced. Important insights can be derived from this description, that make for a better understanding of the rationale, origins and perspectives of national and international control regimes on the foreign arms trade.

In the second part (sec. 2.2) we discuss the regulatory initiatives that have been developed internationally in the last few decades to regulate the foreign trade in conventional defence-related goods and technology. Because the EU arms trade is the main subject of this study, we focus mainly on relevant developments and initiatives within the EU. Other relevant international initiatives are only briefly touched on.

2.1 Changes in the size and nature of the international arms trade

2.1.1 Quantitative shifts in the foreign arms trade

The size and nature of the foreign arms trade changed fundamentally in the 20th century. An initial essential element was the evolution of the foreign trade in military equipment **from a private and unregulated business to an explicit aspect of nation-states' foreign policy.**[4] While until the First World War the trade in conventional arms was seen as a private business, since the 1920s governments have been trying to gain control over the trade in arms with other countries. This increasing governmental involvement resulted in an instrumentalisation of the foreign arms trade in national foreign policy. As a consequence, the size and nature of the trade in defence-related goods has been strongly influenced by political considerations. Significant international events, such as the Cold War and its ending, the 1991 Gulf War, and the 9/11 terrorist attacks in the United States have significantly influenced the volume and flows of the international arms trade.

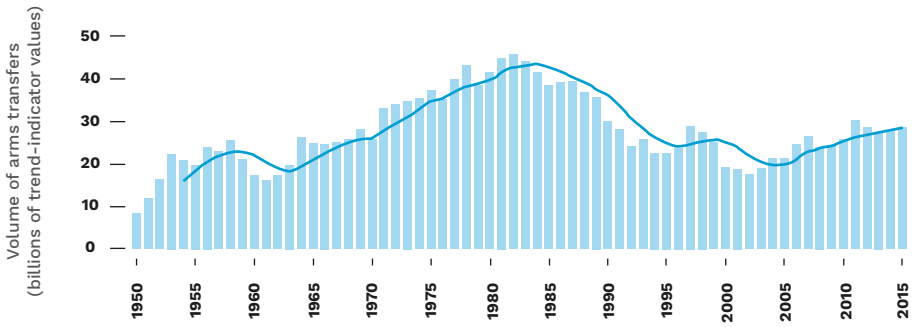
Government control over foreign trade in military equipment has not reduced the size of the foreign arms trade. On the contrary, **the 20th century, and especially the period after the Second World War, was marked by huge growth in the global trade in military equipment.**[5] The main purpose of government control of the foreign arms trade is not by definition to ban or restrict trade in conventional military equipment, but to facilitate the distribution of arms to legitimate destinations and consignees, and to limit their distribution to the wrong countries and end users, or at the very least subject the arms trade to strict controls. However, this growth has not been steady and consistent, but rather erratic, with significant differences from year to year.[6] Geopolitical and economic motives underlie the various evolutions in the foreign arms trade, and these factors can change considerably over time.

The erratic course of the global trade in defence-related products

The *Arms Transfers Database of the Stockholm International Peace Research Institute (SIPRI)* is a useful instrument to obtain an initial overview of (evolutions in) the size of the global arms trade.[7] The database provides an overview of the global arms trade since 1950. In general, it shows that the size of the foreign arms trade has fluctuated markedly since the end of the Second World War. During the Cold War the value of foreign trade in defence-related equipment rose almost systematically

until the mid-1980s. The gradual relaxation in relations between East and West at the end of that decade and the end of the Cold War at the beginning of the 1990s brought a considerable decrease in the foreign arms trade (Figure 2.1). Since 2004, however, there has again been a gradual and consistent growth in the global trade in military equipment. In the period 2010-2014 the value of this trade was 14% higher than in the period 2005-2009.[8]

Figure 2.1: Size of the foreign trade in conventional arms, 1950-2015[9]



According to SIPRI, 58 countries around the world are involved in the export of military weapons and defence-related equipment to other countries. The largest part of the foreign arms trade is concentrated in the hands of a small number of countries. A select group of six countries account for the lion's share of these exports: the United States, the Russian Federation, China, France, Germany and the UK together are responsible for about 74% of all exports of military equipment.[10] The United States in particular is a major player and accounts for around 30% of exports of defence products; Russian exports represent around 25% of the foreign arms trade; while the three European countries together account for around 15% of the global trade in military products.[11] In recent years China has also emerged as an important player in the global defence market, and in the period 2011-2015 climbed to third place on the list of the largest exporters of defence-related products, with a global share of 5.9%.[12]

In this same period 158 countries imported military equipment. While most countries across the globe to some extent participate as importers in the international arms trade, a few countries account for disproportionately large imports of military equipment. More specifically, India, Saudi Arabia, China, the United Arab Emirates (UAE), Pakistan and Australia have been importing significant amounts of conventional arms and together account for 37% of global imports of military equipment in the period 2010-2014.[a]

These data illustrate that most countries participate in the global trade in military equipment either as producers or recipients. However, **both the number of participating countries and the direction and significance of global trade flows have changed considerably.**[13] During most of the 20th century foreign trade in conventional arms took place mainly between Western countries. In the first decades of the Cold War this trade remained strongly concentrated within the two military alliances: NATO and the Warsaw Pact. However, the number of countries participating in the foreign arms trade gradually increased during the 1960s and 1970s, mainly as recipients, but also as producers.[14] In the 1970s the size of arms exports to regions in such as Asia, sub-Saharan Africa, Central and South America, and the Middle East gradually increased. However, as long as the Cold War continued, the trade in military equipment nevertheless remained largely concentrated within the existing military power blocs and between political allies.

The collapse of the Soviet Union fundamentally changed this dynamic. Trade in military equipment is no longer exclusively or mainly associated with long-term alliances in a bipolar system, but has become much more complex. The Middle East in particular (and Asia to a somewhat lesser extent) has emerged in the past few decades as a significant recipient of military equipment.[15] This trend has continued in recent years.[16] Specifically, imports by Saudi Arabia increased strongly in the period 2010-2014, making this country the second-largest arms importer in the world after India. Moreover, Saudi Arabia and other Arab Gulf States (Qatar, Kuwait, Oman, the UAE) have placed major orders for military equipment in recent years, so that their imports will increase further in the near future. Similarly, various countries in the south-east Pacific region (Vietnam, Indonesia, Japan, Australia) are also planning major arms acquisitions or have recently signed major arms contracts.

a This does not mean that these countries have the highest defence expenditures and spend the largest amounts of money on the procurement of military equipment. The size of the foreign arms trade also depends on domestic arms production capacity. The larger a country's domestic defence industry, the less it needs to import military equipment. This explains why the United States, while having the largest defence budget in the world, only accounts for 2.9% of imports of defence-related goods. Most of the defence-related goods the US armed forces procure are bought from US-based defence companies.

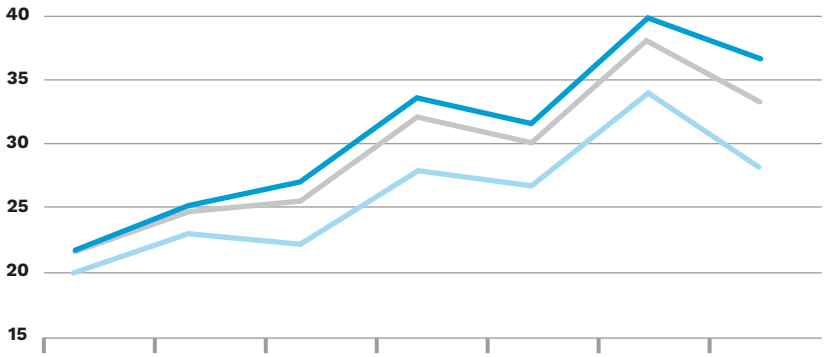
This is in contrast to the traditional recipients of military equipment during the Cold War, when mainly Western and East Bloc countries spent significant amounts of their budgets on the procurement of military equipment. The disappearance of the immediate security threat posed by the Cold War brought about a different view of security in these countries and resulted in most of them scaling down their defence budgets and purchasing less military equipment.[a] While the European countries in NATO spent on average 3-3.5% of gross domestic product (GDP) on military expenditure during the 1980s, this percentage gradually dropped to 2% in the 1990s and even further to 1.5-1.7% of GDP in the period 2000-2016.[17]

EU share of the international arms trade

The EU generates a significant part of the global trade in military equipment. The collective share of EU Member States in the global foreign arms trade fluctuates between 25% and 30%. The European defence market consists of large, medium and small defence industries. Some European countries – such as Germany, France and the UK – are among the most important arms producers and exporters in the world, while others, such as Italy, Spain, Sweden, the Netherlands, Belgium and Austria, have a significant defence industrial base. Other countries have only a small, or even a virtually non-existent defence-related industrial base. An important source to identify evolutions in the size of the foreign arms trade of EU Member States and the most important recipient regions for these defence-related goods are the consolidated annual reports published by the Working Party on Conventional Arms Exports (COARM). These reports, containing data on the licensed (and actual) arms exports of each EU Member State, have been published since 1999.[18]

a Significant differences between European countries in their defence expenditures can be identified, however. Greece, the UK, Estonia and Poland consistently keep their military expenditures at a fixed proportion of 2% of GDP; Belgium, Spain and Slovenia, in contrast, spend less than 1% of GDP on defence.

Figure 2.2: Licensed exports of defence-related equipment from the EU, 2002-2013 (€ billions).



	2002	2004	2007	2008	2010	2012	2013
EU	21,55	25,2	27,1	33,5	31,72	39,87	36,7
EU-15	21,55	24,7	25,59	32,07	30,12	38,05	33,23
EU	19,78	23,02	22,25	27,88	26,66	33,86	28,07

LOI = Letter of Intent

Source: COARM consolidated annual reports

In general, European exports of defence-related equipment have increased significantly since 2002 (Figure 2.2).[a] COARM annual reports show that, despite annual fluctuations, the licensed value of these exports has increased from €21.5 billion in 2002 to €36.7 billion in 2013.[b] This increase is not the result of the expansion of the EU by 12 countries in this period, as demonstrated by the data on licensed exports from the original EU 15 between 2002 and 2013. New Member States' share of licensed arms exports remains limited.

Six EU Member States account for the lion's share of licensed exports of military equipment. Figure 2.2 shows that France, Germany, the UK, Spain, Italy and Sweden – the countries that signed the Letter of Intent (LOI) in 1998 regarding the

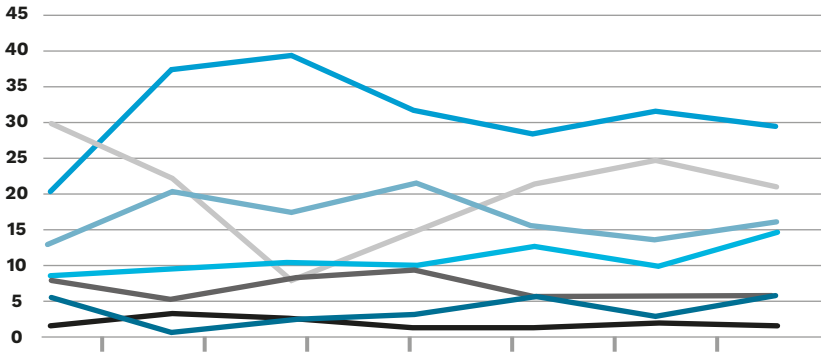
a The year 2006 is missing in this time series because Spain and France did not publish data on licensed exports for that year, only on actual exports. We did not include data of 2014 and 2015 because the numbers submitted by France are not comparable with previous years because of a heavily modified reporting procedure.

b Importantly, Greece has failed to submit data on arms exports to COARM since 2013.

strengthening of the European defence industrya – annually account for around 85-95% of total licensed exports of defence-related products from the EU.

In the same period (2002-2013) the **other EU Member States constituted the most important destination region** for the EU foreign arms trade in military equipment (Figure 2.3). In this period, around a third of all EU annual arms exports were destined for other EU Member States. Three other regions receive the majority of the remaining exports from EU Member States: the Middle East (around 20% of licensed exports from the EU), Asia (15%) and North America (10-15%).

Figure 2.3: Share of the various destination regions in total exports of defence-related equipment from the EU, 2002-2013 (%).



	2002	2004	2007	2008	2010	2012	2013
EU	20,2	37,4	39,3	31,6	28,4	31,4	29,3
Middle East	29,8	22	7,9	14,8	21	24,4	20,9
North America	8,3	9,04	10,1	9,5	12,4	9,6	14,3
Rest of Europe	7,67	5,04	7,9	9,2	5,5	5,3	5,5
Asia	12,7	20,3	17,5	21,3	15,1	13,2	15,7
Sub-Saharan	1,4	2,8	2,3	1,1	1	1,7	1,3
North-Africa	4,96	0,5	2,1	2,9	5,2	2,5	5,2

Source: COARM consolidated annual reports

a With this LOI 'on measures to facilitate the restructuring of the European Defence Industry' these six countries aim to facilitate international cooperation on the development of arms systems by drawing up agreements on procedures for the export of such items.

Table 2.1: Licensed value of exports of military equipment from EU Member States and share of the three destination regions, 2010-2014.

	Licensed arms exports (in € millions)					Share of exports to destination regions 2010-2014 (in %)		
	2010	2011	2012	2013	2014	EU	North America	Middle East
Belgium	1001	834	969	613	4510	16.3	52.9	18.6
Bulgaria	296	223	219	491	827	6.3	11.8	25.5
Cyprus	-	-	-	-	-	-	-	-
Denmark	376	237	222	782	147	15.1	69.8	1.4
Germany	4750	5414	4700	5850	3970	29.3	13.9	23.6
Estonia	2	350	3	3	4	1.7	0.3	0.23
Finland	61	184	58	353	228	53.2	7.01	12.3
France	11180	9991	13760	9540	73297*	17.3	3.05	32.8
Greece	295	225	339	-	-	-	-	-
Hungary	138	156	270	513	432	30.6	55.3	0.6
Ireland	24	27	47	61	86	44.5	35.5	13.5
Italy	3250	5262	4160	2150	2650	43.2	7.6	18.3
Croatia**	-	-	-	711	482	-	-	-
Latvia	8	0.07	0.3	0.07	3	20.9	1.6	1.1
Lithuania	23	50	20	22	15	17.6	15.3	2.2
Luxembourg	0.2	1	4	3	10	39.5	33.7	0
Malta	0.4	5	9	5	9	9.9	1.1	2.8
Netherlands	912	415	941	963	2070	21.2	18.4	5.1
Austria	1768	1632	1550	2370	902	29.7	16.1	27.7
Poland	457	849	633	858	919	13.3	59.1	5.9
Portugal	21	31	52	146	255	70.2	6.9	1.1
Romania	152	183	179	296	249	28.6	24.2	18.4
Slovenia	11	12	9	9	10	35.2	0	9.4
Slovakia	58	30	73	122	268	21.9	2.45	46.6
Spain	2240	2871	7690	4320	3670	55.5	2.5	11.9
Czech Republic	451	346	265	288	500	21.7	15.1	24.8
UK	2840	7002	2660	5230	2590	31.9	14.2	30.8
Sweden	1400	1119	882	980	510	21.1	12.8	19.7

* Data for France for 2014 deviate strongly owing to a modified reporting method. Licenses issued for making presentations and starting negotiations are also included in this high figure.

** Data on Croatian arms exports have only been integrated into the EU consolidated reports after the country's accession to the EU on 1 July 2013.

Source: COARM Consolidated annual reports

Table 2.1 shows licensed exports for each EU Member State in the period 2010-2014 and the total share in this period of exports of military equipment to the three most important destination regions. This table also shows that in terms of the foreign arms trade, a select group of countries account for the majority of total exports from the EU, while in eight countries no significant defence-related industry appears to exist. The largest defence industries are situated in France, Germany, Italy, Spain and the UK. Countries such as Belgium, Austria, the Netherlands, Sweden and Poland have medium-sized defence industries. The other EU countries have little or no defence-related industrial base. It is also striking that the share of exports to the various destination regions varies strongly among EU Member States. Certain countries, such as Ireland, Finland, Italy, Hungary, Portugal and Poland, mainly export to other EU Member States and North America (the United States and Canada). Other countries – France, the UK and Slovakia (and Germany, Bulgaria and Czech Republic to a lesser degree) – export significant amounts of military equipment to recipient countries in the Middle East.

Significant quantitative shifts in the foreign arms trade

The international trade in military equipment appears to follow an erratic pattern that is strongly influenced by geopolitical factors and shifts.

The sharp decrease in the trade in defence-related items after the end of the Cold War, i.e. since the early 1990s, reversed and was followed by a new global rise in the value of the foreign arms trade since 2004.

EU arms exports have followed this trend. In the period between 2002 and 2013, the value of the international trade in military equipment from EU Member States almost doubled: from €21.6 billion in 2002 to €37.6 billion in 2013.

Exports from the new EU Member States remain largely limited. In other words, the traditional defence industries are the main beneficiaries of the global rise in conventional arms exports.

2.1.2 Changes in the nature of the international arms trade

The significant changes in the size of the foreign arms trade after the end of the Cold War had a major impact on the nature of the international trade in defence-related goods. Consolidation, increasing competition, the privatisation of defence companies, advances in technology and the increasing internationalisation of supply chains are the most relevant developments in this context.

Shifts after the Cold War: consolidation, privatisation and export-orientation

The shifts in national security perceptions that occurred after the end of the Cold War fundamentally impacted the international defence market. During the Cold War the constant threat of armed conflict between Western countries and the Eastern Bloc led to almost continuously increasing national defence budgets and the build-up of military arsenals as instruments of deterrence. In other words, a guaranteed high demand for the procurement of military equipment existed in NATO and Warsaw Pact member states. Moreover, European governments preferred to purchase military equipment from domestic producers, which were often (partly) state-owned.[19] As a result of both trends – a substantial defence budget and a preference for (state-controlled) domestic companies – defence companies faced limited competition. After the Cold War, however, defence budgets in most Western countries gradually decreased, procurement procedures and government procurement priorities changed, and many countries found themselves with significant amounts of surplus military equipment.

The defence market and industry had to adapt to the new reality. This had three consequences:

- a **tendency towards consolidation**, with increasing competition on the defence market leading to a wave of take-overs and mergers of defence companies across EU Member States;

- decreasing domestic demand, obliging defence companies to focus on the **export** of their products to other countries to compensate for the shrinkage of the domestic market; and[20]

- a changing relationship between governments and the defence industry. There was a significant **tendency to privatise traditionally state-owned defence companies**, although significant differences between EU Member States

continued to exist regarding the extent to which the trend towards privatisation occurred. Most defence companies in the UK and Germany were privatised or have always been privately owned. In other countries (such as France) state participation is still substantial, with the government as a significant minority shareholder or even as a (more or less) full owner of particular companies. Examples of the first type are the Airbus Group (pan-European; 27% of the shares owned by the French, German and Spanish governments), Thales and Safran (respectively 6.18% and 18% of the shares in the hands of the French state) and Finnmechanica (32.45% owned by the Italian state). Examples of companies that are (almost) exclusively owned by governments are the French companies DCNS (64% of shares owned by the French government) and Nexter Systems, and the Walloon Herstal Group.

A more technologically refined and international defence market

Another evolution is the advances in the technological complexity of equipment offered on the defence-related market. Since the 1990s, innovation and the development and integration of new technologies have become essential to companies in order to remain competitive on the defence market. Companies feel obliged to make substantial investments in R&D in order to remain competitive.

An additional consequence is that other companies are also becoming involved in the defence-related industry as producers of – often high-tech – goods that are mainly intended for civilian use, but which also have military applications (with or without modifications). The number of companies that are oriented more or less exclusively towards the defence industry has decreased in recent decades (because of the tendency to consolidation described above), but in the same period more and more companies have become involved in the production of high-tech goods for military use. This usually involves the production of components that are further processed by larger systems integrators into finished weapons systems.[21]

This trend, combined with growing specialisation and diversification in the defence industry, has led to the internationalisation of the supply chain.[22] Large systems integrators no longer produce all the components they require, but increasingly turn to other (foreign) companies for the supply of high-tech parts. This internationalisation of the production chain also implies that more and more countries are becoming involved in the production of defence-related equipment. Although the integration of components still mainly takes place in countries with a traditional defence industrial base, the number of countries with companies that are active in the arms trade and produce defence-related goods has gradually increased.[23]

2.2 The European regulatory framework for the international arms trade

2.2.1 Controlling the international trade in conventional arms: a recent phenomenon

The trade in conventional arms systems has long been immune from international control. In contrast to WMD, conventional weapons are seen as products that nation-states may legitimately obtain and possess in accordance with the right to self-defence laid down in Article 51 of the UN Charter.[24] The right of states to possess and purchase conventional arms systems is therefore not fundamentally questioned.

Consequently, most governments in principle make no objection to the international trade in conventional arms systems.[25] Control of the foreign trade in conventional arms therefore differs from the non-proliferation approach to WMD and other weaponry that is seen as inhumane (such as cluster munitions and anti-personnel mines). While international regimes exist to control and reduce the stockpiles of WMD or even to prevent the development and proliferation of such weapons, the international trade in conventional military equipment has gone largely untouched by the international community. Although some attempts were made during the 20th century to develop international control regimes for the trade in conventional arms, states' sovereignty concerns, national foreign policy principles and national economic interests prevented the development of international regulation of the foreign arms trade.[26]

Despite the traditional resistance of nation-states to giving up sovereignty with regard to the foreign trade in conventional arms, in recent years initiatives to create international regimes to govern the international trade in military equipment have been increasingly successful.

National governments need to balance various basic principles in any arms export control system. Taking these principles into account can result in conflicting views on the need for and desirability of participation in international control regimes.

Reasons for restricting international arms trade control

In the first place, **national or strategic security interests** play an important part in national governments' assessments of the foreign arms trade. From a national

security perspective, there are various reasons to stimulate the foreign trade in military equipment and to block the development of international controls on international arms trade flows.

- Participation in the foreign arms trade is often necessary in order to maintain the national defence industry, since domestic demand can be insufficient. The sale of military equipment to foreign actors is therefore necessary to establish and retain a sustainable domestic defence industry with sufficient room for innovation. Having a viable defence industry is a crucial security interest, because it guarantees security of supply if a country becomes involved in an armed conflict.

- Countries without a significant domestic defence industry enter the market to purchase military equipment as a means of self-defence.

- Nation-states are approaching the trade in military equipment in light of the strengthening of political and military alliances: they are setting up collective defence systems, which can be stronger than a mere national defence approach. During the Cold War, the two superpowers – the United States and the Soviet Union – used the arms trade to support allies and to ally themselves with other states in their power blocs. The export of arms to other countries was not significantly driven by the policy or behaviour of the importing regime, but mainly by a country's ideological positioning on the East-West axis. It mainly took place within the two main military alliances (NATO and the Warsaw Pact).[27]

To summarise, from a national security perspective countries participate in the international arms trade both as suppliers and recipients, and may be reluctant to accept international control regimes in this context, because such international regulations could limit their capacity to sell or procure military goods.

National economic interests constitute a second element influencing the assessment of the foreign arms trade. Defence-related industries deliver significant numbers of jobs. Although the economic gains of the arms trade as a proportion of gross national product remain, even in the most important arms-producing countries, relatively limited, thousands to tens of thousands of jobs are directly or indirectly created in the defence-related industry.

According to figures provided by the AeroSpace and Defence industries association of Europe (ASD) – the official interest representative of the aeronautics, space and defence industry in Europe – in 2013, 778,000 people were directly employed in the aeronautics, space, and land and naval defence sectors, compared to 696,000 in

2008. The strongest growth is apparent in the land and naval defence sectors, in which 45,000 direct jobs were created between 2008 and 2013, employing 226,000 persons in 2013.[28] In the United States, the number of jobs directly related to the defence industry was estimated at 845,000 in 2014, with about three million direct and indirect jobs being created by defence-related industries.[29]

National governments, especially in countries with significant defence industries, may therefore support the production and export of defence-related goods, which can contribute positively to economic growth and stimulate employment numbers. From an economic perspective, nation-states could in other words be less inclined to accept far-reaching international controls on conventional military equipment exports, because this might result in more restrictive arms export practices and a reduction of the volume of arms exports.

To summarise, **states essentially put their own national security and economic interests first**. Because of the limitations of national sovereignty and the potentially negative impact on economic returns, they are often unwilling to cooperate in attempts to develop and implement international restrictions on the foreign arms trade.

Incentives for participating in international arms control initiatives

On the other hand, in terms of the same principles – national economic and security interests –governments could be willing to participate in international control regimes for the trade in conventional military equipment.

From an **economic perspective**, participation in control regimes can lead to greater and better access to new sales markets for a country's domestic defence industry. By accepting international controls and developing effective arms control systems, national governments can increase their international legitimacy and their status as a reliable (trading) partner.

Participation in international control regimes could also be beneficial from a national security perspective. In this context, three arguments can stimulate states' participation in international control of the trade in conventional arms. Firstly, an extensive and uncontrolled trade in defence-related products by other countries can threaten national security. International controls on arms exports and imports can, in other words, be crucial in sustaining regional and international peace and security. Secondly, participation in international control systems can improve access to new military products, because membership of such control

regimes can increase the legitimacy of the nation-state as a recipient of military equipment. Thirdly, participation offers states the possibility of joining political and military alliances and of being involved in international decision-making processes.[30]

New: a 'responsible' arms trade

In recent years, an additional aspect of the international arms trade, that favours international arms trade controls, has come to the fore. The call for a more 'responsible' international arms trade increased after the end of the Cold War, which brought about a broader trend that puts human rights, humanitarian issues, and concerns about conflict prevention in the global spotlight.[31]

This reflects a normative change in terms of which human rights, good governance and conflict prevention are no longer either peripheral concerns or reasons to justify arms transfers, but instead have become central grounds to restrain exports of military equipment.[32] In other words, considerations of human rights, conflict prevention, internal oppression and humanitarian principles should play a central role in the assessment of applications for the export of defence-related goods.[33] As a consequence, the focus of such an assessment shifts. While traditionally concerns related to the supplier's country were pivotal in assessing the acceptability of arms exports, a 'responsible' arms trade control system now takes the (potential) effect of arms exports on the situation in the *recipient country* into account, and even prioritises such concerns.

Although it remains controversial whether this growing presence of concerns about human rights, good governance, and social and political development in the country of final destination reflects a genuine growing awareness and importance of such norms in international policy-making or is merely a case of 'window-dressing' by national governments to gain legitimacy for their arms transfers, the increased prominence of these issues is undeniable.[34]

Importantly, this does not suggest that economic interests and issues of national security - the so-called 'hard' material interests of nation-states - no longer influence the international arms trade. But it does result in an increasing connection of considerations about human rights and conflict prevention to a topic once exclusively dominated by hard security and economic calculations. In the traditional assessment of the desirability and legitimacy of such exports, the national interests of the exporting state took priority. The new set of principles also includes a focus on the situation in the country of end use of the relevant products.

The difficult balance among three principles

Altogether, this implies that states have to take three perspectives into consideration in the implementation of a control system and policy on the trade in conventional arms systems and should try to reconcile them with one another: (1) an economic perspective; (2) a national strategic and security perspective; and (3) an ethical/human security perspective regarding the country of final destination of the weapons they sell. These three general (and abstract) considerations (Figure 2.4) are inevitably present in the development of an arms export control system in general, as well as in the assessment of concrete licence applications.

Figure 2.4: General considerations in national arms export control systems

Balancing national security, national economic interests and human rights concerns in arms export controls

The control of trade in conventional arms has to reconcile multiple and sometimes conflicting principles. States can have different motives for stimulating their foreign arms trade: economic motives (employment and support of the national industrial base) and political motives (international influence and affirmation of alliances). But at the same time they have particular reasons for subjecting this trade to restrictions by their participation in international control regimes.[35]

Balancing these principles, and managing the conflicting interests in applying them in the assessment of licence applications for the export of military equipment, is difficult. National governments therefore often have an ambivalent attitude towards international control of the trade in military equipment.

The international nature of the foreign arms trade makes national governments increasingly inclined to take part in international control regimes. The current practise of arms export control in most industrialised countries is therefore increasingly influenced by international regimes and treaties.[36] However, national governments are still sensitive to encroachments on national sovereignty in terms of the control of the international arms trade. In practice, this has an important influence on the establishment, participation and implementation of such international regulatory initiatives.

International regulatory initiatives

Various international initiatives have been adopted in recent decades to regulate the international arms trade. These regimes are mostly informal and are largely aimed at specific types of weapons. Examples of such specific international control regimes are the Zangger Committee and the Nuclear Suppliers Group which focus on nuclear arms; the Australian Group which focuses on biological and chemical weapons; and the Missile Technology Control Regime for missiles, drones and associated technologies.

An exception to this thematic type of regimes is the **Wassenaar Arrangement**. This international control regime was set up in 1996 in order to strengthen control over the dissemination of goods and technologies that can be used for the development of conventional arms and weapons of mass destruction.a To this end, states participating in this control regime agree to adhere to guidelines for the assessment of export licences and lists of defence-related goods that must be subjected to control - the so-called Munitions List. Currently, 41 countries are members of this

a The Wassenaar Arrangement is the successor of the 'Coordinating Committee on Multilateral Export Controls' (CoCom). As a product of the Cold War, the United States and its allies established this informal regime to avoid the exports of strategic goods to countries in the communistic bloc. The end of the Cold War made the existence of this regime redundant, resulting in its termination in 1994 (S. Depauw & T. Baum (2016), *Spelregels voor wapenhandel: het juridisch kader voor de buitenlandse handel in strategische goederen, Leuven: Acco: pp 43-44).*

control regime, including, besides most NATO Member States, the majority of countries from the former East Bloc.[37]

The **United Nations** also traditionally focuses on controlling the development, proliferation and use of, and trade in arms.[38] The emphasis here for a long time was on combatting the proliferation of WMD or on the reduction of existing arsenals of such weapons.[a] It was not until the adoption of the Arms Trade Treaty (ATT) by the UN General Assembly on 2 April 2013 that a global framework for the control of the trade in conventional military equipment was brought into being.b The treaty entered into force in 2014, following ratification by 50 countries. At the end of May 2017, 130 countries had signed the treaty and 89 had ratified it.[39] Although the main arms-exporting countries – the United States, the Russian Federation and China – have not ratified the ATT, all EU Member States have done so.

2.2.2 The European regulatory framework for arms export control

In this study we focus specifically on the regulation of the trade in conventional arms within and from the EU. For a long time the trade in military equipment was explicitly excluded from the EU common internal market.[40] Member States refer to Article 223 of the Treaty of Rome of 1958 (Article 346 since the Treaty of Lisbon in 2007), which established the European Community. This article granted each Member State the right to adopt any measures that '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'.[41] Member States used this article to give themselves carte blanche to treat the foreign arms trade as an exclusively national competence.[42]

Since the start of the 1990s the EU has been focusing increasingly on the international arms trade. The EU is a complex organisation with various institutions and diverse legal instruments that operate at different speeds.[43] The matter of non-proliferation and control of the arms trade has a transversal nature: it touches on EU

a Within the UN various treaties have been approved with the aim of the non-proliferation and destruction of nuclear weapons (Non-Proliferation Treaty, entered into force in 1970), biological weapons (Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological [Biological] and Toxin Weapons and on Their Destruction, entered into force in 1975), chemical weapons (Chemical Weapons Convention, entered into force in 1997), anti-personnel mines (Mine Ban Treaty, in force since 1999) and cluster munitions (Convention on Cluster Munitions, in force since 2010).

b This treaty obliges UN Member States to develop an effective system for the control of the foreign arms trade. In addition, certain forms of trade in conventional arms are prohibited and assessment criteria are formulated for exports that are not prohibited, but which nevertheless constitute a risk to peace and security. UN Member States are also obliged to maintain registers of exports and to publish this information.

foreign policy, but also on other areas of EU competence, such as trade policy, the internal market and internal security. This implies that the EU has developed legislation dealing with many aspects of the arms trade (conventional arms, civilian firearms and dual-use products) with different starting points, such as security, trade and economic development.[44] This reflects the fact that such relevant EU legislation also originates from different institutions, such as the European Commission or the European Council, each of which has its own rationale.

To explain the growing openness of EU Member States to be more actively involved in the domain of arms exports, three factors are important.[45]

Three explanations for the creation of EU legislation on the international arms trade

The **1991 Gulf War** was a first important incentive. This war is generally seen as a watershed event with regard to conventional arms trade controls.[46] Coalition troops were confronted with military equipment that shortly before had been sold by the same Western countries to the regime of Saddam Hussein. This **boomerang effect** whereby Western troops were fighting against Iraqi forces whose arms had been supplied by these troops' own governments was pivotal in the decision to impose stricter controls on the international trade in conventional arms.[47] At the international level this resulted in the establishment of the United Nations Register of Conventional Arms in 1992. As the first attempt to increase transparency on arms transfers, UN Member States are asked to (voluntarily) submit information on their annual imports and exports of conventional weapons.[a]

Within the EU the European Council expressed concerns over the apparent ineffectiveness of combatting the international proliferation of conventional arms. As a consequence, during the preparation of the Treaty of Maastricht, arms exports and non-proliferation became a spearhead in the development of a new European foreign policy. The harmonisation of the export control policies of EU Member States via the implementation of common assessment criteria took priority.[48] Stimulating restrictiveness and transparency with regard to international transfers of conventional arms, especially to conflict areas, was adopted as a general goal.

Secondly, the EU aims to present itself as a ***'normative power'*** on the international stage. The absence of its own armed forces means that the EU's power in the

a The initial success of the UN Register has, however, gradually decreased. While in 2001 up to 126 national reports were submitted, these numbers dropped since then to 60 submissions in 2014 (SIPRI Yearbook 2016).

international domain lies not in the traditional military interpretation of power, but rather in its normative manifestation.[49] In its foreign policy, the EU calls on a set of standards and ethical principles: the organisation describes itself as a 'force for stability, cooperation and understanding in the wider world' and promotes respect for human rights, development and conflict prevention as the basic principles of its foreign policy.[50] And in the area of arms export control, as part of its foreign policy and because of the essential role conventional arms play in international peace and stability, the EU aims to make these high standards key in the assessment of applications for the export of military equipment.

The **changes in the defence market** since the beginning of the 1990s (see sec. 2.1) are a third reason for the growing EU focus on the trade in conventional arms. Trends towards a stronger concentration and consolidation of defence companies, technological advances, far-reaching specialisation and the use of sub-contractors, plus an increasing internationalisation of the market changed the outlook of the (European) defence industry. Such evolutions brought with them the need for a more harmonised European arms export control policy, and for the removal of existing constraints to transnational cooperation within the borders of the EU.

These three processes encouraged the various EU institutions to develop several initiatives relating to the foreign arms trade. In essence, **two regulatory initiatives have a fundamental impact** on the legislative framework and the practice of arms export control of EU Member States:

- ***Common Position 2008/944/CFSP*** aims to promote the development and application of common criteria for the export of military equipment to non-EU states; and

- ***Directive 2009/43/EC*** aims to stimulate a free internal European market for the trade in military equipment between EU Member States.

In other words, both instruments aim to stimulate European harmonisation of the various aspects of the foreign arms trade. While the Common Position installs common assessment criteria for the extra-EU arms trade, the Directive harmonises the procedures and principles for the intra-EU trade in defence-related equipment.

2.2.2.1 Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing the control of exports of military technology and equipment

The industrial restructuring after the Cold War helps to understand the gradual emergence of the need for a common European arms export control policy. With decreasing defence budgets, competition within the defence industry increased. At the same time defence companies felt the need to focus on the export of defence-related products as domestic demand shrank significantly. This growing export orientation increased the risk of 'undercutting': different ways of assessing licence applications would benefit companies in countries with the most lax assessment criteria.[51] The growing importance of exports therefore became an economic incentive for a more coordinated European arms export policy.[52] In other words, a common European export control policy was to **contribute to the reduction of unfair competition** between companies in EU Member States by developing a European level playing field.[a]

Additionally, the side effects of the uncontrolled proliferation of conventional arms experienced during the first Gulf War in 1991 resulted in a growing awareness among EU Member States of the need for a shared evaluation framework to govern export licence applications for military equipment.

From the Common Criteria to a Code of Conduct

In the build-up to the Treaty of Maastricht (1993), in which a formal common European foreign policy was developed for the first time, the European Council adopted various initiatives on arms export controls. Firstly, the *Ad Hoc Working Group on Conventional Arms Exports (***COARM)** was set up in 1991. The purpose of this working group was to compare national legislation and explore possibilities for the harmonisation of measures to control arms exports. Also, in 1991 and 1992 the European Council adopted eight Common Criteria for the assessment of arms export applications (see box).[53]

With these criteria, the European Council explicitly aimed to include considerations about human rights and conflict prevention in the assessment of licence

a A principle whereby everyone should play by the same rules. In the context of control of the foreign arms trade in the EU, this means that all those concerned (including companies and traders) are subject to the same restrictions (S. Depauw & T. Baum (2016), *Spelregels voor wapenhandel: het juridisch kader voor de buitenlandse handel in strategische goederen,* Leuven: Acco, p.65).

applications for the export of defence-related equipment and to develop a more restrictive and 'responsible' arms trade to non-EU countries.

The eight Common Criteria for the assessment of arms export applications

1. Respect for the international obligations and commitments of EU Member States
2. Respect for human rights in the country of final destination
3. The internal situation in the country of final destination, as a function of the existence of tensions or internal armed conflicts
4. The preservation of regional peace, security and stability
5. The national security of EU Member States, as well of friendly and allied countries
6. The behaviour of the buyer country towards the international community, its attitude towards terrorism, the nature of its alliances and its respect for international law
7. The risk of internal diversion or unauthorised re-export of the military equipment
8. The compatibility of the exported equipment with the technical and economic capacity of the recipient country[a]

In June 1998 the European Council formalised these Common Criteria in a politically binding document, the **EU Code of Conduct on Arms Exports**.[54] Since then, EU Member States are supposed to use these criteria in the assessment of licence applications for the export of defence-related equipment. All eight Common Criteria were integrated into the document and further elaborated. Moreover, additional principles and procedures were foreseen in this document:[a]

– The Code of Conduct establishes these **Common Criteria** as merely minimum criteria; EU Member States are therefore free to apply additional and stricter criteria.

– The Code of Conduct provides for a **common list** of military items based on the control list developed by the Wassenaar Arrangement. Another important initiative in this respect was the establishment of the **EU Common List of Military Products**.[55] On 13 June 2000 the European Council established this list, which

a This eighth criterion was added during the European Council of Lisbon in 1992 to the original seven criteria that were formulated during the European Council of Luxembourg in 1991.

was aimed at further converging EU Member States in the field of conventional arms exports. In practice this common list is almost identical to the Munitions List of the Wassenaar Arrangement. The EU Common Military List is updated annually and follows the updates of the Wassenaar Arrangement to its Munitions List. The Council published the current EU Common Military List on 14 March 2016.[56] At its inception the list was merely a political commitment in the framework of the Common Foreign and Security Policy of the Member States to align their national control lists to this common EU list. The EU Common Military List has evolved since then into a reference document to which Directive 2009/43 also refers (see sec. 2.2.2.2). EU Member States undertake to subject all products on the common list to export controls.

– Member States should evaluate export licence applications on a ***case-by-case*** basis against the criteria.[57]

Importantly, the Code of Conduct also contains initiatives to effectively stimulate European harmonisation in the interpretation and application of these eight Common Criteria:

– A **'denial notification' procedure** has been implemented. This procedure commits EU Member States to bilateral consultations in cases of essentially similar licence applications that have been previously denied by another Member State. If, following consultation, a country decides to issue a licence, it is obliged to provide the other country with a detailed explanation of this decision. The purpose of this procedure is to prevent undercutting, whereby Member States undermine each other's export control policies by being less strict in applying the criteria in the assessment of almost identical applications for the export of defence-related equipment.[58]

– COARM has been publishing a regularly updated **user's guide** for the interpretation of the eight Common Criteria since 2003.[59]

Member States must also submit an annual report to the EU on the export of military equipment. Since 1999 these national annual reports have been bundled into a **consolidated EU report. Originally, Member States were obliged to circulate a** *confidential annual report on their arms exports to other Member States.*[60] However, pressured by the then-Finnish presidency of the European Council, the European Parliament, and civil society, the consolidated EU report has been made public since 1999.[61] As a result, a significant source of information on European arms exports that was previously inaccessible has become generally available.[62]

Member States use the meetings of the COARM Council Working Party to exchange information on sensitive destinations and specific technical issues with regards to the interpretation of the Common Position via the so-called tour-de-tables.

Via the COARM online information system Member States can submit their export data, and exchange denials and consultations. The system can also be used to exchange other information deemed useful for export licence application assessment.

From politically to legally binding: Common Position 2008/944

Because the Code of Conduct was a purely political document, its effectiveness was quickly questioned. Therefore, a review of this document was on the agenda from 2004, but it was not until 2008 that sufficient political momentum existed to take further steps in the development of the EU export control policy. In 2008 the European Commission launched the European Defence Package, which contained Directive 2009/43 (see below). The co-decision procedure within the EU meant that the European Parliament had to support this Defence Package. This enabled the European Parliament to obtain the agreement of dissenters within the European Council to the conversion of the politically binding Code of Conduct into the legally binding Common Position 2008/944 'defining common rules governing control of exports of military technology and equipment'.

The legally binding nature of the Common Position implies that EU Member States are obliged to make their national policy adhere to the principles set out in it. The content of Common Position 2008/944 differs only slightly from the 1998 Code of Conduct, and only an explicit reference to respect for International Humanitarian Law has been added to criterion 2.[a] In light of the limited differences with the Common Criteria of 1991, for the last 25 years arms exports from the EU have been assessed against the same criteria, which were increasingly refined and elaborated, and became gradually more strongly legally binding.

However, **the enforceability of the principles set out in the Common Position remains very limited**. Because a Common Position is a legal instrument within the Common Foreign and Security Policy framework, the European Court of Justice has no formal authority. Under Article 29 of the Treaty of the European Union, Member States are obliged to adapt their own national policies in accordance with

a The Common Position also recognises in Article 10 that Member States may also take account of the effects of arms exports on their economic, industrial, social and commercial interests, but only to the extent that this judgement has no influence on the application of the Common Criteria.

the guidelines of the Common Position, but national governments still autonomously determine the extent to which these principles are integrated into national legislation and how the criteria are interpreted in effect. The effective assessment of licence applications is also still done by national governments.[63]

The influence of the Common Criteria on EU Member States' arms exports

The question remains as to the extent to which these Common Criteria have effectively changed the arms export policies of EU Member States. Several studies have focused on this issue by attempting to analyse the impact of the Common Criteria on EU Member States' arms exports.[64]

Several studies suggest that after the implementation of the 1998 Code of Conduct, exports of arms to countries experiencing serious violations of human rights (criterion 2) and with an internal conflict or involvement in regional conflict (criteria 3 and 4) appear to have declined compared to the period before its implementation.[65]

This trend contrasted with the rest of the world, where there was no decline in exports to such countries. The reduction was largely accounted for by the old EU Member States (before the expansion in 2004), and specifically those countries that do not have major defence industries. This last group also exports less to conflict regions, but the reduction is smaller. It appears, therefore, that the export control policies of EU Member States seem to have become more restrictive since the implementation of the Code of Conduct in 1998, certainly as regards exports to highly problematic countries.

At the same time, only limited harmonisation in the policies of the various EU Member States appears to exist. Moreover, the reduction of exports of defence-related products to problematic countries is smaller among the largest producers and exporters than among smaller producers.

The Arab Spring and the conflict in Yemen since March 2015 have been prompting social and political discussions in many EU Member States in recent years regarding the **export** of defence-related products to countries in the **Middle East and North Africa.**[66] Various European countries reacted to the uprisings during the Arab Spring – and the violent responses of the governments concerned – with restrictive measures. For example, in March 2011 the UK suspended 122 licences that had previously been issued for exports to Bahrain, Egypt, Libya and Tunisia.

France suspended the issue of new licences for defence-related equipment to Egypt, while the German government announced that no new licences would be issued for arms exports to Libya.[67] EU exports of defence-related equipment to countries in this region quickly resumed, however, and it appeared that little had changed in the period 2010-2013 in the control of arms exports to these countries.[68]

2.2.2.2 Directive 2009/43/EC on simplifying terms and conditions of transfers of defence-related products within the Community

A second document in which the EU attempts to regulate the foreign arms trade is Directive 2009/43 'simplifying terms and conditions of transfers of defence-related products within the [European] Community'. Directive 2009/43 is primarily aimed at the **trade in military equipment within the borders of the EU.**

The European Commission sees the European defence industry to be important to European industrial policy: it has considerable economic significance and is an important employer. With revenues of up to €97.3 billion in 2014, directly employing 500,000 people and providing 1,200,000 indirect jobs in about 1,350 companies (both multinationals and small and medium-sized enterprises (SMEs)), and large investments in innovation, the defence industry is considered by the European Commission to be an essential part of European industry as a whole.

Importantly, a large part of these sales occur on the internal (European) market. Total licensed arms exports by all the EU Member States together amounted to €40.3 billion in 2009. Most of the revenue of European defence companies comes from intra-EU trade.[69] The competitiveness of the European defence industry is therefore a focus of the European Commission's *Europe 2020 strategy.*[70]

The qualitative evolutions in the defence market – the growing need to export and the need for technological innovation (see sec. 2.1.2) – prompted the defence industry to turn to the EU. The industry expressed the need for a larger level playing field with equal competition, a lower administrative burden for licences for intra-EU trade and adequate government investment in R&D.[71]

The European Defence Package

At the end of 2007 the European Commission launched the 'European Defence Package' with two directives and a communication[72] designed to convert the

defence markets in the EU, which traditionally operated at the national level, into a common European defence market.

A first directive (Directive 2009/81/EC) 'on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security' reorganises the **tendering politics in the area of defence procurement by EU Member States**.

The second directive, Directive 2009/43, **reforms the internal market for the trade in defence-related products**. This directive was adopted to simplify the administrative regulations for the trade in defence products within the borders of the EU and to strengthen cooperation among Member States. This is also clear from the priority objectives of the directive, which takes a mainly economic approach. It assumes that national legislative measures disrupt the internal market and so also hamper innovation, industrial cooperation and the competitive capacity of the EU defence industry. With this directive, the EU aims to create a simplified, more flexible and harmonised control system for the trade in defence-related products within the EU. In this way, this trade becomes part of the liberalised internal EU market. This implies that intra-EU trade in defence-related goods can no longer be classed as exports (or imports), but as transfers.

To achieve these objectives, Directive 2009/43 provides for a European harmonisation of the material scope for transferring defence-related goods, the possibility of exempting certain forms of trade in defence-related goods from a licensing obligation, the implementation of new (more flexible) licence types, more specifically general and global licences, and reduced control of the end use of the licensed defence-related goods, with specific focus on the international trade in components.

1. Firstly, the directive imposes a **binding list of defence-related goods that are subject to a licensing requirement.** Only the intra-EU trade in products that appear on the EU Common Military List can still be controlled by Member States. In this way, the material scope for transferring defence-related goods in every EU Member State is harmonised.

2. Secondly, the directive provides for the possibility of **exempting certain transfers** from licensing requirements. That is the case, for example, when the applicant is part of the armed forces or a government body of another EU Member State, or when the applicant is an intergovernmental organisation (such as the EU or UN), or when the trade in defence-related goods relates to humanitarian disaster relief.

3. A third simplification introduced by this directive relates to the **licensing system.** For transfers of defence-related goods, Member States must implement three types of licences in their export control systems for intra-EU trade:[73]

- An **individual licence** covers one specific transfer of a specific product to a specified purchaser.

- A **global licence** is also granted to an individual supplier, but grants the possibility of transferring (various categories of) products to (categories of) purchasers in one or more Member States.

- A **general licence** grants immediate permission to suppliers who meet certain conditions to transfer certain products to a purchaser based in another Member State, without always having to request an (individual or global) licence in advance. The directive obliges Member States to publish a minimum number of general licences, but they are free to publish additional general licences, and to determine which products on the EU Common Military List are eligible for one of the general licences and which conditions users of these licences must meet.

It is the use of this third type of licence that the European Commission is seeking to encourage, with a view to developing a more flexible licensing regime for intra-EU trade in defence products. Moreover, the Commission aims to promote the use of global licences in cases when general licences are not eligible. The use of individual licences for intra-EU transfers of military equipment should therefore become the exception rather than the rule.

4. The directive also establishes a more flexible control regime for intra-EU-trade in the **components** of defence-related goods. Member States must refrain from placing limitations on the intra-EU trade in components, unless the transfer is considered to be sensitive.[74] Through this regulation the directive aims to encourage the internationalisation of the supply chain and promote scale advantages within the borders of the EU.

2.3 The increasing relevance of the EU in regulating the international arms trade

Various developments in the nature and extent of foreign trade in military equipment strongly influenced the EU defence market after the end of the Cold War. Privatisation, consolidation, the increasing reliance on extra-EU exports to maintain turnover and employment, technical innovations, and the internationalisation of the production chain prompted European institutions, partly at the request of the European defence industry, to develop various regulatory initiatives.

The EU has developed a unique approach that combines the facilitation of trade in defence products within the EU, with strengthening the control of the trade in such goods with non-EU states.[75] The European regulatory initiatives seek a balance between, on the one hand, the further liberalisation of the unified market and the free movement of goods within the EU and, on the other hand, foreign policy considerations concerning the promotion of human rights and the prevention of conflict.[76] In other words, in its policy the EU tries to reconcile stricter controls on the export of defence products with the facilitation of trade in defence products within the borders of the EU.

Table 2.2: Comparison of Directive 2009/43 and Common Position 2008/944

	Directive 2009/43	Common Position 2008/944
EU institution	European Commission	European Council
Legal status	**Legally binding** Must be transposed into national law	**Legally binding** **Not** required to be transposed into national law
EU Court of Justice	Formally involved	**No** formal partner
Focus	**Intra-EU trade** in military equipment	**Extra-EU** trade in military equipment
European convergence through...	... the simplification of the intra-EU trade in military equipment, in order to create a European defence market	... introducing high standards concerning human rights, conflict prevention, peace and stability

As the comparison in Table 2.2 illustrates, the two relevant European regulatory frameworks – Directive 2009/43 and Common Position 2008/944 – differ in various aspects.

- They are **different types of legislation** imposing different obligations on EU Member States: both instruments are legally binding, but a Directive has to be transposed into national law, while a Common Position does not.

- The Directive was prepared by the European Commission, the Common Position by the European Council. While the former instrument addresses **intra-EU** trade, the latter regulates **extra-EU** trade in military equipment.

- As a consequence, the potential involvement of the **EU Court of Justice** differs, because this court only has competence over EU legislation regarding the internal common market and not with regard to issues relating to the common foreign policy.

- Although both instruments aim for a stronger European convergence, the domains and means by which the EU aims to do this differ strongly. The Directive aims to simplify the intra-EU trade in military equipment in order to create a European defence market. The Common Position aims to integrate high standards in the areas of human rights, conflict prevention, peace and stability into the assessment of licence applications for extra-EU trade.

Importantly, however, the arms export control policy remains an exclusively national competence. Both EU instruments impose legally binding elements on EU Member States, but the effective development of this policy domain and the assessment of licence applications remain the responsibility of individual Member States. Neither the Common Position nor the Directive is directly applicable in the law or policy of individual Member States. They are obliged to make their national policies correspond with the content of the Common Position; they must transpose the principles of the Directive into their own national law.

Directive 2009/43 leaves considerable discretionary powers to Member States for national interpretations. For example, national governments are still free to determine the geographical and material scope of global and general licences, to decide on the possibility of exempting transactions from a licensing requirement, and to develop national interpretations of certain concepts such as ‘sensitive transfers’. Consequently, it is interesting to look at how and to what extent EU Member States have dealt with these regulations. For the Common Position, Member States are free to determine whether and how they integrate the Common Criteria into

national law. In other areas too, such as the possibility of including additional assessment criteria and the extent of public transparency on arms exports, the Common Position provides significant discretionary powers to Member States.[77]

In other words, **although the EU has developed several regulatory initiatives to harmonise EU Member States' arms export control systems, these instruments still leave ample room for national interpretations.** As a consequence, the extent to which both regulatory initiatives have in reality led to the harmonisation of the export control systems of the various EU Member States is an important question. In the following chapter we therefore analyse national legislation and policies on arms exports controls in eight EU Member States.

Arms export controls: a European comparison

03

3.1 Methodology

EU Member States have a longstanding tradition of controlling the international trade in military equipment. However, they differ strongly in terms of their political-cultural contexts, and the size and nature of their domestic defence industries. As a result, the guiding principles, structure and organisation of their respective national arms export control systems are very diverse.

In this context, it is worth analysing the extent to which the relevant EU initiatives – in particular Directive 2009/43 and Common Position 2008/944 - aimed at harmonising the Member States' arms export control systems have resulted in a convergence of these national systems. Individual Member States have considerable freedom in the national implementation of these EU initiatives. Consequently, a comparative analysis of how the various Member States have implemented both EU instruments is important to determine similarities and differences:

1. How are Directive 2009/43 and Common Position 2008/944 implemented by EU Member States?

2. Which differences and similarities could be identified in this implementation among (selected) EU Member States?

3. What are the implications of these similarities and differences for the objectives of these European legislative initiatives?

Because we aim to conduct an in depth analysis and comparison of the EU Member States' complete arms export control systems, a discussion of all 28 EU Member States is not feasible. We therefore select eight Member States. We took both the

size and nature of the domestic defence industry and geography into account in this selection. For the former aspect, we selected Member States with substantial defence industries and others with less substantial defence industries. We also aimed to include defence industries producing complete weapons systems and Member States mainly involved in exporting components. With regard to the second variable, we aimed to maximise geographical diversity in the selection of EU Member States.

Based on these criteria, we selected the following eight EU Member States: Belgium (divided into the regional systems for Flanders and Wallonia), France, Germany, Hungary, the Netherlands, Portugal, Sweden and the UK.

We use three sources and research methods to provide comprehensive and exhaustive insights into both the policy and legislative framework relating to arms export controls in the selected EU Member States.

External country studies as primary source

1. ***Country studies*** of the various countries we selected constitute the primary source on which the systematic comparison is based. These studies were carried out by external researchers who were selected on the basis of their expertise regarding the export control systems in the relevant country. The country studies contain an in-depth analysis of the legislation and policy of the national arms export control systems, and also focus on the relevant social and political context. More specifically, this latter aspect concerns the institutional framework relating to arms export controls, an overview of the relevant legislation (with a brief historical overview of the developments of the legislative framework), and a description of the nature and size of the domestic defence industry. A list of the details of the various external researchers is included as Annex 1 to this report.

We set up a comparative matrix to maximise the comparability of the various country studies. All the researchers completed this matrix with relevant information from the respective national arms export control systems. This allows us to gather as much relevant and comparable information as possible. Because our study focuses specifically on the national implementation of the two EU regulatory frameworks, this comparative matrix is principally informed by the relevant aspects of Common Position 2008/944 and Directive 2009/43.

For **Common Position 2008/944** it concerns the following aspects:

- adding additional strategic goods to the material scope of the arms export control system;
- the national implementation of the eight Common Criteria;
- the inclusion of additional national criteria;
- the implementation of Article 10 of the Common Position;
- the details national governments submit to COARM for the European report on foreign arms trade;
- the use of the *'denial notification' procedure; and*
- the frequency and content of information on arms exports made public by national governments.

With regard to the content of **Directive 2009/43** it covers:

- the possibility of exempting specific transactions from the licensing requirement;
- the implementation of global and general licences for intra-EU transfers;
- the number of general licences published;
- the material, temporal, and geographical scope of general and global licences;
- the control of trade in and any re-export of components; and
- the definition of concepts such as 'sensitive products' and 'sensitive transfers'.

Additional analyses

During the systematic comparison some specific aspects were found not to be fully covered in all country studies (mainly because no public information on these topics was available) or new questions arose during the comparison. In order to tackle these gaps and inconsistencies in our comparative analyses, additional analyses were carried out to ameliorate and deepen the comparison.

Firstly, we carried out additional analyses of relevant legislation, national policy documents, and publicly accessible administrative guidelines and documents published on the websites of the competent national authorities. **Consulting** these **documents** enabled us to answer very specific questions in greater detail.

Secondly, the **national authorities** involved in the assessment of licence applications for defence-related products in the selected countries were contacted. This occurred after an initial comparison had been made and served mainly to supply additional answers to specific questions and unresolved ambiguities, especially in relation to current arms export control policies and practices.

Development of the comparison

The research questions formulated in the introductory chapter are used to guide the comparative analysis. Each subsequent part will start with an elaboration of the relevant principles in both the Common Position and the Directive. The purpose of the analysis is, after all, to examine the national implementation of both regulatory frameworks.

We base this comparison on **five major topics**. As far as possible, this division into five topics follows the logic of the relevant arms export control systems. Therefore, the following topics are discussed in sequence in this comparative analysis:

- the institutional framework around arms export controls (sec. 3.3);
- the material scope of the arms export control system (sec. 3.4);
- the licensing system (sec. 3.5);
- end-use controls (sec. 3.6); and
- transparency and parliamentary control (sec. 3.7).

We start by describing the general **historical and political-cultural context** of arms exports (and their control) and the size and nature of the domestic defence industry in the various countries (sec. 3.2). These country descriptions often contain important information for understanding how the existing export control systems in the various countries have been developed.

3.2 Historical and political-cultural context

The national political history, identity and culture of each country, and the size and structure of the national defence industry are important to understand the national discourse on the exports of military equipment. It is therefore essential to pay attention to the specific historical and political-cultural context in the selected countries. Historical and political-cultural developments influence the position that governments adopt in the international domain and the interpretation and

significance they lend to the foreign arms trade. The information will be important in explaining the differences among these countries.

For each of the countries we discuss (1) the historical-political context and the societal salience of the foreign arms trade; and (2) the nature and size of the domestic defence industry.

For these case descriptions we rely in the first instance on the respective country studies. We have also consulted additional literature, in the form of international academic articles, national annual reports on the export of military equipment, research reports and relevant media reports.

3.2.1 Belgium

Historical-political context

Belgium has had a legal framework to control the foreign trade in strategic goods since 1934. Since the Second World War Belgian exports of arms have been a cause of political and social concern in the Belgian political system.[78] The Belgian consultation model, which is also described as 'a string of negotiations and agreements ... of discussions and bargaining with which conflicts are discharged and points of contention pacified',[79] has collided at its borders with the foreign arms trade on various occasions.[80]

Since the 1990s in particular the **controversies surrounding arms exports acquired a communitarian interpretation,** in which the public discourse was quickly reduced to a difference of opinion between Flemish pacifism and the Walloon emphasis on economic interests. Following a controversial export of firearms by Walloon company FN Herstal to Saudi Arabia, an internal regionalisation took place within the federal government in 1992: Walloon applications for arms export licences were handled by a French-speaking minister, Flemish applications by a Dutch-speaking minister. At the same time, a new legislative framework was introduced with better defined control and sanction mechanisms and an obligation to report on arms exports to the federal parliament.[81] These regulations remained in force until 2002, when a new controversial export of arms – this time to Nepal – appeared on the political agenda. After considerable political commotion, this licence was eventually granted, but it resulted in a new legislative framework in March 2003, in which assessment criteria for licence applications were strengthened and transparency increased. However, during the government negotiations in the summer of 2003 a formal regionalisation of the competence over arms export

controls was decided on. Via the Special Law of August 2003, the competence of licensing foreign arms exports was transferred from the federal level to the regions, with the exception of transactions by the Belgian army and police, which remain under federal oversight.

During almost ten years, the regions exercised this competence on the basis of the federal law of 2003. The Walloon, Flemish and Brussels Capital Region all implemented regional legislation to develop their own arms export control system in 2012. As a consequence, **four arms export control systems are currently in place in Belgium:** three regional systems in Flanders, Wallonia and Brussels Capital Region, and a federal system for international arms trade by Belgian armed forces and police services.

As a result, there is not one Belgian arms export control system. Because most arms exports originate from **Wallonia** and **Flanders**, we further discuss these two arms export control systems in the comparative analysis.

Nature and size of the Belgian defence industry

Since as far back as the Middle Ages, Belgium has been known as an arms-producing region. Although originally there were arms factories in most Belgian trading towns, arms production was heavily concentrated in the region around Liège.[82]

In the 1970s the Belgian defence industry saw strong growth owing to increasing demand from the Belgian armed forces, but also through the export of military equipment. During this decade the Belgian defence industry employed 60,000-70,000 people, mainly in Wallonia, where two-thirds to three-quarters of this employment was located. Firearms, light and heavy munitions, military vehicles and components of fighter aircraft were the most important items produced by the Belgian defence industry. The relaxation of East-West tensions in the following decades had important consequences for Belgium: employment in the defence industry declined steadily, and while in 1980 the employment rate in that industry was 30,000, this number gradually fell to around 7,000 in 2000.[83]

The changing nature of the defence industry, with a rising demand for high-tech products, became perceptible in Belgium during the 1990s: while traditional defence companies were facing difficulties to adapt to the changing realities, these

realities created important opportunities for new high-tech players in the defence market. These new players were mainly concentrated in the Flemish Region, giving the Belgian defence industry a community aspect, with, on the one hand, the traditional defence industry in the Walloon part of the country, and, on the other hand, the new high-tech defence-related industry mainly in Flanders.[84]

Most defence-related companies in Belgium are SMEs, with a quarter of the identified companies having fewer than 20 employees, and only seven with more than 1,000 employees in 2014.[85] According to the BSDI (the lobby group for the Belgian security and defence industry), this sector currently realises annual sales worth €1.5 billion and employs more than 15,000 people.[86] The majority of the turnover (and associated employment) occurs in the Walloon Region; consequently, Walloon arms exports account for most Belgian arms exports. In general, Walloon exports account for 60-75% of Belgian arms exports, and those from the Flemish Region 20-30%. The remainder originate from the Brussels Capital Region and the Belgian armed forces.[87]

According to an analysis carried out by a Belgian research NGO, the Group for Research and Information on Peace and Security (GRIP), four main sub-categories are identified in the Belgian defence-related industry. These categories in decreasing order of importance are:[88]

- firearms and light weapons, munitions, and explosive devices;
- aeronautics, electronics and the space sector;
- mechanical equipment, vehicles and naval vessels; and
- textiles and equipment.

The Walloon and Flemish defence industries differ strongly in terms of the products they manufacture. The Walloon industry mainly manufactures finished and traditional defence products, such as firearms, munitions and explosives. All the companies in the first and most significant sub-category of defence-related companies are situated in the Walloon Region. The FN Herstal group in particular, as a producer of firearms and munitions, is a very important actor and is responsible for a large part of Walloon licensed arms exports. Other important defence companies in the Walloon Region are CMI, Sonaca, Sabiex and Mecar. Because of a major contract in 2014 worth more than €3.2 billion, CMI is listed 97th in SIPRI's 2015 list of the 100 largest arms-producing companies. This contract consists of the delivery of turrets and cannons to General Dynamics Canada for integration in armoured vehicles destined for the Saudi Arabian army.

Importantly, since the end of the 1990's FN Herstal has been fully owned by the Walloon government. The same holds for *Sonaca, a company active in the development, manufacture, and assembly of advanced aerospace structures for the civil, military, and space markets. The Walloon government (92%) and the Belgian federal government (8%) are the shareholders of this company.*[89]

By contrast, the **Flemish defence-related industry is mainly active in the manufacture of high-tech products,** specifically components for larger arms systems. This involves goods such as visual displays, radar and communications equipment, weapons guidance systems, electronics for armoured vehicles and military aircraft, components for unmanned aircraft, etc. The number of Flemish companies active in the defence-related industry is limited and most companies do not concentrate primarily on the defence market.[90] The implications of this for the Flemish defence industry are twofold. Firstly, the industry is strongly focused on exports, because of very limited domestic demand. Secondly, Flemish companies do not often supply their products directly to governments or armed forces. Most Flemish defence-related products are transferred to defence companies in other (Western) countries, where they are integrated into larger weapons systems.[91]

3.2.2 Germany

Historical-political context

The production of and foreign trade in military equipment in Germany has been fundamentally affected by recent history. Up to and during the Second World War Germany was a very significant arms producer, but in 1945 a ban was imposed on the production of arms. The country was the defeated party in the war, was subsequently partitioned into two states, and as a consequence did not reappear as an independent actor in international politics until the mid-1960s. In the mid-1950s the production of military equipment restarted in West Germany, but it only became possible to export arms from the 1960s. West Germany, however, adhered to a minimalist foreign policy in which principles such as multilateralism, international cooperation, the primacy of international law, and the aims of international peace and stability were prioritised. The country consequently imposed strict limits on arms exports.[92] This resulted from the changed national identity after the Second World War, in which European integration was seen as vital to German interests. The emphasis in German foreign policy is currently still on multilateralism and a far-reaching Europeanisation.[93] Cooperation with other Western governments, especially those of the United States and France, is therefore an important element of German foreign policy.[94]

Another consequence of the political context in the decades after the Second World War was that the German defence industry supplied defence products to other NATO Member States and 'NATO-equivalent' countries.

In the mid-1990s, a growing call for the dismantling of existing control systems arose in Germany, in order to support the restructuring of the defence industry in the post-Cold War era and to facilitate cross-border cooperation. The fact that the German system was felt to be considerably stricter than those of other European countries, putting German companies at a competitive disadvantage, was the rationale behind this call. As a consequence, the German government supported German companies in attempts to harmonise the arms export control system at the European level. The end of the Cold War and the reunification of Germany also led to the extent of Germany's presence in international politics increasing from the 1990s.

The subject of arms exports occupies an important position in the social and political debate in Germany. Discussions involve the question of greater transparency, as well as specific export dossiers, particularly regarding countries in the Middle East (Saudi Arabia and Qatar). Since 2011 there have been lively debates in the German parliament on arms exports, especially in terms of greater transparency. The background to this was the lack of information sharing by the government on the export of tanks to Saudi Arabia. The information submitted to the German parliament was so incomplete that it was not even clear whether a licence for these exports had been issued or not. Discontent about government communications on arms exports was shared across party lines and led to a political consensus on the need for greater transparency.

Following a recent scandal around firearms supplied to Mexico, strict *post-shipment controls were introduced. Sigmar Gabriel, the former minister of economic affairs who was responsible for this policy area until January 2017, was very outspoken on this subject and critical of certain exports, especially to countries in the Middle East.*[95] Under his tenure, publicly accessible information was extended and various initiatives announced, such as the development of a new legal framework for which a consultation process was introduced, although it is highly unlikely that new legislation will be voted on before national elections in the autumn of 2017.[96]

Nature and size of the German defence industry

For historical reasons, the German defence industry is heavily **privatised.**[97] As a result, the tendency to privatise defence companies in other European countries

had little effect on the German defence industry. This industry produces a wide range of both finished military goods and components. The most important categories of military equipment produced in Germany are tanks and armoured vehicles and their components, military aircraft and helicopters (and components), submarines, warships, production facilities and technology, munitions, and electronics. Armoured vehicles (and components) account for a large part of German exports (€15.1 billion in 1998-2013). In addition, warships (€7.1 billion), military aircraft (€3.2 billion) and electronics (€5 billion) represent a significant part of German arms exports.

Three German companies were represented in SIPRI's list of the top 100 arms producers in 2015: Rheinmetall (30th position), ThyssenKrupp (46th) and Kraus-Maffei Wegmann (85th). The trans-European company Airbus (7th) is also an important player in the German market.[98] According to SIPRI, this puts Germany among the **global top 5** largest exporters of military equipment. In the period 2007-2011 the country accounted for 9.4% of global exports of conventional arms; in the period 2012-2016 this share declined to 5.6%, making it fifth in the world, after the United States, the Russian Federation, China and France.

The most important **customers** of the German defence industry in 2012-2016 were South Korea (13% of all exports), Greece (12%) and the United States (9.7%). More generally, EU countries are collectively by far the largest recipients of German defence products (€21.2 billion in 1998-2013), followed by North America (€8.5 billion) and the Middle East (€7.8 billion).[99]

Germany's exports of military equipment have recently shown a strong **recovery**. The value of its exports doubled in 2015 compared to 2014, from €6.5 billion in 2014 (of which €4 billion came from individual licences and €2.5 billion from global licences) to almost €13 billion in 2015 (€7.9 billion via individual and €5 billion via global licences).[100] Moreover, this trend appeared to continue in the first half of 2016, with €4.03 billion worth of approved individual licences (compared with €3.46 billion in the first six months of 2015).[101]

3.2.3 France

Historical-political context

The position of France during the Cold War period and traditional feelings of chauvinism in French society determine the way in which the defence industry is organised and how French society views the subject of arms exports (controls). France

still sees itself as a global power. Consequently, three principles are central to the policy and the political-cultural consciousness of French society: (1) national independence and sovereignty; (2) activism on the global stage; and (3) maintaining a global presence.[102] These principles, which play an important role in French defence and foreign policy, have a strong impact on the nature and size of the French defence industry, the primary markets for French military products, and the political and public discourse on arms export controls.

For a long time the French army was the most important customer of the French defence industry. At the end of the Cold War France spent around 3.5% of GDP on defence, amounting to around €7 billion per year. This share has gradually declined since the beginning of the 1990s to 2% of GDP in 2015 and around €6 billion per year.[103] Confronted with declining domestic demand, the French government played an active role in guaranteeing the consolidation of production capacity; besides this, the government actively stimulated exports of military products, for example by entering into strategic partnerships with various countries. In 2016, for example, a partnership with Egypt was established, and France is currently the most important supplier of military products to that country.[104]

Arms exports play a marginal part in the social and political debate in France. Public discourse is dominated mainly by the concept of independence, in which France's own national strategic foreign policy is key to French government policy. Strong feelings of national pride and chauvinism are therefore present across all political parties. Both on the left and right of the political spectrum there is a broad consensus to retain and strengthen the French defence-related industrial base.[105] Companies and trade unions emphasise employment and the economic benefits of the defence industry. Some resistance is arising in society at large, but very little is said about the ethical aspects of the foreign arms trade. The economic and political interests of the French state take priority.

Nature and size of the French defence industry

The French defence industry is among the few that are able to produce the **entire range** of important military products. All types of conventional arms systems can be produced in the industry, from armoured vehicles to fighter aircraft, military vessels and submarines, etc. According to SIPRI, this puts France among the global top 5 arms exporters: in the period 2012-2016 its arms constituted 6% of the global trade in military equipment.[106] The total size of its annual arms exports amounts to €6-8 billion.[107]

The Conseil des Industries de Défense Françaises (the formal representative of the French defence industry) estimates that around 165,000 jobs are connected with the country's defence industry, which amounts to around 4% of all the jobs in industry.[108] Other sources suggest a lower figure, at 47,000 direct and 67,000 indirect jobs. In 2014, 659 French SMEs were said to be involved in the export of military equipment. Most French arms exports are produced by a few very large companies. Various French companies are among SIPRI's 2015 list of the top 100 arms producers: Thales (11th position), Safran (14th), DCNS (24th), CEA (45th), Dassault Aviation (47th) and Nexter Systems (63rd).[109] In addition, the French government is a significant shareholder in the Airbus Group (7th) and MBDA (27th). An important feature of most of these large French companies is that the French state is either a significant shareholder or sole owner. An example from the first category is Thales (and Airbus), while companies such as DCNS and Nexter Systems are wholly owned by the French state.

French companies mainly export aircraft, and aerospace and marine-related products. The export of land vehicles also plays an important part, but in this area French companies face severe competition from other, non-French companies. As regards foreign markets, it is notable that French defence products are relatively weak in the European market: only Greece and Finland are important recipients of complete French arms systems. Including components and sub-systems, four European countries (the UK, Spain, Germany and Italy) were among the top 20 most important recipient countries of French defence products in the period 2006-2016, albeit in 10th, 17th, 18th and 20th place, respectively. The United States is in 7th place on this list.

Consequently, French companies export mainly to non-Western countries, with the Middle East and North Africa being the most important markets for French military equipment. Saudi Arabia, Qatar and Egypt were the three most important recipient countries of French military equipment in the period 2006-2015, followed by Brazil, India and the UAE. Around 68% of all French exports go to the Middle East and Asia.[110]

3.2.4 Hungary

Historical-political context

The Cold War and Hungary's membership of the Warsaw Pact hugely impacted the defence industry and foreign arms trade. Under the communist regime the Hungarian defence industry was centralised and state owned. The collapse of the

Eastern Bloc resulted in the privatisation of defence-related companies to an even greater extent than in Western countries, while a new legal framework was also developed.

Since the end of the 1990s both mainstream society and the successive Hungarian parliaments and governments have advocated stricter control of arms exports, especially of small arms and light weapons. There is resistance from both left and right to increases in defence budgets, particularly in times of economic cutbacks. One of the consequences of this is that, compared with other East European countries, the Hungarian defence industry receives relatively little support or low subsidies from the Hungarian government. However, parliamentary involvement in and control of Hungarian arms exports remain relatively limited.

Nature and size of the Hungarian defence industry

During the Cold War Hungary had an extensive defence industry, with products such as telecommunications and transport equipment, and industrial chemicals. In the 1980s the industry was worth around $370 million, with about 20,000 employees and accounting for 3% of GDP.[111] The size of the Hungarian defence industry is currently limited, particularly in comparison with its importance during the Cold War. Recently, however, a gradual growth in arms exports has become noticeable. While at the start of the 21st century Hungary exported around €10-15 million worth of defence-related equipment, this increased to over €30 million in 2013 and 2014. The number of employees in the defence industry has been fluctuating around 1,500-2,000 since 2000. According to the Hungarian government, in 2014, 496 companies had permission to develop their military industrial activity, with 205 of them involved in the foreign arms trade.[112]

After the end of the 1990s the main products exported from Hungary were munitions and firearms, fire-control systems, radar systems, land vehicles, aircraft parts, software, bombs and missiles. In the period 2003-2013 almost half of Hungarian arms exports were munitions (41.3%), followed by vehicles and tanks (10.6%), firearms (10.1%), aircraft components (8.6%), explosives (6.9%) and software (4.6%).[113]

Hungarian defence-related products are mainly exported to other Western countries. Exports to other European countries and to the United States represent over 80% of all arms exports from Hungary. Almost the whole of the remainder of the country's exports go to Asian countries. The most important countries that imported Hungarian products in the period 2003-2013 were the United States (51.1%), Germany (8.5%), Ethiopia (7.1%), the Czech Republic (6.7%) and the UK (4.8%).[114]

3.2.5 Netherlands

Historical-political context

Dutch foreign policy is traditionally characterised by two competing elements: on the one hand, the mercantile element and Dutch participation in global trade, and on the other hand, the desire to promote moral standards at the global level.[115] Since the 1970s the Dutch government, which wishes to profile the Netherlands internationally as an ethical 'model country', has been aiming to develop a more normative approach to arms export control. The criterion of 'regional tensions' was included in the assessment of licence applications in 1975, with the aim of arriving at a more restrictive and ethical decision.[116] A subsequent memorandum from the Dutch government of 1979 refers explicitly to criteria such as arms embargoes and violations of human rights in the country of end use as criteria to be taken into account in the assessment of licence applications.[117] The Dutch government therefore traditionally focuses on a restrictive arms export control policy in which peace takes priority over economic interests.

In addition, the Second World War fundamentally changed Dutch thinking: the country traditionally operated a policy of neutrality/independence with regard to its own national security. The events of the 1940s fundamentally changed this perception, leading to a shift towards the need for collective security. The Netherlands could no longer guarantee its own security, and so committed itself heavily to international cooperation and integration.[118] Consequently, the country joined NATO and the EU as the best guarantee of national security. Based on this vision, the Netherlands aims for the Europeanisation of the arms industry, albeit always within the context of NATO cooperation.

Traditionally, both mainstream society and the Dutch parliament pay considerable attention to the control of arms exports. For example, a huge social discussion arose in 2011, during the Arab Spring. In various countries in the Middle East and North Africa (including Egypt and Bahrain) armoured vehicles that had been sold by the Dutch army as surplus equipment were deployed against street protests. This led to a fierce debate in the Dutch parliament and to promises of greater transparency. The debate recently flared up again following arms-related exports to Saudi Arabia, in particular in the context of that country's role in the civil war in Yemen since 2015. A resolution was discussed in parliament to impose a de facto Dutch arms embargo on Saudi Arabia. However, it was not approved. The Dutch government did not support it either, being of the opinion that other European countries would simply supply the equipment. The competent minister therefore called for stronger European cooperation and further European harmonisation.

Nature and size of the Dutch defence industry

Apart from a few exceptions, the Dutch defence- and security-related industry consists of mainly civilian companies and research institutes that specialise to some extent in military production. In the Netherlands, 651 companies are involved in the defence- and security-related industry. Through the growth in employment, especially in services and ICT, the number of companies in the defence-related sector has increased significantly in recent years.[119] This sector largely consists of SMEs that are mainly active in the supply chains of the large defence companies in Europe and the United States. The number of jobs involved is estimated at around 24,800, of which almost 8,000 relate to employment in the R&D sector.[120] It is estimated that military production accounts for total Dutch sales of €4.5 billion per year. This forms an average share of around 15% of the total sales of the relevant companies and institutes. Of the total exports by the Dutch defence- and security-related industry in 2014, around €3.1 billion worth was classified as military exports.[121]

The total value of licences issued in 2015 amounted to €813 million. This is less than in 2014, when the total value amounted to €2.1 billion, but is more in line with the 2013 figure, when defence-related exports had a total value of €963.5 million. Dutch exports of military products mainly consist of components. For example, in 2014 a significant part of the licensed exports related to a global licence for the export of components for the F35 Lightning II (Joint Strike Fighter) to the United States, Italy and Turkey. It is only in the area of naval vessels that the Dutch industry is capable of exporting fully finished military equipment, such as patrol ships, light patrol vessels and armed supply ships.

With this emphasis on the production of components and the importance of cooperation within the EU and NATO, the Dutch defence industry focuses to a considerable degree on exports to Western countries. In 2015 the most important recipient countries of Dutch exports were the United States (18%), the EU (20%), and other European countries and NATO Member States (24%). The Middle East is fourth, with 16% of licensed Dutch exports. The latter mainly relates to exports of components in 2015 for patrol ships built in Romania for the UAE, at a Romanian shipyard of the Dutch company Damen Shipyards.

A significant part of Dutch arms exports involve the sale of surplus military equipment by the Dutch army. In 2013 the army was responsible for 12% of Dutch defence-related exports, while in 2014, 20% of all Dutch arms exports consisted of surplus military equipment. In effect, this involves components for fighter aircraft, helicopters, howitzers, etc., but also complete arms systems, including armoured vehicles, minesweepers, trucks and F-16 fighter jets.

3.2.6 Portugal

Historical-political context

In the decades after the Second World War Portugal was embroiled in various colonial wars, particularly in Africa. These wars attracted international protests, and the United States, among others, imposed an arms embargo on Portugal. The Portuguese state could, of course, still purchase some products from other European countries, but felt obliged to develop its own industrial base in order to be self-sufficient, especially in terms of its own infantry equipment. Various state companies were set up to that end.

The result today is that arms export controls and the defence industry are still very much under the control of the Portuguese government, with the Ministry of Defence being responsible for arms export controls. Only companies with prior permission from the ministry may be active in this area. Most of them have a more-or-less strong government participation via the holding company EMPORDEF (Empresa Portuguesa de Defesa). At the same time, Portugal attaches great importance to European integration and is traditionally a supporter of increasing Europeanisation. The country viewed entry into the EU as the ideal political choice, as an alternative to the totalitarian, closed and unstable system that Portugal knew during the dictatorship that lasted until 1974.[122]

In societal and political debates, arms exports are not a significant topic in Portugal. In the competent Portuguese parliamentary commission almost no questions are asked about arms exports, and in the social debate such a discussion almost never arises.

Nature and size of the Portuguese defence industry

Portugal's arms exports have declined considerably since the 1980s. In the last decade of the Cold War, because of its national defence industry and the ending of the colonial wars in the 1970s, Portugal was actively engaged in exporting surplus production of defence-related equipment. In this period the country annually exported military equipment worth over €300 million. In later years this sum declined sharply. For example, annual exports of military equipment in the period 2010-2012 fluctuated around €20-30 million. In 2013 and 2014 the value of these exports increased, with defence-related products worth around €100 million being exported.[123]

In terms of the products exported, around half of their value is related to military aircraft and components. Portugal does not produce complete aircraft, but mainly components of aircraft intended for the military aircraft of the Brazilian aircraft company Embraer. The two other categories of products that were exported from Portugal in 2014 were (components for) armoured vehicles (ML6 – 40%) and electronics (ML11 – 6%). The most important recipient countries of Portuguese military products are Spain and the UK in the EU, and Brazil and the United States outside the EU.

3.2.7 United Kingdom

Historical-political context

In the UK, the political and cultural context of arms export controls is heavily influenced by the Second World War and the subsequent Cold War. The UK may have emerged as victor from the Second World War, but in the following years its empire and dominant position on the world stage gradually disintegrated. Nevertheless, the idea of British 'exceptionalism' remained, characterised by a specific vision of national sovereignty, with the emphasis on parliamentary accountability and the independence of its own foreign policy.[124] In the second half of the 20th century various British political leaders tried to strengthen the UK's international political power. Motivated by this approach, the British government invested heavily in the country's own defence industry and helped to promote arms exports.

An important turning point in dealing with arms exports occurred in the 1990s. After the Gulf War of 1991, the apparently inadequate system for the control of arms exports became a very important political issue. British soldiers found themselves confronted by an Iraqi army that fought with British military equipment, the result of Saddam Hussein's extensive procurement of such equipment in earlier years. This scandal led to the establishment of a committee of inquiry. The committee's final report in 1996 exposed several problems in the existing system. In the lead-up to the elections in 1997, arms export controls were a central election issue, and the Labour Party, which went on to win the elections, promised a more ethical approach to arms export controls. After Labour's victory a new legal framework for arms export controls was developed in 2002. The new system replaced the old regulations, which had not changed substantially since 1939. With this new legal framework, additional assessment criteria were introduced and the transparency of the system was significantly increased.

On 23 June 2016 British voters decided in a referendum to leave the EU. The UK parliament had promised in advance to abide by the result of this referendum, which implies that the UK will indeed exit the EU in the near future. What the implications of this will be for the country's arms export control system remains to be seen.[a]

In recent years arms exports have taken a prominent place in the political and social debate in the UK. In the 1990s they even formed a central part of Labour's campaign for the 1997 elections, as a reaction to the 'arms for Iraq' scandal after the first Gulf War. There has also been a strong parliamentary and social focus in recent years on arms exports, largely as a consequence of events during the Arab Spring in the Middle East and North Africa. Since 2011 the government has been criticised by various politicians and NGOs for doing too little to reform the arms export control system. This is mainly because the Middle East in general and Saudi Arabia in particular are by far the UK's most important arms trading partners. In the years following the Arab Spring, various large contracts were signed with countries in this region. However, criticism intensified after the start of the war in Yemen in 2015 and the violations of human rights by the coalition led by Saudi Arabia. The UK nevertheless continues to export arms to that country, and political and social criticism continues to grow. Legal steps have been taken in mainstream society, with a legal opinion issued in December 2015 by a prominent law firm concerning the legality of such exports and the launch of a legal procedure in the High Court by the Campaign Against the Arms Trade in March 2016.

During the summer of 2016 exports of military equipment were again an important issue in the political debate in the UK. The supply of arms to Saudi Arabia while that country was involved in the conflict in Yemen continued to create considerable controversy. For example, it appeared that just before the summer parliamentary recess the British government had changed several answers to written questions: the statement that its findings had shown that Saudi Arabia had committed no violations of international human rights law was modified to state that it had no data on human rights violations.[125] While it originally appeared that the Committees on Arms Export Controls (CAEC) would call on the government to suspend arms supplies to Saudi Arabia, the four parliamentary committees that form the CAEC were unable to reach consensus on collective recommendations.[126] Two committees – the International Development Committee and the Business and Innovation Committee – have advised the British government to suspend the sale of military equipment to Saudi Arabia;[127] the Foreign Affairs Committee only requests an independent UN

a For reflections on the impact of Britain's exit from the EU (colloquially known as Brexit) on arms export controls, see https://www.sipri.org/commentary/topical-backgrounder/2016/brexit-and-export-controls-entering-uncharted-waters.

commission of inquiry and more active control by the British government.[128] The fourth committee – Defence – achieved no consensus on a collective report.

Nature and size of the UK defence industry

The British defence industry is one of the largest in the world. Nine British companies are represented among SIPRI's 2015 list of the top 100 arms producers, including BAE Systems (3rd position), Rolls-Royce (16th), Babcock International Group (22nd) and Serco (55th).[129] According to the sector organisation – Aerospace, Defence, Security and Space (ADS) – in 2015 the British defence industry achieved sales of £24 billion and had around 142,000 direct employees.[130] BAE Systems is by far the largest employer, with around 100,000 employees. Besides these large companies, over 5,000 SMEs are said to be directly involved in the defence industry. Although most British defence companies were traditionally state owned, in the 1980s under Prime Minister Margaret Thatcher most of them were privatised.

Based on SIPRI analyses, in the period 2005-2014 the UK accounted for 4.4% of global exports of military equipment, putting it currently 6th in the world, after the United States, the Russian Federation, China, France and Germany.[131] The British government uses a different approach and includes all military equipment and related products and services to measures the country's defence output, while SIPRI only looks at large conventional weapons systems and specific components. Based on internal data, British industry won orders worth €10.9 billion in 2014, making it the second most important player on the global market after the United States, with a market share of 16%. Military aircraft are the most important category of defence products exported by the UK. More than half of licensed exports involve these kinds of products, and the British government estimates that 66% of all defence-related exports come from the aviation sector. Other products that are exported are firearms, heavy munitions (bombs and missiles) and warships.

The Middle East, North America and Asia are the most important markets for British defence products. According to SIPRI data, Saudi Arabia in particular (48%), India (11%) and Indonesia (9%) received the most defence products from the UK in the period 2012-2016.[132]

3.2.8 Sweden

Historical-political context

Before, during and after the Second World War (armed) neutrality formed the basis of Swedish foreign policy.[133] Sweden remained neutral during the war and subsequently did not join either of the two major military alliances, i.e. NATO or the Warsaw Pact. This decision had a significant impact on the shape of the Swedish defence industry, resulting in the development of a strong national defence industry with only limited input from foreign suppliers. In the purchase of defence products the Swedish government operated a 'Sweden first' policy whereby Swedish companies were favoured in public tenders and the Swedish government provided subsidies for the development of new arms systems.[134]

A second result of this neutrality policy was that Sweden imposed strict restrictions on countries to which arms could be exported. This enabled the Swedish government to give priority to normative principles (humanitarian aid; the principles of good governance, peace and stability) in the assessment of export licence applications.

After the Cold War the defence budget was gradually reduced, which led to a gradual scaling down of the 'Sweden first' principle. Under a new law passed in 2008 new principles were adopted for the procurement of military equipment by the Swedish army. Preference shifted towards purchasing fully developed systems from abroad, even if the Swedish defence industry was able to develop and manufacture them. Swedish investments in the development of new arms were to take place as much as possible in cooperation with other states, preferably EU Member States. To compensate for reduced government spending, the Swedish government supported defence companies with export contracts. However, the new coalition government that took office in 2014 put a stop to this approach by abolishing the state agency that had previously been set up for this purpose.

Arms exports have played an important part in Swedish political and social debates for a long time. An important topic in the public debate is that of the control of re-exports. In very recent years in particular scandals have surfaced concerning Swedish products found with the Revolutionary Armed Forces of Colombia (FARC) guerrilla movement (via Venezuela), the Myanmar army (via India) and the Iraqi army (via the Czech Republic). Another important feature of parliamentary debates since the Arab Spring has been relations with Saudi Arabia. In 2005 the Swedish government had signed a memorandum of understanding (MoU) with the Saudi government for military cooperation. In 2012 it was revealed that within this

framework the Swedish government had been negotiating to provide support for the construction of a factory for the production of anti-tank missiles in Saudi Arabia. In 2015 the government formally decided against renewing this preferential agreement with Saudi Arabia, although many aspects of it were already no longer active. Arms exports to Saudi Arabia are still possible, however.

An illustration of the importance of this topic in Swedish politics is the fact that in March 2012 the competent minister, Sten Tolgfors, was forced to resign following a major controversy around the reported MoU with Saudi Arabia. The topic therefore appears to weigh heavily in Swedish politics if a minister is forced to resign over it. In addition, a parliamentary committee was set up in 2012 to evaluate the country's arms export control policy. In its final report of June 2015 this committee referred among other things to the need for a 'democracy criterion' for the assessment of licence applications, for clearer definitions and for measures to achieve greater transparency.[135] Criticism came from all sides regarding the committee's recommendations, but the Swedish government announced that it would develop a new legal framework in 2017 based on the committee's recommendations.[136]

Nature and size of the Swedish defence industry

Although during the Cold War most Swedish defence companies were state controlled, the end of the Cold War changed their ownership structures. As a consequence of the trend towards privatisation, most of these companies passed into foreign hands. Currently five large defence companies are active in Sweden: Saab, BAE Systems Bofors, BAE Systems Hägglunds, Kockums and Nammo Sweden. Saab produces the Gripen NG fighter aircraft and other military equipment, such as radars and sensors, marine combat systems, anti-ship missiles, surface-to-air missiles, anti-tank missiles and recoilless firearms. BAE Systems Bofors produces artillery, marine firearms and munitions. BAE Systems Hägglunds produces armoured vehicles and specialised vehicles. Kockums produces small and medium-sized submarines, corvettes, patrol boats and submersible motors. Lastly, Nammo Sweden produces munitions.

In 2013 the Swedish defence industry employed around 50,000 people, of whom 20,000 were directly involved in the manufacture of military products. The largest employer is Saab, with 14,700 employees in 2014.

In 33rd place, Saab is the only Swedish company on SIPRI's 2015 list of the top 100 arms producers.[137] According to SIPRI, in the period 2006-2016 Sweden accounted for 1.6% of global exports of conventional arms systems. This puts the country in

12th place globally. In the period 2005-2015 the value of licensed exports from Sweden fluctuated between €800 million and €1.4 billion. Exports reached a high point in the period 2009-2011 as the result of supplies of larger arms systems to Denmark, the Netherlands, Finland, the UAE, Pakistan, Saudi Arabia, Switzerland, South Africa and Thailand. Because most of these orders have been completed, the value of Swedish exports declined somewhat in the period 2012-2015. But recently several new large contracts have been signed, such as the sale of 36 Saab Gripen fighter aircraft to Brazil worth $4.7 billion in September 2015, so that there is a real possibility of this value rising again in the coming years.

Exports to other EU Member States and to traditional allies such as Canada, the United States and South Korea account for over 80% of Swedish global exports. The other 20% goes to around 20 other countries, of which India and Thailand are the most important recipients. In 2015 Norway, the United States, Finland, India and Germany were the most important recipients of Swedish military products. Between 2014 and 2015 exports to the Middle East and North Africa declined by 40%, but many types of defence-related products are still exported to Qatar, the UAE, Saudi Arabia, Kuwait, Algeria and Tunisia.

3.3 Institutional framework

Arms export controls do not appear in an institutional vacuum. In every national system this issue (and the government bodies directly involved) comes under a specific policy domain. The policy domain within which arms export controls are organised in practice can indicate how arms exports are perceived in a particular country. In this part we analyse, firstly, which policy domain is primarily involved in the assessment of licence applications. Secondly, we examine the other policy areas involved in the arms export control systems in the various EU Member States and which roles these government actors fulfil in the assessment procedures for licence applications.

1. **The arms export licensing authorities in the various Member States fall under different policy domains.** In four of the nine surveyed export control systems (*Germany, Hungary, the UK and Wallonia), the licensing authority falls within the policy domain* of economic affairs or trade.[138] Defence is the assigned policy domain for arms export controls in two countries (*France and Portugal).*[139] In *Flanders,* the licensing authority falls under the foreign affairs policy domain. This was also the case in *Sweden* for a long time, but since May 2016 the Ministry of Justice has

been responsible for this area.[140] In *the Netherlands*, the licensing authority falls under the Ministry of Finance.[141]

Table 3.1: Institutional organisation of arms export controls: licencing authority and policy domains

	Licensing Authority	Policy domain
Flanders	Dienst Controle Strategische Goederen (dCSG)	Foreign Policy
France	Direction Générale de l'armement (DGA)	Defence
Germany	Weapons of War: Ministry of Economic Affairs Other weaponry: Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA)	Economic Affairs and Energy
Hungary	Haditechnikai és Exportellenőrzési Hatóság	Economic Affairs
Netherlands	Centrale Dienst Invoer en Uitvoer (CDIU)	Finance
Portugal	Direcção-Geral de Armamento e Infra-Estruturas de Defesa (DGAIED)	Defence
Sweden	Inspektionen för Strategiska Produkten (ISP)	Justice and Migration
UK	Export Control Organisation (ECO)	Trade, energy and industrial strategy
Wallonia	Direction des Licences d'armes et des biens à double usage	Economic Affairs and Industry

2. In *Flanders the competent authority is part of the Department of Foreign Affairs.*[a] Although the dCSG can call on the services of the (federal) Ministry of Foreign Affairs [142], no other departments or policy domains are involved in the licensing procedure. This is in contrast to the other systems studied, in which **several other policy domains are involved in the assessment of licence applications.**

This is clearly the case in *France*. Although the relevant French licensing authority (DGA) is part of the Ministry of Defence, the prime minister decides on the granting of licences, and the licences themselves are issued by the minister responsible for Customs. Various policy domains are therefore involved in the licensing process.

a In the Belgian federal system the principle of *'in foro interno, in foro externo'* is used to guide the foreign policy of the federal state and the regional governments. This principle implies that the regional governments have full competence in foreign policy in the policy domains that fall under their competence internally. In other words, for policy domains such as education, culture, the environment, foreign trade and the foreign arms trade, the regions can develop their own sovereign foreign policy.

This is reflected in the *Comité Interministérielle pour l'Etude de l'Exportation de Matériels de Guerre* (CIEEMG), which decides on all licence applications. This inter-ministerial committee advises the prime minister and comprises representatives of the ministries of Defence, Foreign Affairs and Economic Affairs. Each ministry evaluates the licence applications on the basis of its own expertise. The Ministry of Defence analyses the strategic and technological impact and possible operational and possible risks of the potential exports for its own and allied armed forces. The Ministry of Foreign Affairs analyses the geostrategic impact of the exports and monitors the relationship between the licensing policy and France's wider foreign policy and its international engagements. The Ministry of Economic Affairs analyses whether the recipient country possesses the necessary financial capacity to pay for the exported goods.[143]

In *Germany,* the licensing procedure depends of the nature of the products concerned. The German arms control system distinguishes 'weapons of war' *('Kriegswaffen')* and 'other weaponry' *('sonstigen Rüstungsgüter')* (see sec. 3.4.2.2). For 'other weaponry', BAFA is the licensing authority, which falls under the competence of the Ministry of Economic Affairs. For 'weapons of war', the Ministry of Economic Affairs and Energy is the licensing authority (in consultation with the ministries of Defence and Foreign Affairs). For the most sensitive applications (owing to the nature of the products, the size of the order or the country of destination) or if there is no agreement among the various ministries concerned, the dossier goes to the Federal Security Council ('Bundessicherheitsrat'). This is chaired by the chancellor, and the ministers of Defence, Economic Affairs, Foreign Affairs, the Interior, Finance, Justice, and Economic Cooperation and Development form part of the council.[144]

In a number of other countries surveyed other policy domains are only involved in cases of sensitive dossiers.

– For example, in the Netherlands, the licensing authority, the CDIU (which falls under the Department of Customs), forwards sensitive applications to the International Trade Policy and Economic Governance Department of the Ministry of Foreign Affairs. In these cases the Security Policy Department evaluates the license application in light of the eight European assessment criteria. If the recipient country is considered to be a developing country,[a] additional advice is also obtained from the Directorate-General for International Cooperation and

a More specifically, when the recipient country is included in one of the three categories of the OECD-DAC list.

the Directorate-General for Political Affairs. The three last-mentioned departments fall under the Ministry of Foreign Affairs.[145]

- In *Sweden*, licence applications 'of primary or specific importance' are passed to the Ministry of Foreign Affairs. For licence applications of 'special importance' (e.g. applications for exports to countries not dealt with previously) advice is also obtained from the Export Control Council, an advisory body formed by representatives of the political parties in the Swedish parliament, the Ministry of Foreign Affairs and the Ministry of Defence (see also sec. 3.7.2).[146]

- In *Wallonia*, advice from other departments (International/Foreign Affairs) is necessary in case of 'sensitive' and 'very sensitive' licence applications. These account for about 25% of all licence applications. In the latter case, the competent minister should explicitly motivate why he decides to overrule the advice of the Consultative Commission, if that is the case.

3. **In most of the countries surveyed, other ministries or agencies also play a supporting role** by assisting the licensing authority with the provision of advice or information. In Sweden and Flanders, however, that is not the case. In Sweden, this was a deliberate decision: to guarantee the autonomy of the licensing authority (the ISP), the Swedish legislature considered it necessary to formally exclude other ministries and agencies from the licensing process. Nevertheless, the ISP retains the right to consult other government bodies in order to obtain relevant information.[147]

Figures 3.1 to 3.9 show in schematic form the procedures for the nine systems surveyed.

Figure 3.1: Institutional framework for arms export control in Flanders

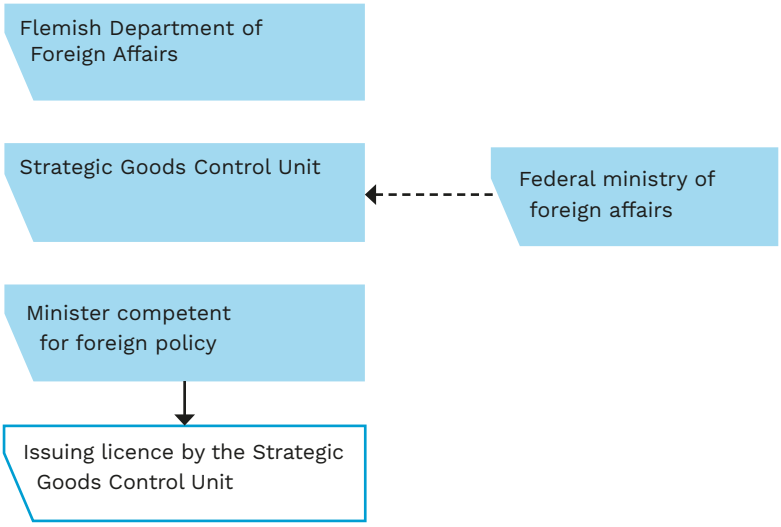


Figure 3.2. Institutional framework for arms export control in Wallonia

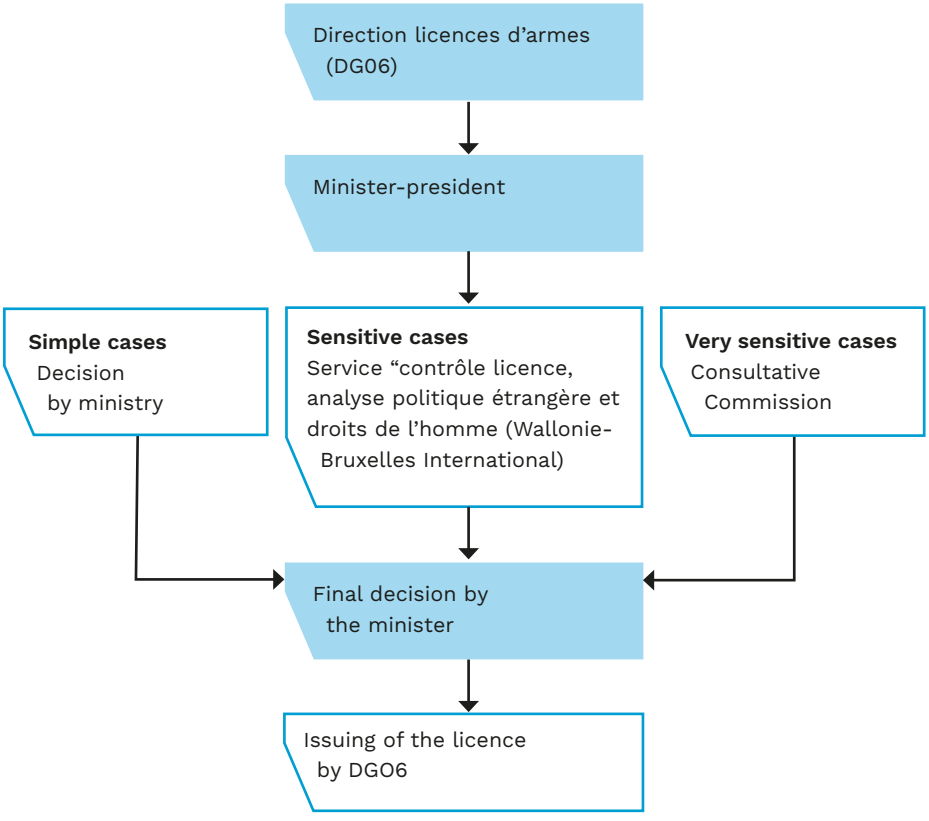


Figure 3.3: Institutional framework for arms export control in France

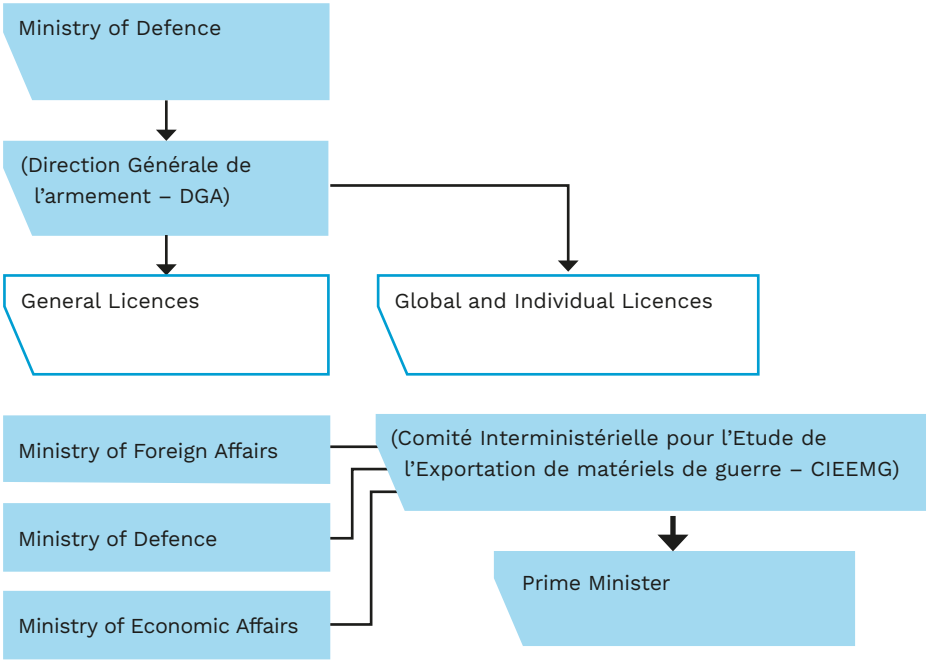


Figure 3.4: Institutional framework for arms export control in the Netherlands

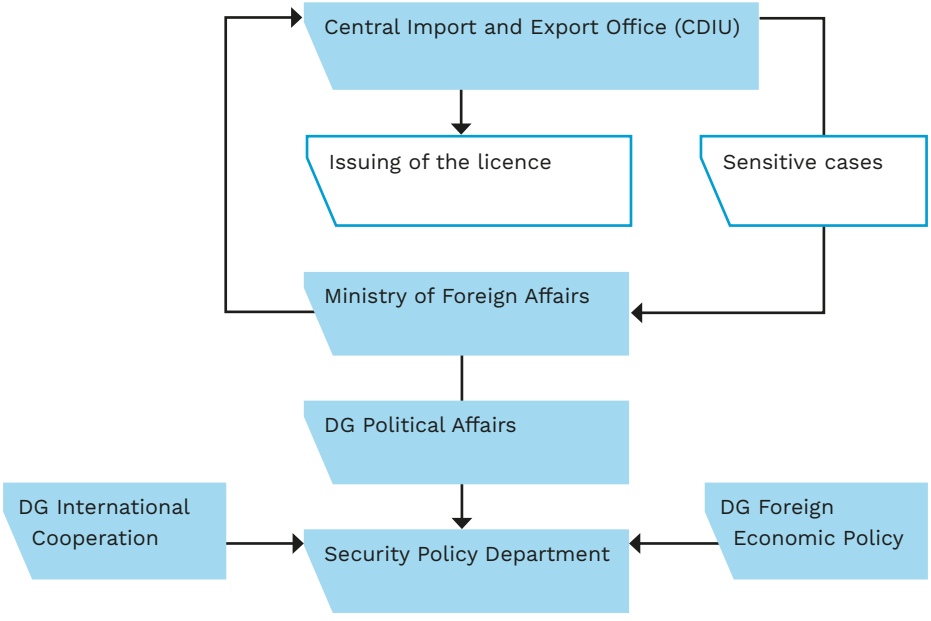


Figure 3.5: Institutional framework for arms export control in Portugal

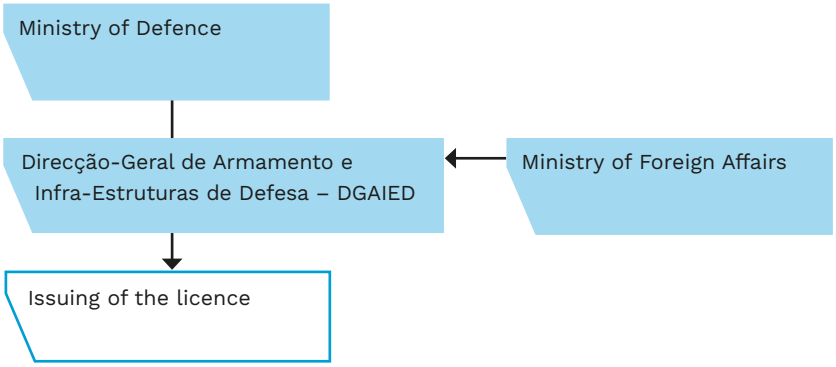


Figure 3.6: Institutional framework for arms export control in the UK

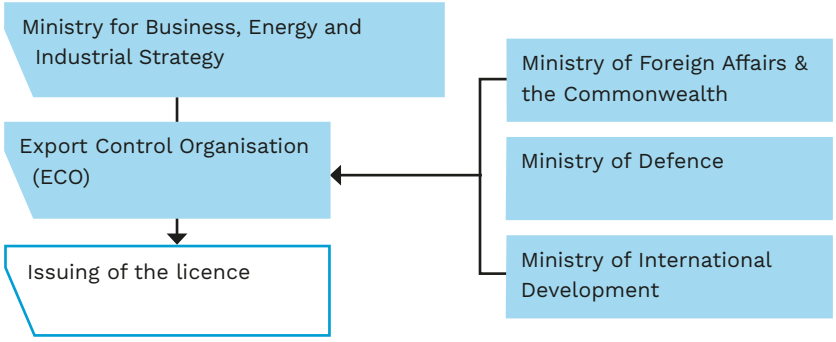


Figure 3.7: Institutional framework for arms export control in Sweden

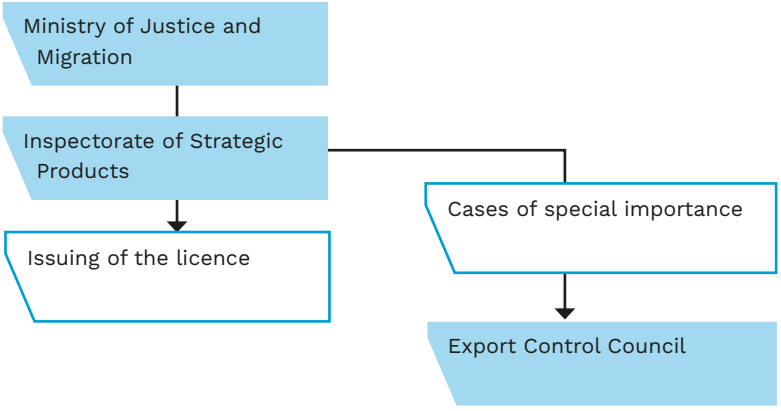


Figure 3.8: Institutional framework for arms export control in Hungary

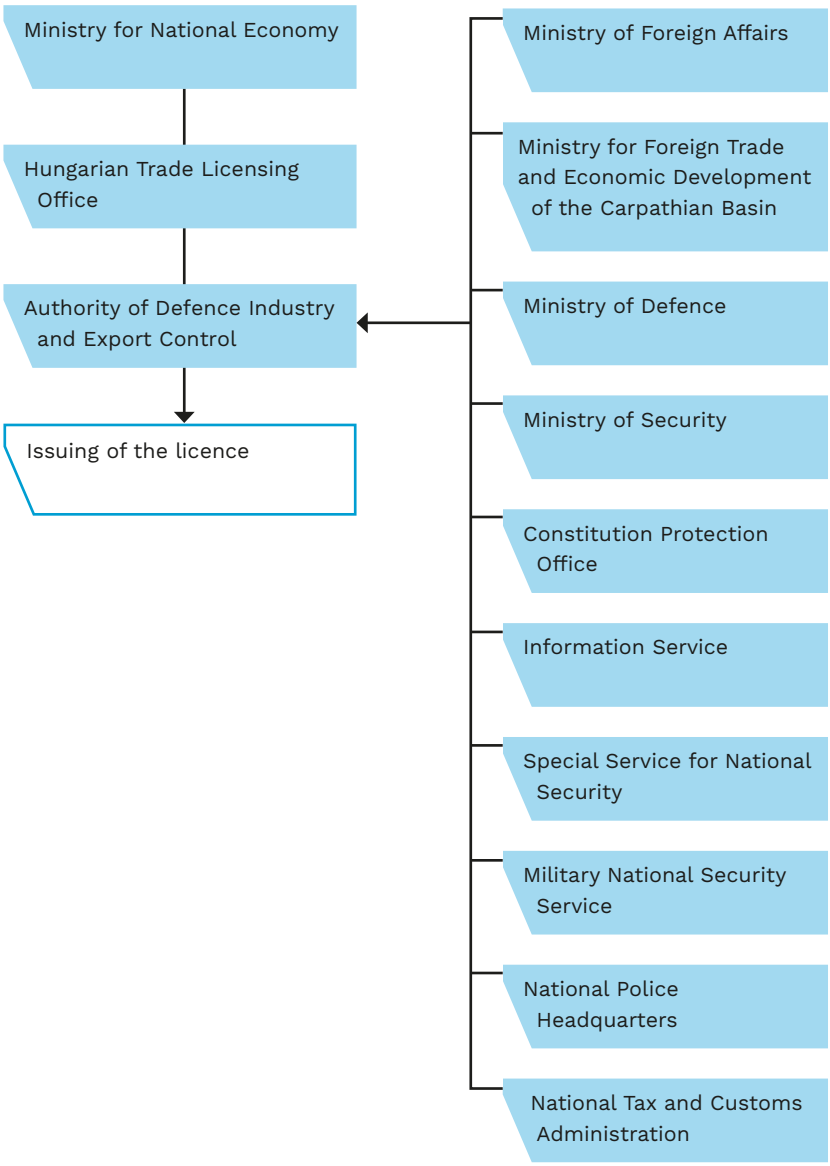
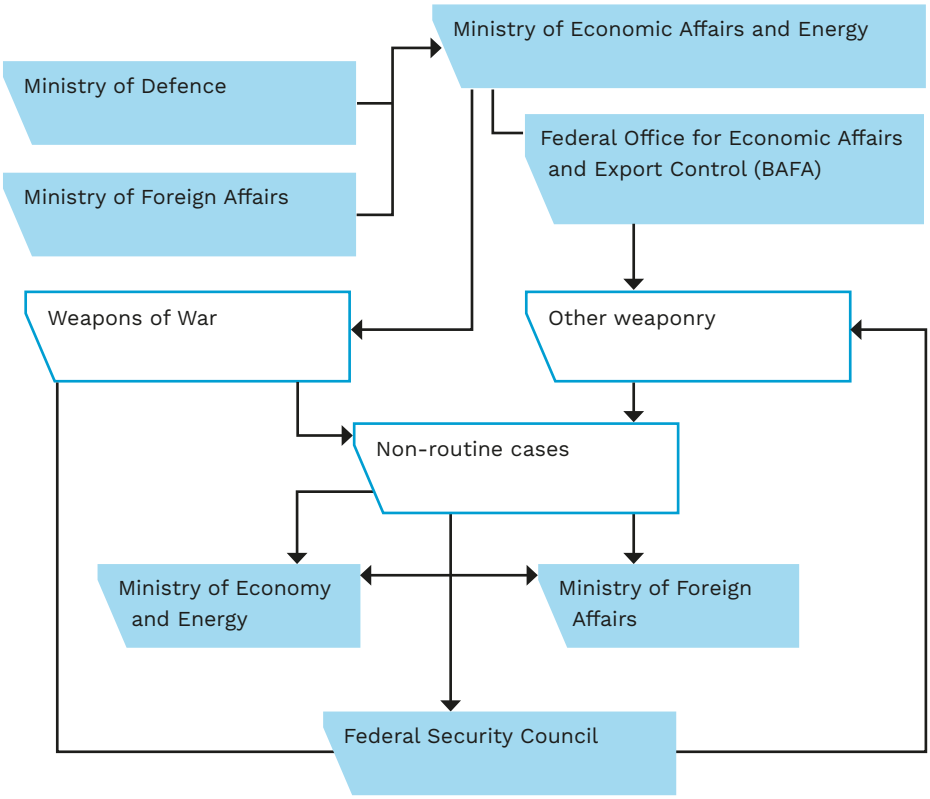


Figure 3.9: Institutional framework for arms export control in Germany



Institutional embeddedness of arms export controls – national historical differences

The institutional framework of national arms export control systems **varies significantly among EU Member States.** National licensing authorities fall under diverse policy domains, e.g. Economic Affairs, Defence or Foreign Affairs.

In most of the selected EU Member States, **several policy domains are involved in the licensing procedure** in general and in the assessment of specific dossiers in particular, especially in cases of sensitive licence applications. This reflects the essentially political salience of the foreign arms trade and the specific character of the goods that are exported. The diversity of the policy domains involved reflects the various factors that national governments

have to take into account in the assessment of foreign trade in conventional arms: national strategic and security considerations, national economic interests, and ethical-normative considerations.

3.4 Material scope of the arms export controls

A second aspect of the regulation of arms export controls is the material scope of the relevant legislation: which products and transactions are subject to export control and which are not? In the following sections we therefore first discuss the transactions that are exempt from licensing (sec. 3.4.1), and then the material scope of the arms export control system (sec. 3.4.2). In the latter section we will discuss in more detail:

- national implementation of the **EU Common Military List (sec. 3.4.2.1);**
- the enumeration of **national product categories (sec. 3.4.2.2);**
- the existence of a **catch-all clause (sec. 3.4.2.3); and**
- any distinction made regarding the degree of **sensitivity of the various products (sec. 3.4.2.4).**

3.4.1 Exempted transactions

EU Member States can decide to exempt specific trade flows from licensing obligations. This generally applies to trade flows that, because of their end use, are not considered to be potentially problematic. Directive 2009/43 explicitly states that the transfer of defence-related products between EU Member States is only permitted with prior approval, but in Article 4 provides for the possibility for Member States to exempt certain transactions from the requirement to apply for a licence in a number of specific cases. These cases include if:

- the supplier or recipient is a governmental body or part of the armed forces;
- the supplies are made by the EU, NATO, the International Atomic Energy Agency (IAEA) or other inter-governmental organisations for the performance of their tasks;
- the transfer is necessary for the implementation of a cooperative armament programme between EU Member States;
- the transfer is linked to a humanitarian aid in the case of disaster or as a donation in an emergency; and

– the transfer is necessary for or after repair, maintenance, exhibition or demonstration.

In this part we briefly describe licensing exemptions as implemented in the nine systems surveyed. We examine the extent to which the various governments implement this aspect of Directive 2009/43. We subsequently analyse whether those exemptions only apply to intra-EU transfers of defence products, or also to extra-EU exports.

1. **Only three governments adopt the five exemptions prescribed in Directive 2009/43:** Sweden[148], Wallonia[149] and France[150]. The six other systems have either partly adopted the five proposed exemptions from Directive 2009/43 or not at all (see Table 3.2).

Table 3.2. Exempted transactions in Directive 2009/43: implementation by EU Member States

	Government body/ part of armed forces	Intergovern-mental organisations	Cooperation programmes among Member States	Humanitarian aid/ emergency donation	Repair, maintenance, exhibition or demonstration
Flanders	yes	yes	no	yes	no
Germany	yes	no	no	no	no
France	yes	yes	yes	yes	yes
Hungary	yes	yes	no	yes	no
Netherlands	no	no	no	no	no
Portugal	no	no	no	no	no
UK	no	no	no	no	no
Sweden	yes	yes	yes	yes	yes
Wallonia	yes	yes	yes	yes	yes

In two additional systems, the exemptions are **similar** to those foreseen in Directive 2009/43:

- In *Flanders*, the competent minister can exempt the transfer of defence-related products to another EU Member State in three cases: (1) if the applicant is a government body or part of the armed forces of an EU Member State or NATO partner; (2) if the applicant is the EU, NATO, the IAEA, the UN or another intergovernmental organisation of which the Flemish Region or Belgium is a member; and (3) in case of humanitarian aid or an emergency donation

- *Hungary* too has three cases of exempted transfers and exports: (1) for troop movements that have been approved by the Hungarian parliament, the Hungarian government, the EU, NATO or the IAEA; (2) if the Hungarian armed forces are supplying the products in the context of a collective exercise or demonstration; and (3) if the products are supplied in the context of humanitarian aid in emergencies.[151]

Among the remaining countries surveyed we find a **considerable variety of exemptions**:

- *The Netherlands* opted to retain its own (already existing) exemptions.[152] They relate to four situations: (1) the products are destined for the Dutch armed forces; (2) the products are destined for NATO armed forces of the Joint Force Command in Brunssum; (3) the products are the property of the European Research Area; or (4) if military vehicles are used by foreign armed forces in the context of specific events, such as state visits, air shows or fleet reviews.[153]

- Because of the Benelux cooperation agreement, the trade in defence-related goods among Belgium (thus in this study both *Flanders* [154] and *Wallonia* [155]), the Netherlands[156] and Luxembourg is systematically exempted from a licensing requirement.

- In *the UK*, the government can exempt products from the licensing requirement by issuing a *Crown exemption* letter for donations of military equipment by the British government in the context of British security and foreign policy objectives.[157] The 2008 Export Control Order[158] also provides for a series of specific exemptions for aircraft, marine vessels, historical military vehicles, firearms, and software and technology. These exemptions concern shipments with a previously planned return date (tests/re-enactments), recognised arms owners, or specific forms of software and technology transfers.

– *Germany* restricts licensing exemptions to transfers to government bodies and the armed forces of other EU Member States.[159]

2. It is notable that licensing exemptions in several of the countries surveyed relate not only to the transfer of military equipment to EU Member States, but also **to a number of specific cases of extra-EU exports. Only** *Germany and Flanders* restrict the exemptions to transfers to EU Member States.

– For example, *Sweden* and *Wallonia* implement the five exemptions referred to in Directive 2009/43 and apply them to recipient countries in the European Economic Area (EEA).[160]

– In *France*, besides the exemptions described above, legislation provides for a series of exemptions for exports to countries outside the EU. These exemptions relate to cases of transit, transactions of a temporary nature, recognised arms owners, and intergovernmental cooperation programmes.[161]

– Some of the above-mentioned exemptions may also relate to extra-EU trade in *the Netherlands, Hungary* and *the UK*.

Exemptions from licensing requirements: harmonisation, but practice remains unclear

In (almost) all the systems surveyed, **possibilities exist to exempt certain transactions from licensing requirements**. Various EU Member States have clearly been inspired by Directive 2009/43. A limited number of countries have adopted all five exemptions referred to in this Directive. A number of other countries are doing so only to a certain extent, or have given it their own interpretation.

In Germany, exemptions are applied only to the transfer of defence products to the government bodies and armed forces of EU Member States. France and the UK apply a wide range of exemptions that also often relate to extra-EU exports. In the other countries surveyed, exemptions for extra-EU exports are more restricted or non-existent.

An important observation is that the exemption provision is often included in the relevant legislation, but **the extent to which it is applied in practice remains unclear**. In Flanders, for example, it appears that exemptions are possible, but in the period 2012-2015 the Flemish government effectively exempted no transactions from licensing requirements.[162]

3.4.2 Material scope of arms export control systems

On the basis of the EU Common Military List, EU Member States determine whether or not a product is 'military' and so subject that good to a licensing requirement. Traditionally, each country had its own national list of military products the export of which it considered necessary to control. This list determined the material scope of the country's arms export control system. Before a product on the list could be transferred or exported to another country, a licence needed to be issued by the national government.

Both EU legislative instruments contain important binding principles in this respect. In particular, Common Position 2008/944 and Directive 2009/43 refer explicitly to the EU Common Military List to determine the material scope of the arms export control system. More specifically, the Directive stipulates that a licensing requirement can only be applied to the transfer to another EU Member State of products on the common EU list. Importantly, this list does not automatically replace existing national lists, but Member States should make their national lists conform to the EU list. In this part we therefore analyse how EU Member States integrate the EU Common Military List into their own legislation and national list(s).Moreover, for extra-Community exports EU Member States can operate their own (and if desired, more extensive) national lists for exports requiring a licence. Secondly, therefore, we look at which countries add other product categories to their national lists.

We subsequently discuss the possible use of a catch-all clause. Such a clause would allow governments to require a licence for specific products on an ad hoc basis. This would therefore potentially affect the material scope of the arms export control system of a particular country, and will therefore be analysed. Lastly, we discuss the way in which some countries differentiate the sensitivity of the listed products, which may affect the rules and procedures for the export of these goods.

3.4.2.1 The EU Common Military List

EU Member States are obliged to use the EU list as a **basis** for **the material scope** of their arms export control system. Each of the nine systems has attuned the material scope of its list to the EU Common Military List. The ways in which the various systems do this differ.

Five governments refer to the EU Common Military List in their own legislation. The Netherlands[163], Wallonia and Flanders[164] do not have their own national

military lists, but refer directly in their legislation to the common EU list to define the material scope of their arms export control systems. The Walloon system distinguishes between intra-EU and extra-EU trade, with the EU Common Military List only being used for the intra-EU trade.[165] The 'old' Belgian Military List of 1993 is still being used to determine the material scope for the extra-EU trade in military goods.[166] *France* [167] and *Hungary* [168] include the EU Common Military List in an annex to the relevant legislation.

The four remaining countries (*Germany*, [169] *Portugal*, [170] *the UK* [171] and *Sweden* [172]) do no refer in the legislation to the common EU Military list. However, the content and structure of the list has been copied, which implies that the EU Common Military List de facto forms the basis of these countries' own national lists.

3.4.2.2 Additional national categories

Member States can subject extra-Community exports of specific defence-related goods to a licensing requirement in accordance with their own considerations and priorities. Our analysis shows that several EU Member States use this option. Only *Germany, Portugal* and the *Netherlands* use a national list of military products that consists exclusively of the products on the EU Common Military List.

In four systems the additional product categories include products with a paramilitary use and/or products that could be used for internal repression or violation of human rights. Therefore, a licensing requirement is provided for these goods:

- In the *UK* a number of products are listed under the 'PL' codes. One of these PL codes relates to 'other security products and paramilitary products' (PL5001) and covers goods that are controlled on the basis of EU Regulation 1236/2005 on trade in instruments of torturea, as well as various types of law enforcement equipment.[173]

- In *Hungary*, chapter 25 of the national list covers 'instruments for enforcement and crime control'. This covers the products to which Regulation 1236/2005 applies.[174]

a This Regulation prohibits the import and export of products that are solely intended to be used for capital punishment, torture or other cruel, inhuman or degrading treatment. In the United Kingdom, the Regulation further subjects the listed products to a license requirement (e.g. Tasers). This Regulation does not relate to intra-Community trade in these goods.

– In *Flanders*[175] and *Wallonia*[176] 'law enforcement equipment' is included. This covers for example the products listed in Regulation 1236/2005 and a specific list of products such as Tasers, water cannon for riot control and vehicles specially designed or adapted to remove barricades.

In addition, various countries also add **other products to the national list**. The types of these goods vary widely from country to country:

– In the *UK* PL5017 covers equipment and test models (other than those stated on the British military list) that are specially designed or adapted for the development or use of military products.[177]

– *Sweden* has three additional product categories: fortifications (e.g. bunkers), nuclear detonation mechanisms and special components of such mechanisms, and specified chemical substances.[178]

– In *France*, six additional product categories are listed, all aerospace-related.[179]

– In *Hungary*, chapters 23 and 24 of the national list contain respectively 'other equipment specially designed for military purposes' (e.g. clothing and shoes, camouflage material, and personal protection equipment) and 'services specially designed for military purposes'. Chapter 26 groups 'products for secret services'. The latter includes listening devices, visual monitoring equipment, computer and electronic communications equipment, interference devices, detection instruments, break-in equipment, scrambling and encryption tools, and tracking devices.[180]

3.4.2.3 Catch-all clause

Besides the ability to (systematically) control products that appear on a military list, governments may also decide to include an **ad hoc mechanism** in their legislation in order to impose a licensing **requirement on exports of non-listed products.** This mechanism is generally referred to as a 'catch-all' clause. The idea behind such a clause is that products whose technical features fall just outside of the definitions and technical specifications of the military list or products that have certain characteristics that give them a strategic importance may constitute a security risk.[181]

1. Our analysis of the nine export control systems suggest that **only Flanders and Wallonia include a military catch-all clause** in their legislation. This is the result of their common history. In the Federal Law of 1991 a catch-all clause was integrated

in the Belgian Military List, allowing to control "other equipment and goods, destined to support military actions". Because the Walloon system continues to use the Belgian Military List for extra-EU exports, the original catch-all clause still exists. The Flemish catch-all clause in contrast was changed in the Arms Trade Decree of 2012. In Flanders a licence is required for the export of "other equipment for military use" [182], which is defined as "goods that alone or in combination with each other or other products, substances or organisms can seriously harm persons or property and "which can be used to commit violence in an armed conflict or a similarly violent situation". The focus of this Flemish catch-all clause is on the potential use of the products and not the status of the end user.[a] Since the implementation of the Arms Trade Decree in 2012 only two transactions have been made subject to a licensing requirement by the Flemish government. The Walloon government does not publish information on the use of the catch-all clause, although in practice it seems to be used frequently.[183]

2. The **other countries** have no military catch-all clause. The only possibility these countries have to place specific goods on an ad hoc basis under licensing requirements is the **catch-all clause as defined in Article 4 of Regulation 428/2009 on the foreign trade in dual-use products**. This clause allows governments to control the foreign trade of non-listed products, among other things, in case of a potential military end use, *but only in a very specific context*. The dual-use catch-all clause on military end use states that a licence is required if:

- an internationally binding arms embargo (the UN, Organisation for Security and Co-operation in Europe (OSCE) and EU) is in force on the purchasing country or the recipient country;

- *and* if the exporter has been informed by the authorities that the products are, or could be, wholly or partly intended for 'military end use'. This is defined here as 'the processing of the items into products that appear on the military list', 'the use of production, test or research equipment and components of these, for the development, production or maintenance of military products that are on the military list' and 'the use of unfinished products in a factory for the manufacture of military products that are on the military list'.

a According to the Flemish government, this definition is based on Article 2 of the German *KriegsWaffengeszetz. However, this article is not a catch-all clause, but relates to the composition of the German military list and makes it legally possible for the German government to add more products to its list.*

3. In this context, the *German system of* '**Einzeleingriff'** is relevant to mention.[184] Although it is not a catch-all clause, this clause in the German *Kriegswaffengesetz* allows the government to prohibit the export of non-listed goods for a period of six months if it is felt that these goods pose a security risk, or may have a defence-related use. In this period, the goods can then be added on the military control list so that their export becomes subject to a licensing requirement. If the good is not added to the military list, it can be traded freely again after six months. However, in practice this clause appears not to be applied often.

3.4.2.4 Distinctions according to the sensitivity of listed products

Several EU Member States make additional distinctions between the products on their national list, with **specific rules and licensing procedures in place for certain products.** In *Flanders, France, Germany* and *Sweden*, a distinction is made among different types of military products, with defence-related products deemed as more sensitive being subject to stricter regulations.

- In *Flanders*, a specific category of 'sensitive products'a is distinguished, for which specific rules apply. For example, products in this category are excluded from certain general licences (see sec. 3.4.3) and stricter conditions are imposed on the end use for the export of these products.[185]

- *France* operates an additional advance control procedure for certain categories of sensitive products (war equipment and firearms) (see also sec. 3.5.1).[186]

- *Germany* makes a distinction between 'weapons of war ('Kriegswaffen') and 'other weaponry' ('sonstigen Rüstungsgüter').b The two categories do not fall under the same licensing authority (see sec. 3.3) and a different legal logic is applied. The trade in 'weapons of war' is legally prohibited, which implies that an applicant cannot apply for a licence. That is in contrast to 'other weaponry', the trade in which is possible in principle, but on which the government can impose restrictions. The export of 'weapons of war' is considered a privilege, while the export of 'other weaponry' is considered a right. One of the

a These 'sensitive products' are defined as 'defence-related products included in the UN register of Conventional Arms … including small arms and light weapons'.

b The first category covers offensive products, their munitions and essential components. In effect these include nuclear weapons, biological and chemical weapons, warplanes and helicopters, combat vehicles, warships, etc. The remaining military products, production equipment, technology and software fall into the second category.

consequences is that 'weapons of war' are subject to a double licensing requirement (see sec. 3.5.1.2).[187]

– *Sweden* applies a distinction based on the destructive capacity of the goods. In Swedish legislation products with a destructive capacity are described as 'military equipment for combat' (MEC), while components of MEC products and products with no destructive capacity are considered to be 'other military equipment' (OME). Consequently, there are additional prohibitions for MEC, while for the export of OME, on the other hand, a number of rights exist.[a 188]

The material scope of arms export controls: balancing between European harmonisation and national sensitivities

European legislation obliges EU Member States to use the EU Common Military List as a basis for the material scope of their arms export control systems. It is therefore not surprising that almost all the countries surveyed refer explicitly to the EU list in their national legislation, or include the structure and content of this list in their national list of controlled goods. In general, **the various national military lists are very similar to each other as regards content and form**, partly as a result of the influence of the EU Common Military list.

Most countries also subject the extra-Community export of certain products that are not on the EU list to a licensing requirement. They usually do so by including extra product categories in their own national lists, e.g. products that can be used for internal repression, torture or human rights violations.

Flanders and Wallonia both include a **catch-all clause** in their arms export control system. This clause enables both governments to make the export of non-listed products subject to an ad hoc licensing requirement.

Several systems make a distinction in the national products lists in terms of the **sensitivity of the products concerned**. Other principles or specific rules and procedures often apply to products that are seen as more harmful.

a For MEC an additional prohibition applies to the export if the recipient state (1) is involved in armed conflict with another state; (2) is involved in international conflict that could lead to armed conflict; (3) is experiencing internal armed unrest; or (4) commits extensive and serious human rights violations. For OME there is a right to export if the recipient state (1) is not characterised by extensive and serious human rights violations; (2) is not involved in armed conflict with another state; or (3) is experiencing no internal armed tensions/instability.

3.5 Licences: types, procedures and scope

The basic principle of export control is that defence-related products cannot be traded freely between countries, but are subject to control via a licensing requirement. For foreign trade in products within the material scope of arms export control systems (see sec. 3.4) a licence must be applied for. This obligation enables the government to establish an effective system to control the foreign trade in military equipment and to assess the legitimacy of a licence application.

The European harmonisation of the licences that are available in EU Member States has been one of the main goals of European regulatory initiatives. Directive 2009/43 in particular is crucial in this regard because it obliges Member States to implement three types of licences for the intra-EU trade in defence-related equipment. Specifically, the Directive introduces general and global licences for the transfer of defence products to other EU Member States. By introducing these types of licences together with traditional individual licences, the EU aims to create a more flexible licencing system for the intra-EU trade.

In contrast, Common Position 2008/944 contains no stipulations on the use of general or global licences. For extra-Community exports, therefore, EU Member States are entirely free to choose the licences they make available. It is therefore interesting to see to what extent which types of licences can be used for extra-EU arms exports in the various Member States. Moreover, the Directive introduces specific rules with regard to notification and reporting requirements for the users of the licences.

In this part, we first discuss the steps licence applicants must take before a licence to transfer or export defence-related products can be applied for (sec. 3.5.1). We then discuss the existing types of licences for the transfer and export of military equipment, and focus in particular on the material and geographical scope of these licences in the various EU Member States. We first discuss general licences (sec. 3.5.2), then global licences (sec. 3.5.3). We do not explicitly discuss individual licences: national export control systems have traditionally been using this type of licence for arms exports. As a result, the procedures for this type of licence are organised identically in all systems. Finally, we discuss the various requirements with regard to registration, notification of use and archiving for the various types of licences (sec. 3.5.4).

3.5.1 Prior obligations

Various systems provide for additional procedures that have to be followed before the formal licence application is made for the export or transfer of defence-related products. These procedures can be both formal and informal. In the former case, this often involves the requirement to request licences in advance (sec. 3.5.1.1). In the latter case, informal procedures are implemented that allow companies to informally discuss the legitimacy of a potential future licence application with the licensing authority (sec. 3.5.1.2).

3.5.1.1 Prior licensing obligations

Most systems impose additional obligations before a licence to export or transfer military equipment can be requested. **In seven systems, permission to participate in the international arms trade involves additional licences or permits. Only the** *UK and the Netherlands do not appear to impose such additional obligations.*

In most systems a prior licence relates to specific transactions, such as permission to produce or transport defence-related goods. The exact form of the prior licence and its material scope differ, however. Some governments require this for all products and recipient countries, while in other systems formal prior obligations change according to the sensitivity of the products and the recipient countries.

- *Portugal*[189] and *Sweden*[190] require a prior licence to manufacture defence-related goods. This licence applies to all product types and all recipient countries (both intra- and extra-EU trade). Only companies holding such a licence are therefore allowed to produce defence-related goods.

- *France* and *Germany* differentiate among types of goods. In France, a prior trade licence is required for products in category A (war equipment and arms that may not be obtained or possessed by private individuals) and B1 (handguns that may not be obtained or possessed by private individuals without permission).[191] In *Germany*, a licence for the transport of *weapons of war* is legally required if these goods are exported, in addition to the export licence that is legally required in terms of the Foreign Trade Act.[192] Therefore, two licences are required for exports of weapons of war in Germany.

- *Hungary* uses a geographical differentiation. For intra-EU trade, an *activity licence for foreign trade* is required. This can be general (covering every product, country or transaction), or specific (applying only to a specific product, country

or transaction). The licence authorises the holder to undertake market research, preparatory negotiations or the preparation of a tender. For exports outside the EU[193] *a negotiation licence* supplements the activity licence. The negotiation licence allows the applicant to set up a contract for 12 months. In terms of this licence the Hungarian government can impose ad hoc conditions and restrictions on the end use of the weapons in question, even before a formal export licence is applied for.[194]

Only **Flanders and Wallonia operate a ratione personae** by taking into account the reliability of the licence *applicant*. *The Flemish*[195] and *Walloon*[196] government therefore do not consider activities or goods, but the person of the applicant by imposing a 'prior authorisation' requirement. Recognised arms dealers, certified companies and intergovernmental organisations (EU, NATO, UN, IAEA etc.) are exempted from this obligation.[197] All other persons or companies wanting to apply for an export or transfer licence should obtain a 'prior authorisation', before being eligible to submit a licence application.

3.5.1.2 Prior informal procedures

Informal assessment procedures are a second possibility for evaluating the legitimacy of a potential licence application. Through these procedures licence applicants can informally ascertain from the licensing authority whether and to what extent a formal licence application would be positively or negatively assessed.

Negotiations on contracts for the purchase of defence-related products can in practice often take a long time and involve a considerable financial investment for the companies involved. By using informal procedures, companies can obtain a preliminary evaluation of how a future application is likely to be assessed at an early stage of the negotiation process with the potential recipient of the products. This information can be used to decide whether it is worth continuing with the negotiations.

- This procedure is found in the *Flemish Region ('prior advice) and in the Netherlands ('exploratory study')*.[198] These procedures allow informal advice to be requested early in the negotiation process regarding the assessment of a licence application for a specific product for supply to a specific end user.

- In *Germany,* a prior inquiry may be requested from the licensing authority. Regarding the application for products in the category 'other weaponry', BAFA makes the decision and it is binding on the administration if the situation in the

recipient country has remained unchanged in the meantime. This is not the case for weapons of war: an informal decision on these products is taken by the Ministry of Foreign Affairs and its result is not binding in any way on the German government.[199]

Obligations prior to the formal licence application

Almost all governments surveyed provide for procedures and obligations for the prospective users of licences before they submit the licence application for the export or transfer of defence-related products.

Most governments operate a system of **prior licences**. For example, in advance of the effective licence application they can monitor their own domestic defence-related industry and any contacts this industry establishes. Such additional controls exist for sensitive products and for sensitive recipient countries. Flanders and Wallonia deviate somewhat from this practice because, via the system of 'prior authorisation', it takes into account the reliability of the *person* of the licence applicant.

In addition, several governments organise **informal assessment procedures**. Such procedures enable companies who are negotiating with a potential foreign buyer of defence-related products to obtain an idea at an early stage of the chances of a licence being approved or denied. In principle, they can thus avoid spending a great deal of time and money on negotiations, only to have the formal licence application refused. In practice, such informal assessments are used very often. However, most governments do not report on the use and outcome of such assessments, mainly to protect companies' commercial interests.

3.5.2 General licences

A first type of licence introduced by Directive 2009/43 is the general licence. Such licences are published by the competent authorities and allow all competent companies to transfer goods without prior approval; they only need to report that such transfers have been made. In other words, no prior governmental approval is required for the transfer of defence-related goods.

Directive 2009/43 prescribes that EU Member States must publish at least four general licences: two for specific recipients, and two others for transactions of a

specified and temporary nature. Member States must publish a general licence for these four types of transfers of defence-related products:

- the recipients are armed forces and governments of EU Member States;
- the recipients are certified companies within a Member State. (Such certification means that the purchaser is reliable; i.e. is able to comply with the export restrictions that apply to the transfer);
- the transfer takes place in the context of demonstration, evaluation or exhibition; or
- the transfer takes place in the context of maintenance or repair.

In addition, the Directive stipulates that Member States may publish general licences for the development, production and use of defence-related products in the context of an intergovernmental cooperation programme between EU Member States.[200] Below we firstly identify the types of general licences that exist in the various systems (sec. 3.5.2.1). We then discuss the material scope (sec. 3.5.2.2) and geographical scope (sec. 3.5.2.3) of these general licences.

3.5.2.1 Number and types of general licence

1. **All the governments surveyed have published general licences.** A comparison of national general licences with the general licences included in Directive 2009/43 (Table 3.3) shows a strong overlap between national and EU stipulations. Only France and Wallonia have not published all mandatory EU general licences.

- *France* has not issued a general licence for transfers for the maintenance or repair of defence products.

- *Wallonia* has not published the two general licences for temporary transfers either for 'demonstration, evaluation or exhibition', or for 'maintenance or repair'.

Table 3.3: National implementation of mandatory general licences as stipulated in Directive 2009/43

	Armed forces	Certified companies	Demonstration, evaluation or exhibition	Maintenance or repair
Flanders[201]	Yes	Yes	Yes	Yes
France[202]	Yes	Yes	Yes	**No**
Germany[203]	Yes	Yes	Yes	Yes
Hungary[204]	Yes	Yes	Yes	Yes
Netherlands[205]	Yes	Yes	Yes	Yes
Portugal[206]	Yes	Yes	Yes	yes
Sweden[207]	Yes	Yes	Yes	Yes
UK[208]	Yes	Yes	Yes	Yes
Wallonia[209]	Yes	Yes	**No**	**No**

2. Several EU Member States also have other general licences besides those stipulated in Directive 2009/43. Table 3.4 provides an overview of the number of general licences in the various systems. What immediately stands out is the **great variety of existing general licences**. There appears to be a difference between the large and small arms-exporting countries. **The large arms-exporting countries** (*Germany, France and the UK*) have **adopted many additional general licences**. In the other systems, general licences are mainly restricted to those stipulated in Directive 2009/43.

Table 3.4: Number of general licences per arms export control system

	Flanders	Germany	France	Hungary	Netherlands	Portugal	UK	Sweden	Wallonia
Number of general licences	5	10	11	3	4	5	25	5	2

The history of the various licensing systems plays an important part in this. *Germany* and the *UK* had already used general licences for the foreign trade in military equipment before the implementation of Directive 2009/43. Both countries have therefore only adapted their licensing system slightly. *Germany*[210] has only introduced two new general licences following the adoption of the Directive (for transfers to armed forces and for certified companies), while the *UK* only had to introduce one additional general licence (for certified companies).[211] For the other systems, on the other hand, Directive 2009/43 resulted in significant changes to their licensing system. For example, *France*, which had no general licences prior to the implementation of Directive 2009/43, has subsequently introduced a large number of them.[212]

The large arms-exporting countries have a high number of additional general licences:

- In *France*, additional general licences relate to specific recipients (police, customs services, border guards and coastguards of another EU Member State; French armed forces stationed within and outside the EU) and products (aerospace equipment).
- *Germany* has general licences for specific products ('special cases', defence equipment, off-road vehicles, explosives, clothing and signal-suppressing equipment), transactions (temporary export or transfer) and activities (trade and brokerage).
- In the *UK*, additional general licences cover specific products (vintage and historical equipment, surplus equipment, components and printed circuit boards, software, and code), transactions (specific international cooperation agreements, such as the A400M), operations (overseas individuals' access to software and technology), and recipients (British armed forces, diplomatic missions and consular posts).

3. **In the smaller arms-exporting countries, general licences are mainly restricted to those stipulated in Directive 2009/43**. At first sight it seems that in Hungary, Sweden and Wallonia, the number of general licences does not correspond with the EU-prescribed minimum number (Table 3.3). However, Hungary groups transfers for demonstration, exhibition and maintenance purposes under one general licence. Sweden uses two separate general licences for maintenance and repair. The first concerns the transfer from Sweden of products for maintenance and repair. The second concerns the transfer from Sweden of products that have undergone maintenance and repair in Sweden. Wallonia is therefore the only government that does not publish general licences for 'repair or maintenance' or 'demonstration'.

The finding that the smaller arms-exporting countries largely restrict themselves to the general licences stipulated by the EU does not detract from the fact that additional licences also exist in a few of them. *Portugal provides for a general licence for the export of military equipment to Portuguese armed forces stationed outside the EU. Flanders has a general licence for the transfer of military equipment to other EU Member States in the context of inter-governmental cooperation programmes between Member States, as is proposed in Directive 2009/43.*

4. However, **actual use of general licences to transfer military equipment within the EU remains limited**. Despite the fact that the EU prioritises this licence type for intra-EU trade, the data available on the use of such licences suggest only their minor use in most countries. A first indication comes from the low number of companies that registered to be certified. Despite the European Commission stimulating this certification process as a means of facilitating intra-EU trade via the general licence for 'certified companies', its success remains limited. Only in Germany and France have several companies been certified; in the other countries in this study none to two companies are currently registered as certified companies (Table 3.5).

Table 3.5: Number of certified companies registered in CERTIDER*, 2012-2017.

	2012	2013	2014	2015	2016	2017
Flanders	0	0	2	2	2	2
France	1	4	4	4	12	9
Germany	3	5	10	14	14	14
Hungary	2	3	3	2	2	2
Netherlands	1	1	1	2	2	2
Portugal	1	1	1	1	1	1
Sweden	0	0	0	1	1	1
UK	0	0	0	0	0	0
Wallonia	0	0	1	2	2	3
Total	8	14	22	28	36	34

* Register of Certified Defence-related Enterprises.

Little information is available on the extent of the foreign arms trade that occurs in the EU on the basis of these general licences. Just two governments – those of *Sweden* and *Flanders* – consistently report on the number of transactions and the actual value of arms transfers under general licences (Table 3.6). These results suggest an increasing use of general licences to transfer military equipment to other EU Member States. Both governments report an incremental increase in both the number of transactions between 2012 and 2015, which also reflects how the value of transfers is gradually increasing.

If information on the use of general licences is available, the general licence for 'transfers of military equipment to armed forces of other EU (or EEA) countries' is the most popular one. The low number of certified companies is also reflected in the low popularity of this general licence. In *Flanders*, no use was made of this general licence in the period 2013-2015; in *Sweden*, five transfers occurred in this period to a certified company in another EU Member State.

Table 3.6: Number of reported transactions done by general licences, 2012-2015

	2012	2013	2014	2015
Flanders	0	8	13	15
France	-	-	-	-
Germany	-	-	-	-
Hungary	-	-	-	-
Netherlands	-	-	-	-
Portugal	-	-	-	-
Sweden	1	4	9	15
UK	-	-	-	-
Wallonia	-	-	-	-

Table 3.7: Actual value of transfers of defence-related goods by general licences, 2012-2015 (in €)

	2012	2013	2014	2015
Flanders	-	9,492,852	5,427,698	37,798,235
France	No information on the use of general licences made available			
Germany	No information on the use of general licences made available			
Hungary	Information integrated into the general information made public			
Netherlands	No information on the use of general licences made available			
Portugal	Information integrated into the general information made public			
Sweden*	4.200.000	850.000	11.480.000	17.100.000
United Kingdom	No information on the use of general licences made available			
Wallonia	No information on the use of general licences made available			

* The Swedish values in the table are approximate, because in Swedish reports values are reported in Swedish kronas (SEK).

3.5.2.2 Material scope of general licences

Directive 2009/43 contains no provisions on the material scope of the various general licences. In other words, EU Member States are free to determine which defence-related goods are eligible to be transferred under the various general licences.

1. Generally, two groups of systems can be distinguished. A number of governments opted to homogenise the material scope of their general licences, while others operate a different material scope for each general licence.

Among the countries with a homogenised material scope for the four general licences are *the Netherlands, Sweden, Wallonia*, and, to a large extent, *Flanders*.[a] However, there are significant differences among these systems in the material scope of the various general licences. *Flanders* and *Wallonia* have the broadest (number of military list/ML categories) and deepest (content of the ML category) material scope: both systems include all the ML categories and (with the exception of the general licence for transfers to certified companies in Flanders) the entire

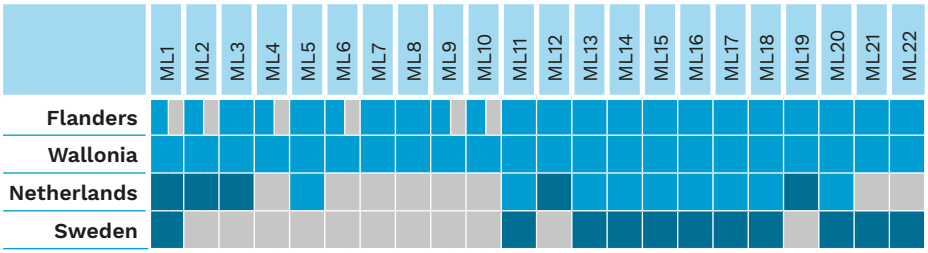
a In the case of Flanders, all general licences have the same content, with one exception (certified companies), which cannot be used for the transfer of 'sensitive goods' (i.e. goods on the UN Register of Conventional Arms).

content.[a] A less broad and deep content is seen in *the Netherlands* and *Sweden*. Table 3.8 illustrates this difference.

Key to interpret tables 3.8 to 3.17

- Light blue: the complete ML category falls within the scope of the general licence.
- Grey: part of the ML category falls within the scope of the general licence
- Dark blue: the ML category is excluded from the scope of the relevant general licence.

Table 3.8: Material scope of general licences in four homogenised export control systems



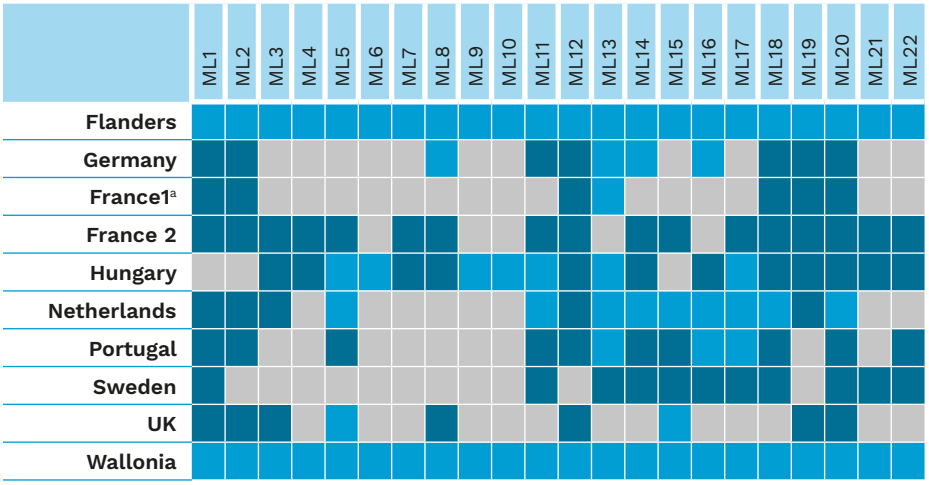
2. **Significant differences can also be identified in the material scope of general licences.** We referred above to the large variation in the number of types of general licences in the various countries, which makes a reliable comparison difficult. Consequently, we compare below the material scope of the general licences that Directive 2009/43 prescribes for intra-EU transfers: (1) transfers to armed forces or governmental bodies of an EU Member State; (2) transfers to a certified company; (3) transfers in the context of a demonstration, exhibition or evaluation; and (4) transfers in the context of the maintenance or repair.

a Importantly, some goods on the EU Common Military List are considered forbidden goods in Flanders. These goods (such as cluster munitions and anti-personnel mines) are therefore excluded from the material scope of all general licences.

General licence for transfers to armed forces and governments of EU Member States

Table 3.9 provides an overview of the material scope in the nine systems of general licences for the trade in military equipment to national armed forces and governments.

Table 3.9: Material scope of the general licence for transfers to 'armed forces and governments'



As table 3.9 makes clear, a **large variation in the material scope** of this general licence exists in the various EU Member States. In the countries surveyed, different product categories are eligible for transfers based on this licence. The table moreover confirms our initial analysis: *Flanders* and *Wallonia* differ from the other countries because they include all goods on the EU Common Military List in the material scope of this general licence. The other countries exclude several product categories entirely or partly from the general licence.

There **are similarities between the ML categories that do not fall within the scope of this general licence**. In six of the nine systems, ML1, ML12 and ML20 fall outside the scope of the general licence; in five systems, ML2 and ML19 are not included.

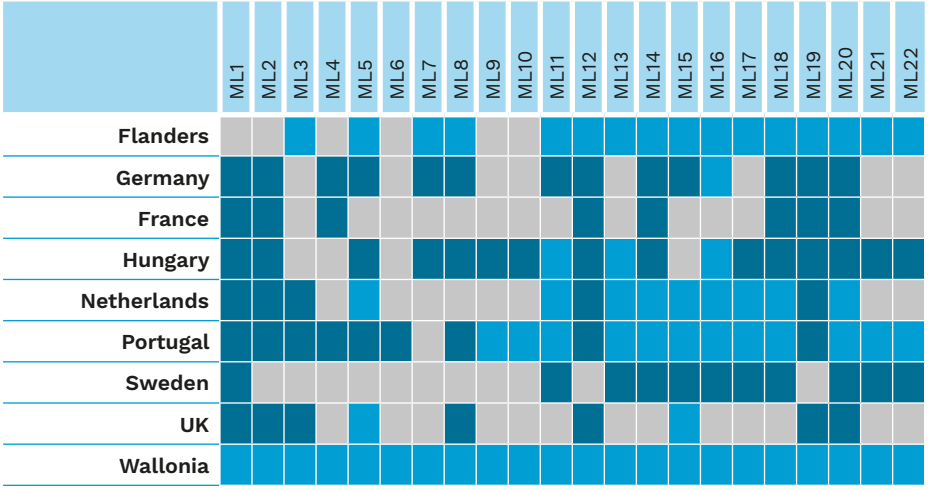
a France has two general licences for transfer to armed forces or government of an EU Member State. The first (France 1) relates to the transfer of *military products* to these recipients, while the second (France 2) can be used for the transfer of *technology* to the armed forces, defence agencies and the defence industry of an EU Member State.

General licence for transfers to certified companies

For the general licence for transfers to certified companies, we equally find **significant differences in the material scope** of the various arms export control systems (see Table 3.10). In addition, **the (relatively) unique nature of the Flemish and the Walloon system** once again becomes apparent. Most other countries exclude certain ML categories from this general licence. Flanders only excludes certain finished products ('sensitive goods'), while Wallonia imposes no restrictions on the material scope of this general licence.

In the other countries, several product categories are excluded from the material scope of this general licence. All countries exclude products from category ML1 and almost every country excludes products from categories ML2, ML12 and ML19. In contrast, products from categories ML11, ML13, ML15 and ML16 are usually fully or partly included in this general licence.

Table 3.10: Material scope of the general licence for transfers to 'certified companies'

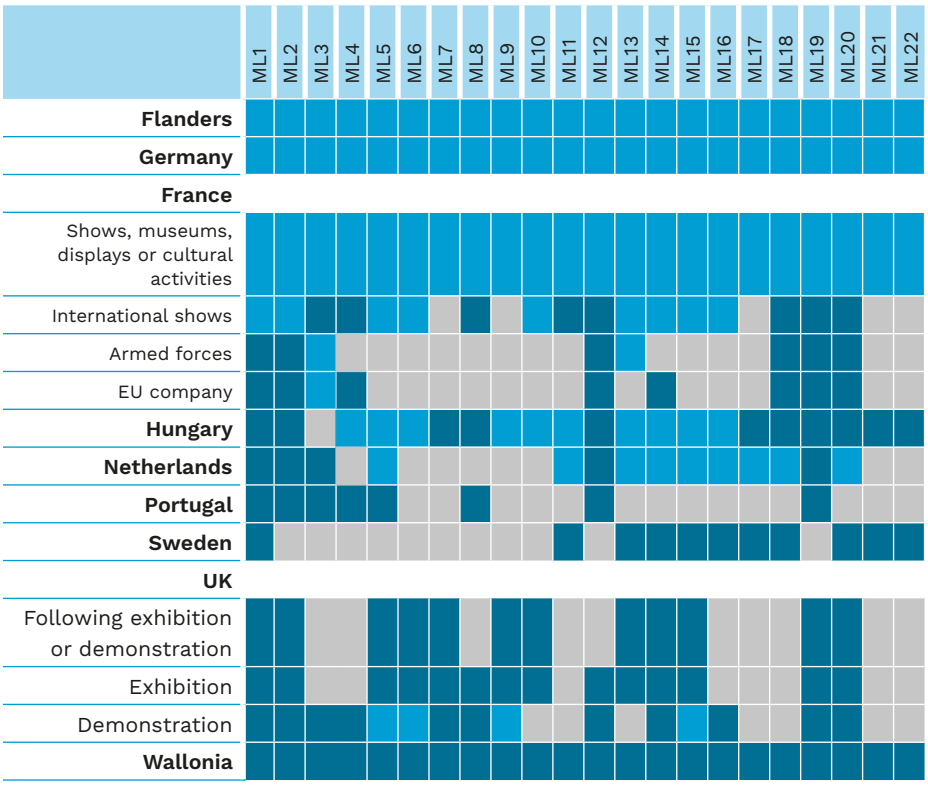


General licence for transfers for 'demonstration, exhibition or evaluation'

Regarding the material scope of general licences for the transfer of military products for a demonstration, exhibition or evaluation, we see that *France* and the *UK* operate various general licences for this category, while the other countries have

one general licence for it[a] (Table 3.11). Importantly, ***Wallonia* has not implemented this general licence in its legal system.** Two systems – those of *Flanders* and *Germany* – allow all goods on the EU Common Military List to be transferred for temporary demonstrations, exhibitions or evaluations. In the other countries, once again significant differences in the material scope of the general licence are to be found.

Table 3.11: Material scope of the general licence 'Demonstration, exhibition or evaluation' in the EU Member States

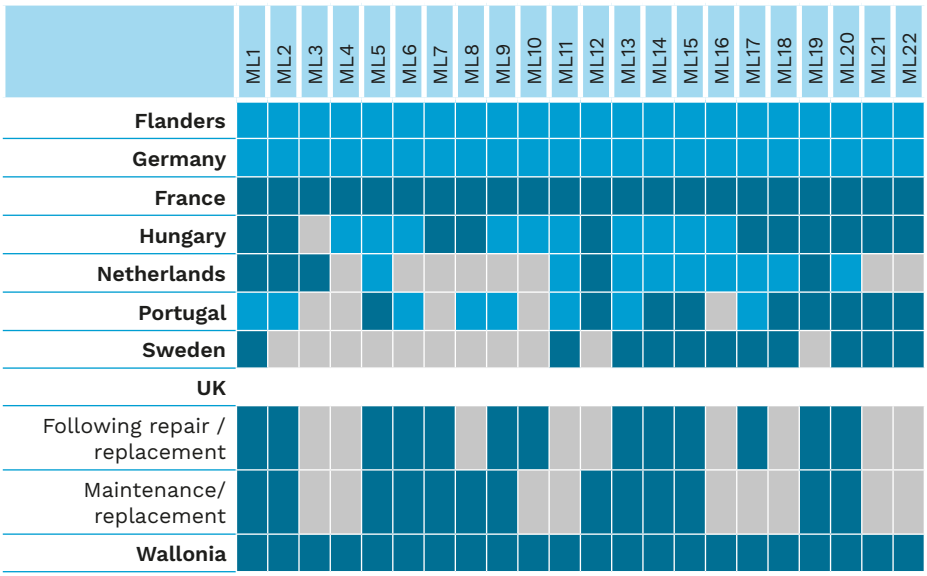


a France has four different licences. Three of these relate to demonstrations at international shows, for armed forces and for EU companies. A fourth licence is intended for products used in the context of cultural activities. The UK has three licences, two of which relate to shipments of goods for an exhibition or demonstration. The third may be used for exporting goods after an exhibition or demonstration in UK territory.

General licence for transfers for 'maintenance or repair'

Finally, we look at the general licences that relate to maintenance and repair (table 3.12). As stated earlier, *France* and *Wallonia* have no general licence for this type of transfer. *Sweden* and the *UK* operate two licences[a]. We once again find significant **variation in the material scope of such licences.** As with the general licence for transfers in the context of a demonstration, it is again notable that **only *Flanders* and *Germany* interpret the material scope fully.**

Table 3.12: Material scope of the general licence for 'maintenance or repair'



3.5.2.3 Geographical scope of general licences

As stated earlier, Directive 2009/43 aims to facilitate the intra-Community trade in defence related goods. An analysis of the nine surveyed systems shows that most systems do not restrict the use of general licences to transfers to EU Member States, but in some cases also allow extra-Community exports of military equipment. In this part, we discuss the differences in the geographical scope of the four general

a One of them relates to the export or transfer of products for purposes of maintenance and repair. The second applies to products that were maintained or repaired in Sweden or the United Kingdom and subsequently exported or transferred.

licences prescribed by Directive 2009/43 ('armed forces', 'certified companies', 'demonstration, exhibition or evaluation', and 'maintenance or repair').

General licence for transfers to armed forces and governments

Table 3.13 shows that only *France and Hungary* restrict to intra-EU trade the general licence for transfers to armed forces and governments. In the other countries this **general licence could also be used for certain forms of extra-Community trade:**

- *Germany, the Netherlands, Wallonia* and *Sweden* also include members of the EEA in the geographical scope of this general licence.
- *Flanders* extends the geographical scope **indirectly**. It allows intra-EU transfers via this general licence, even when is known at the time of the transfer that the end use of the products will be with (1) the armed forces of an EU or NATO Member State, (2) the country of end use is a Member State of NATO, the Wassenaar Arrangement, an ally or friendly country, or (3) the export is necessary for the implementation of inter-governmental cooperation programmes. Direct extra-EU exports via this general licence are therefore not possible in Flanders, only indirect exports in certain cases after transfer to another EU Member State.
- *Portugal* and the *UK* adopt the widest geographical scope and allow trade via this general licence with a number of listed non-EU countries. For Portugal these are Australia, Japan, New Zealand, Switzerland and Brazil. For the UK they are Australia, Japan, New Zealand, Switzerland and Liechtenstein.

Table 3.13: Geographical scope of the general licence for transfers to 'armed forces and governments'

	EU	EEA	NATO	Other
Flanders				
France				
Germany				
Hungary				
Netherlands				
Portugal				
Sweden				
United Kingdom				
Wallonia				

General licence for transfers to 'certified companies'

Compared to the general licence for exports to armed forces, the geographical scope for transfers to certified companies is **more often restricted to the EU or EEA** (see Table 3.14). Only in two systems (*Flanders and the UK) this general licence can be used for exports to end users outside the EU.*

The British system applies a double approval for recipient countries. In the first case the licence allows the exporter to ship products to certified purchasers who are based in the EU or Norway. In the second case the licence entitles the purchaser to ship the goods to a number of listed. countries: members of the EU, EEA or NATO, and Australia, Japan, Switzerland and New Zealand. Flanders operates the same **indirect** extension of the geographical scope as with the general licence for 'armed forces': an initial transfer via this licence to a recipient in the EU, even if the final end use is known to be outside the EU (in the same circumstances as the general licence for 'armed forces').[213]

Table 3.14: Geographical scope of the general licence for transfers to 'certified companies'

	EU	EEA	NATO	Other
Flanders				
Germany				
France				
Hungary				
Netherlands				
Portugal				
Sweden				
UK				
Wallonia				

General licence for 'demonstration, exhibition or evaluation'

In the geographical scope of the general licence for 'demonstration, exhibition and evaluation', **two groups of systems** can be distinguished (see Table 3.15). In a number of countries the geographical scope is restricted to transfers to other EU

Member States (*France, Flanders and Hungary)* or countries that are part of the EEA *(the Netherlands, Wallonia and Sweden)*. The other countries in contrast operate a **wider geographical scope.** *Portugal* and *Germany use a* (more or less identical) closed list of destinations to which military goods can be exported.[a] The *UK*, on the other hand, operates an open list with built-in restrictions: the licence applies to exports to all countries, except those listed in the relevant licence (e.g. Afghanistan, Argentina, China, the Russian Federation and Zimbabwe).

Table 3.15: Geographical scope of the general licence for 'demonstration, exhibition or evaluation'

	EU	EEA	NATO	Other
Flanders				
France				
Germany				
Hungary				
Netherlands				
Portugal				
Sweden				
UK				
Wallonia				

General licence for transfers for 'maintenance or repair'

Finally, Directive 2009/43 also provides for a general licence for the transfer of products for maintenance or repair (see Table 3.16). Here we find the same two-part geographical scope as with the general licences for demonstrations: the same countries apply a more limited (*Hungary, the Netherlands, Flanders and Sweden)* or wider

a In Portugal, these are Australia, Japan, New Zealand and Brazil. In Germany, they are Australia, Japan, New Zealand, Switzerland and Liechtenstein.

geographical scope *(Germany, Portugal and the UK)* to this licence.[a] As already mentioned, *France* and *Wallonia* do not issue such a general licence.

Table 3.16: Geographical scope of the general licence for 'maintenance or repair'

	EU	EEA	NATO	Other
Flanders				
Germany				
France				
Hungary				
Netherlands				
Portugal				
Sweden				
UK				
Wallonia				

General licences – EU-wide implementation, with national differences

Directive 2009/43 obliges EU Member States to include a number of general licences in their legislation. All the governments we surveyed have done so. For a number of EU Member States the Directive meant the introduction of these general licences. In other Member States, such as Germany and the UK, general licences already existed prior to Directive 2009/43.

We see a large variation in the number of general licences. With the exception of Wallonia, all the systems under discussion have included at least the four general licences prescribed by Directive 2009/43 in their regulatory framework. The large arms-exporting countries (the UK, France and Germany) also have several additional general licences.

a Portugal restricts the use of the licence under the category 'Other' to Australia, Japan, Switzerland and Brazil. Germany allows the licence to be used for all destinations, except for countries on which there is an (EU, OSCSE, UN) embargo and for some specified countries (Egypt, Afghanistan, Yemen, Mozambique, Syria, Thailand, Ukraine, Uzbekistan and Venezuela). In the UK, the licence has a global scope, except for countries listed in the licence (e.g. Afghanistan, Argentina, China, Russian Federation, Ukraine, Zimbabwe, etc.).

Because Directive 2009/43 contains no regulations on the material scope of general licences, it is not surprising that significant differences exist among Member States. Most systems restrict this **material scope**, but each does so in its own way. National interpretations of the sensitivity of certain products explain the limitations on the material scope of general licences.

Significant differences are also observed in the **geographical scope** of general licences. Some systems operate a limited geographical scope (only transfers to other EU Member States or countries in the EEA), while in other countries the scope is significantly wider. Some countries work with closed country lists (e.g. Germany); others with open lists with restrictions (the UK).

The influence of international organisations and agreements (NATO, EEA, Wassenaar Arrangement) on the geographical scope of licences is also apparent. A recipient country's membership of one or more of these organisations constitutes a certificate of trust. Members of these organisations are assumed to be *bona fide*, so that strict(er) controls are less relevant. But there are exceptions: some members of these international regimes are sometimes subject to strict(er) controls. This is the case, for example, with NATO member Turkey and for Ukraine and the Russian Federation, which are members of the Wassenaar Arrangement.

Importantly, general licences are only used in a limited way in the various EU Member States. In particular the system for exports to 'certified companies' does not work in practice, as indicated by the low number of companies having such a certification. However, it remains **extremely difficult to reliably assess the general licence's popularity**, because governments do not or cannot publish reliable and relevant information on the use of such licences. Only two governments – those of Sweden and Flanders – publish annual information on the number of transactions that take place under general licences and their value.

3.5.3 Global licences

Together with general licences, Directive 2009/43 introduces a second type of licence that EU Member States are required to implement in their arms export control systems.[214] Global licences are issued to individual suppliers. They permit certain (categories of) goods to be transferred to certain (categories of) purchasers in one or more EU Member States.[215] The EU views global licences as a preferred option when a general licence is not possible. Prior approval for the transfer or export of defence-related equipment is still required, but a global (transfer) licence

authorises a supplier to transfer (or export) an unspecified amount of specified defence-related goods to specified recipients in various countries. This licence type is more flexible than an individual licence because an application for each transfer is no longer needed. EU Member States are authorised to determine for every global licence which product categories it covers and which (category of) purchasers are allowed. Global licences are valid for a period of three years.[216]

1. All EU Member States in this survey offer the possibility of transferring (and exporting) defence-related goods under a global licence. In that sense, all the surveyed governments have implemented this principle from Directive 2009/43 in their arms export control systems, in so far as that possibility did not yet exist. Germany and the UK had already adopted the use of global licences for arms exports.

2. EU Member States are free to determine the material and geographical scope of their global licences. We find that the material scope of global licences in the various systems surveyed is harmonised. All governments provide for the possibility of trading every category of goods on the EU Common Military List using a global licence. The geographical scope of global licences – the countries to which defence-related goods can be transferred or exported with a global licence – differs, however (Table 3.17). Most governments also allow the use of global licences for countries outside the EU. Four countries place no additional geographical restrictions on the use of a global licence.

- *Flanders* operates the most restrictive geographical scope by allowing global licences for intra-EU trade only.[217]

- *Wallonia* allows global licences to be used for arms exports within the EEA; *Hungary*[218] adds *Switzerland* to this.

- *Germany* and *the Netherlands* extend the geographical scope of global licences to include NATO Member States and a few specific additional countries. For Germany, these are NATO-equivalent countries;[a] for the Dutch system, Australia, New Zealand and Switzerland.[219]

- *France, Portugal, Sweden* and the *UK* do not impose any geographical restrictions on global licences.[220]

a More specifically Australia, New Zealand, Switzerland and Japan are defined in the Policy Principles as NATO-equivalent countries.

Table 3.17: Geographical scope of global licences in the EU Member States

	EU	EEA	NATO	Other countries
Flanders				
Germany				
France				
Hungary				
Netherlands				
Portugal				
Sweden				
UK				
Wallonia				

As with the general licences, it is relevant to discuss the popularity of global licences compared to the total number of licences issued. Table 3.18 contains information on the proportion of global licences in the total number of licences issued, as drawn from official national reports.

1. Not all EU Member States report separately on the number of global licences they have issued. *France*, *the Netherlands* and *Wallonia* record the number and value of global licences in their annual reports together with information on individual licences issued. In these cases, a detailed assessment of the popularity of global licences is very difficult.

2. Global licences continue to have a relatively low level of popularity in the various EU Member States: the number of global licences issued in proportion to the total number of licences remains limited. In this respect, *Sweden* is the only country in which global licences for intra-EEA trade total 15% to 20% of all licences issued. In the other systems, the proportion of global licences in the total number of licences is lower than 10%.

Table 3.18: Number of global licences issued and as a proportion of total licences, 2012-2015

	2012	2013	2014	2015
Flanders	-	5/110 4.5%	5/75 7%	6/81 7%
France	*No separate data on the use of global licences available*			
Germany**	77/16,557 0.5%	56/17,336 0.3%	62/12,152 0.5%	119/12,687 0.9%
Hungary	21/267 8%	17/268 6%	20/286 7%	Annual report not yet available
Netherlands	*Data on global licences integrated in general report, no separate information*			
Portugal*	1/177 0.6%	2/176 1%	13/283 4.6%	Annual report not yet available
Sweden	72/362 20%	97/642 15%	110/552 20%	90/565 16%
United Kingdom*	277/12,896 2%	231/13,578 1.7%	279/13,126 2.1%	320/13,973 2.3%
Wallonia	*No separate data on the use of global licences available*			

*Portugal and the UK also use global licences for extra-EU exports. The numbers in this table refer to all licences issued, thus for both intra- and extra-EU trade, because separate data are not made public

** Germany mainly issues global licences for EU, NATO and NATO-equivalent countries. However, no separate data are made public on the number of licences issued for this category of countries.

Global licences as the second-best option for intra-EU trade in military equipment?

Global licences have been implemented by Directive 2009/43 as a second-best option (next to the general licence) to facilitate the intra-EU trade in military equipment. For transactions that are not eligible for a general licence, global licences should be the preferred option.

All arms export control systems allow global licences to be used for the foreign arms trade. This possibility exists for all goods on the EU Common Military List, indicating a significant level of European harmonisation.

Differences exist, however, with regard to the geographical scope of such global licences. With the exception of Flanders and Wallonia, all the governments included in this study go beyond intra-EU (and EEA)

boundaries for the geographical scope of their global licences. Four systems even allow global licences to be used for the foreign arms trade without geographical limitations. This illustrates how the principles set out in Directive 2009/43, with its exclusive focus on intra-EU trade, also affect arms export controls applied to countries outside the EU.

Like general licences, however, the **global licence's success remains limited**. Except for Sweden, the proportion of global licences in the total number of licences issued is very low. Despite attempts by the EU to make individual licences the exception for intra-EU trade, a huge proportion of licences continue to be of this kind.

3.5.4 Information requirements for applicants

Information is crucial for proper arms export control. Based on the information submitted, the competent control and licensing departments are able to check the frequency and legitimacy of exports or transfers and to the potential risks involved. The application and use of a licence are therefore subject to legal obligations regarding the provision and updating of information considered relevant by the legislator. At the EU level, Common Position 2008/944 and Directive 2009/43 impose information requirements on the applicants and users of licences, who have a duty to inform the applicable government department of relevant information. These requirements relate to the use of the licence and to the period before and after use. Below we discuss:

- the requirements for applicants prior to the use of a licence (sec. 3.5.4.1);
- notification of the effective use of the licence (sec. 3.5.4.2); and
- the obligation to archive the data on the use of the licence (sec. 3.5.4.3).

3.5.4.1 Requirements prior to using a licence

Global and individual licences: application

In contrast with general licences, global and individual licences must be obtained from the competent government authority. Both licences are therefore subject to a priori control. The submission of an application for such a licence is therefore an important moment when the applicant must transfer key information to the competent licensing authority. Article 5 of the Common Position states that national governments can only issue licences on the basis of reliable prior knowledge of the end use of the exported goods in the recipient country. This implies the obligation on the part of the applicant/user to supply an end-use certificate (EUC) or associated

documentation or an official authorisation from the importing country. We therefore analyse what formal requirements apply to the application for a licence for the transfer or export of military equipment.

Table 3.19 provides an overview of the occurrence of these categories in the various systems. In general we find that the same aspects appear in the various systems surveyed. The elements required from the applicant fall under five categories: *actors, products, end use, transaction* and *documents.*

- *Actors:* this concerns information (name and contact details) that enables all the actors involved (e.g. the exporter, manufacturer, recipient and end user) to be identified;
- *Products:* this concerns a description of the goods covered by the requested licence. This means that the applicant must supply all the information on the military equipment concerned (e.g. ML category, technical information, etc.);
- *End use:* the applicant must supply a description of the anticipated use of the product(s);
- *Transaction:* this concerns all the information on the transaction as such (e.g. the nature of the transaction, the value of the products involved and their number);
- *Documents:* this includes the documentation that must be supplied with the application (e.g. EUCs, prior licences and other documents).

Table 3.19: Information required in the various systems for the licence application

	Actors	Products	End use	Transaction	Documents
Flanders[221]	Yes	Yes	Yes	Yes	Yes
Germany[222]	Yes	Yes	Yes	Yes	Yes
France[223]	Yes	Yes	/	Yes	Yes
Hungary[224]	Yes	Yes	Yes	Yes	Yes
Netherlands[225]	Yes	Yes	Yes	Yes	Yes
Portugal[226]	Yes	Yes	Yes	Yes	Yes
Sweden[227]	Yes	Yes	Yes	Yes	Yes
UK[228]	Yes	Yes	Individual licence	Yes	Yes
Wallonia	Yes	Yes	Yes	Yes	Yes

1. Regarding the formally required information for the submission of an individual or global licence application, many similarities exist. Exceptions are *France* and the

UK, which set less strict requirements for the control of the end use of the goods (see also sec. 3.6).

2. In some systems an additional obligation applies to the application for a global licence. In *Germany* and the *UK*, applicants for a global licence must be able to prove their companies' need for this type of licence. In other words, the applicant must demonstrate that the application is based on a commercial need.[229]

General licences: notification of first use

General licences – in contrast to global and individual licences – are not subject to an *a priori* application procedure. Any actor who complies with the relevant legal obligations can transfer or export defence-related goods without requesting permission from the licensing authority in advance. However, Directive 2009/43 stipulates that the supplier must inform the government about its intention to use the general transfer licence for the first time.[230] We describe this obligation as the notification requirement.

1. Eight systems seem to need such a pre-use notification requirement. *Hungary* appears not to impose such an obligation, but has a high reporting frequency on the use of the general licence (see also sec. 3.5.4.2). Table 3.20 provides an overview of the organisation of the notification requirement.

Table 3.20: Overview of the notification requirement for the use of general licences

	Pre shipment notification	Term imposed	Post shipment notification
Flanders[231]	Yes	20 working days	No
Germany[232]	Yes	-	Yes (max. 30 days)
France[233]	Yes	30 days (intra-EU) / 3 months (extra-EU)	No
Hungary	No	-	No
Netherlands[234]	Yes	2 weeks	No
Portugal[235]	Yes	30 days	No
Sweden[236]	Yes	4 weeks	No
UK	Yes	-	Yes (max. 30 days)
Wallonia	Yes	30 working days	No

2. Considerable harmonisation also exists in the periods within which actors must report their intention to make use of a general licence for the first time. Most governments require a period of (around) one month. In five systems – those of *Flanders, Portugal, Wallonia, Sweden* and *France* – the notification must take place around one month before the first use; in *Germany* and the *UK*, this is possible up to one month after the first use.

There are also differences. *The Netherlands* for example lays down a much shorter period for the notification of the first use of a general licence, i.e. two weeks. *France* stipulates various terms depending on whether the licence covers a transfer (within the EU) or an export (outside the EU). In the latter case, the notification must be made up to three months before the first use.

In the *UK*, the obligation to notify the authorities depends on the general licence used and varies from 'no notification requirement', to 'registration with ECO for the first shipment', 'report the intention to use the licence to the Foreign Secretary' or 'use of the licence to be reported to the Foreign Secretary within 30 days'. The British system thus appears to assume a gradual ordering of the risks associated with the export:

- There is no notification requirement for the export of military equipment following an exhibition or demonstration in the UK – on condition that the goods return to the (already known) foreign exporter.

- Registration with the ECO is required for licences for transfers or exports to 'reliable' countries (NATO, EU, EEA, Japan, Australia and New Zealand). This also covers shipments that form part of international cooperation agreements (such as in the context of the UK-United States Defence Trade Cooperation Treaty and cooperation programmes such as for the development of the Joint Strike Fighter and A400M).

- There is an obligation to notify the *Foreign Office* in terms of 10 of the 18 licences with this notification requirement that operate an open list with built-in restrictions. This means that they explicitly prohibit users from exporting certain products to a list of specified countries.

3.5.4.2 Requirements for use: the reporting requirement

The provision of relevant information not only applies to the period prior to the use of the licence. Users of individual, global and general licences are also legally bound

to provide their respective governments with a detailed overview of the actual use of these licences. This constitutes the **reporting requirement**. Directive 2009/43 explicitly stipulates the minimum details that licence users must report to the competent authorities. They are obliged to submit a detailed overview on the effective use of the licences, including:

- a description of the products;
- their number/volume and value;
- the dates of transfer or export;
- the name and address of the supplier and consignee;
- the end use and end user, if known; and
- proof that the consignee has been informed of the export restrictions associated with the licence.[237]

We discuss below how the various systems organise the reporting requirement, how they set the period of this requirement and how they organise its content.

General organisation of the reporting requirement

Regarding the obligation to report on the use of licences, we see a high degree of harmonisation. **All systems impose a reporting requirement** on licence users. In addition, this reporting requirement applies to both **the intra- and extra-Community trade** in defence-related products (see Table 3.21). Therefore, although Directive 2009/43 only applies to intra-EU trade, EU Member States also implement the principles of the reporting requirement for the export of military equipment to non-EU countries.

In certain systems (those of *Portugal* and the *UK*) the reporting requirement only applies to specific types of licences. In *Portugal*, only holders of global licences must report on their use. In the *UK*, a reporting requirement applies to 14 general licences. A similar requirement exists for all global licences, with the exception of the global 'dealer-to-dealer' licence, with which British arms dealers can transfer firearms and munitions to other arms dealers within the EU.

Table 3.21: Organisation of the reporting requirements for the use of licences

	Applies to all licences	Application to intra-EU trade	Application to extra-EU trade
Flanders[238]	Yes	Yes	Yes
Germany[239]	Yes	Yes	Yes
France[240]	Yes	Yes	Yes
Hungary[241]	Yes	Yes	Yes
Netherlands[242]	Yes	Yes	Yes
Portugal[243]	Global licences	Yes	Yes
Sweden[244]	Yes	Yes	Yes
UK [245]	Specific general licences[3] All global licences (except one)	Yes	Yes
Wallonia[246]	Yes	Yes	Yes

Periodicity of the reporting requirement

1. Despite the high degree of harmonisation of the formal notification requirement, the various systems differ regarding the periodicity of this requirement. Some governments operate a **fixed periodicity** (such as *Hungary, France, the Netherlands* and *Sweden)*, and some a **variable periodicity depending on the type of licence** (*Flanders, Wallonia, Germany, Portugal* and the *UK)*. The periodicity can therefore differ according to whether, for example, a general or global licence is at issue.

- *Hungary* has the highest frequency of reporting: users are obliged to report on a licence's use every three months. This applies to each licence.
- *France* and *the Netherlands* have a fixed six-monthly periodicity for every licence. *Sweden* requires annual reporting on the use of licences.
- The *UK* is exceptional because it only subjects some general licences to the reporting requirement. Moreover, it exempts one global licence from this reporting requirement for its use.[247]

Table 3.22: Periodicity of the reporting requirement, according to type of licence

	General licence	Global licence	Individual licence
Flanders[248]	6 months	Annually	After expiration of licence
Germany[248]	6 months	6 months & retro-spectively	After expiration of licence
France[250]	6 months	6 months	6 months
Hungary[251]	3 months	3 months	3 months
Netherlands[252]	6 months	6 months	6 months
Portugal[253]	-	6 months	After expiration of licence
Sweden[254]	Annually	Annually	Annually
United Kingdom[255]	Annually	Annually	After expiration of licence
Wallonia[256]	6 months	6 months	After expiration of licence

Content of reporting on the use of licences

1. All systems studied have similar arrangements for the content of the reporting (table 3.23). This means that in general the user must submit the same details for all types of licences, transactions and recipient countries to the competent authority. However, three systems differ from this general finding:

- *Flanders* requires different contents according to whether the notification covers transfers or exports.[257]
- *French* legislation sets various requirements for the documents to be submitted. For general and global licences it requires a copy of contracts of over €200,000, and for individual licences a copy of the contract, and EUC and non-re-export documents.[258]
- In the *UK*, the holders of 14 general licences must report on their use. Similar reporting requirements apply to all global licences, with the exception of the global 'dealer-to-dealer' licence.[259]

2. Besides reporting on the use of the licences, several systems require **additional elements to be reported. In** *Sweden and Portugal*, these involve reporting requirements associated with prior licences (see sec. 3.5.1). In *Portugal*, the holders of a licence that allows them to carry out activities related to the manufacture of, trade and brokering in military equipment and technologies must report on their trading activities.[260] Likewise, *Swedish* holders of a 'licence for the production and supply of arms' must submit a bi-annual report to the competent authority on the exported and invoiced military products.[261] *The Netherlands* requires the user to send an invoice to the competent inspectorate (and not only to the licensing authority) with every use of the licence.[262]

3. *Walloon* legislation foresees an additional reporting requirement for individual licences in case of a first export effectively taking place to an non-EU country if (1) the country of destination was subject to an embargo lifted only 12 months before the licence application; (2) the government had already refused a licence to the supplier for an export to the same recipient in the last two years; or (3) the country of destination had experienced a coup d'état in the last two years.[263] In these cases, the company is prohibited to start the effective production of the goods before the licence is issued. At least 30 days before the contract is signed, the Walloon government needs to be informed about the country of end use, the end user and the type of equipment.

Table 3.23 Content of the reporting requirement concerning the use of the licences

	Products				Supplier		Purchaser										
	Description	Quantity	Value	Restrictions on integrated components	Name	Address	Name	Address	Time of shipment /use	Recipient country	Final country of destination	End use	End user	Proof of information provision concerning restrictions	Proof that the conditions have been met	Documents (e.g. customs, contracts, certificates)
Flanders	Intra-EU	Yes	Yes		Intra-EU	Intra-EU	Intra-EU		Yes			Intra-EU	Intra-EU	Yes	Yes	
France	Yes	Yes	Yes	Yes			Yes	Yes	Yes	Yes	Yes		Yes	Yes		Yes
Germany	Yes	Yes	Yes		yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Hungary	Yes	Yes	Yes		Yes	Yes	Yes	Yes				Yes	Yes			
Netherlands	Yes	Yes	Yes				Yes	Yes	Yes				Yes			Yes
Portugal	Yes	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes						Yes
Sweden	Yes	Yes	Yes				Yes	Yes			Yes					
UK	Yes	Yes	Yes				Yes	Yes	Yes	Yes	Yes		Yes			
Wallonia	Yes	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes						

3.5.4.3 Archiving requirement

A last aspect of the formal requirements is the archiving requirement. To facilitate *a posteriori* controls, licence holders are legally obliged to archive certain documents relating to the licences' use for a legally specified period. Directive 2009/43 obliges EU Member States to impose an archiving requirement of at least three

years on licence users.[264] We discuss the general organisation, mandatory period of retention and content of the archived information.

General organisation of the archiving requirement

Since Directive 2009/43 imposes an archiving requirement on the licences' use, it is not surprising that all the systems surveyed include this requirement in their legislative framework. In every system this requirement applies to general, global and individual licences. Directive 2009/43 only imposes an archiving requirement on intra-Community trade. The EU regulatory frameworks provide no guidelines for extra-Community trade. The systems surveyed consequently differ in the degree to which this requirement applies to extra-Community trade in defence-related products.

The geographical scope of the archiving requirement therefore varies. Three types of systems can be distinguished in this regard. *Hungary* is the only government that limits the archiving requirement to licences for intra-Community trade. *The Netherlands* and *Sweden,* besides an intra-Community archiving requirement, also have a limited extra-Community requirement. *Sweden* extends the archiving requirement to include the EEA countries, while *the Netherlands* imposes the requirement on trade with EEA countries and NATO Member States. The other systems – those of *Portugal, the UK, Flanders, Wallonia, France* and *Germany* – operate a legal archiving requirement for both intra- and extra-Community trade.

Retention periods for the archiving requirement

A second aspect of the archiving requirement is how long licence users must retain data on licences' use. Directive 2009/43 stipulates a minimum period of three years. Member States differ considerably in terms of the period of retention they legally require (table 3.24). The archiving requirement fluctuates between a minimum of three years (as in the *UK*[265]) to seven years (as in *Flanders),* and even ten years (as in *France* and *Wallonia).* Two governments – those of the *UK* and *Germany* – allow the retention period to vary according to whether a general or global licence has been used.

Table 3.24: Overview of the retention period and geographical scope, by licence type

	General licence	Global licence	Individual licence	Geographical scope
Flanders[266]	7 years	7 years	7 years	Intra- & extra-EU
Germany[267]	(Minimum) 3 years	5 years	5 years	Intra- & extra-EU
France[268]	10 years	10 years	10 years	Intra- & extra-EU
Hungary[269]	5 years	5 years	5 years	Intra-EU
Netherlands[270]	7 years	7 years	7 years	Intra-EU, EEA & NATO
Portugal[271]	(Minimum) 10 years	(Minimum) 10 years	(Minimum) 10 years	Intra- & extra-EU
Sweden[272]	7 years	7 years	7 years	Intra-EU & EEA
UK[273]	4 years	3 or 5 years	3 years	Intra- & extra-EU
Wallonia	10 years	10 years	10 years	Intra- & extra-EU

Content of the archiving requirement

A last aspect of the archiving requirement is what information licence users are required to keep after the transfer or export has taken place. Here the various systems **impose similar obligations** on licence users (table. 3.25).

In the *UK*, the archiving requirement has a limited content. No details need to be kept on the value of the export or transfer or the time of the transaction. *Flanders* is the only area to distinguish between transfers and exports. A less extensive archiving requirement content applies to the latter transactions. Some governments attach additional obligations to the supply of specific documents. In *Portugal*, all the customs and licence documents, invoices, transport documents and all other information considered to be relevant must be retained. In the *UK*, the exporter must retain the required official authorisations for general licences. This is because an official export authorisation is required if the products are categorised by the

government as 'officially sensitive'.[a] In *Flanders*, licence users must also retain evidence that the licence conditions have been met.

Table 3.25: Content of the archiving requirement

	Products			Timing	Supplier		Purchaser		End use	End user	Proof purchaser has been informed of restrictions in licence	Other
	Description	Quantity	Value		Name	address	Name	address				
Flanders[274]	Intra-EU	Yes	Yes	Yes	Intra-EU	Intra-EU	Intra-EU	Intra-EU	Intra-EU	Intra-EU	Yes	Yes
France[275]	Yes	Yes	Yes				Yes	Yes	Yes	Yes	Yes	
Germany[276]	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	
Hungary[277]	Yes	Yes	Yes	Yes			Yes	Yes	Yes	Yes	Yes	
Netherlands[278]	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	
Portugal[279]	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Sweden[280]	Yes	Yes	Yes	Yes			Yes	Yes	Yes	Yes	Yes	
UK[281]	Yes	Yes			Yes	Yes	Yes	Yes		Yes		Yes
Wallonia[282]	Intra-EU	Intra-EU	Intra-EU	Intra-EU	Intra-EU	Intra-EU	Intra-EU	Intra-EU	Intra-EU	Intra-EU	Intra-EU	

a Since April 2014 the British government has operated the *Government Security Classifications Policy*. This distinguishes among the levels *official* (all public routine actions, operations and services), *officially sensitive* (information that would cause harm to individuals, organisations or the government if it were to be lost, stolen or published in the media), secret (information that needs to be protected, and which could cause serious harm if made public), and top secret (information that, if made public, would cause considerable loss of human life, harm international relations or seriously influence current intelligence operations).

Information requirements for companies: significant European harmonisation

All the systems studied oblige licence users to submit to the licencing authorities all the relevant information with regard to the use of licences.

In this area, therefore, we find **clear harmonisation**. There are important similarities in the way in which the various systems implement the principles of Directive 2009/43. Information, reporting and archiving requirements are present in all the systems, while the formal requirements of these obligations are very similar.

All the systems surveyed impose requirements regarding the supply of information on the actors involved (who?), products (what?) and end use (why?).

The UK, however, is an exception to this harmonisation. The British system does not enquire systematically about the end use for products covered by global licences, and operates a more restricted reporting requirement, i.e. only for part of general and global licences.

3.6 End use controls: assessment, requested documents and restrictions

The most important reason why governments develop arms export control systems is to assess the legitimacy and desirability of the export or transfer of defence-related goods. These considerations are central to their assessment of licence applications. The **assessment criteria** used to evaluate the legitimacy and desirability of a planned export constitute the first element in this process. In addition, the **definitions of 'consignee' and 'end user'** play an important part in this process, because the assessment of the Common Criteria is based on knowledge of the end use and end user.

A third cornerstone of an effective arms export control system is control of the end use, the way in which governments attempt to identify the end use, and the degree to which they check whether the stated end use is indeed the actual end use. In this part the focus is on the formal documents required for establishing end use. At the same time, governments try to keep control over what happens to

exported products after the export has taken place. We refer to the various methods that governments use for this purpose, which are collectively known as **'restrictive measures'.**

We discuss these various aspects below. We compare how the surveyed EU Member States deal with:
- assessment criteria (sec. 3.6.1);
- definitions of the key concepts relating to end use (sec. 3.6.2);
- control of the end use (sec. 3.6.3); and
- the use of restrictive measures (3.6.4).

3.6.1 Assessment criteria

The essence of any arms export control system is formed by the criteria against which the desirability and legitimacy of a licence application are assessed. **Common Position 2008/944** is crucial in this regard, because it sets out the eight Common Criteria that all EU Member States are legally obliged to take into account in the assessment of licence applications for the export of military equipment. These criteria focus on considerations of human rights, conflict prevention, democracy and peace in the country of end use and explicitly prioritise these principles above EU Member States' economical and industrial interests.[283] These criteria explicitly function as minimum criteria: governments are free to formulate additional criteria and operate a stricter policy.[284]

For intra-EU trade, the European regulatory framework – **Directive 2009/43** – contains no specific rules. However, the Directive does recognise that prior approval of the EU Member State of origin is necessary, and that transfers can be restricted based on considerations of human rights, peace, security and stability,[285] public order, and public safety.[286]

Below we look at three aspects:
- How do the various systems **implement the eight Common Criteria?** (sec. 3.6.1.1)
- How do EU Member States **formulate** the Common Criteria and to what extent do they provide for additional grounds for denial of licences in their own assessment framework? (sec. 3.6.1.2)
- Do EU Member States include **additional criteria** that they take account of in the assessment of licence applications? (sec. 3.6.1.3)

3.6.1.1 National implementation of the Common Criteria

1. EU Member States are free to determine how they implement the Common Criteria in their national arms export control systems. This results in significant differences in how governments nationally implement the Common Criteria. They include (a reference to) the Common Criteria in their own legal framework, maintain similar national criteria, or only refer in policy documents to the Common Position as an international commitment that directs the national licensing policy:

- *Flanders*[287] and *Wallonia*[288] explicitly include the Common Criteria in their legal frameworks.
- Two other governments also include a reference to the Common Criteria in their legal frameworks, by referring to the Common Position in the law (*Portugal*)[289] or by including the Common Criteria in an appendix to the legal framework (*Hungary*).[290]
- *Sweden, Germany* and the *UK* maintain their own national criteria that closely reflect the Common Criteria. In practice, these are the 'Swedish Guidelines'[291] (Sweden), the 'Policy Principles'[292] (Germany) and the 'Consolidated EU and National Arms Export Licensing Criteria'[293] (UK). All three governments also state in official policy reports that they take explicit account of the Common Criteria.
- *The Netherlands* and *France* do not implement the Common Criteria in national legislation, nor do they use their own national assessment criteria; in official policy reports both countries do, however, report that their respective assessment procedures use the Common Criteria.[294]

2. Three governments **make a distinction in the geographical scope of the Common Criteria:** the assessment of licence applications depends on the country of end use. The remaining countries in principle apply the Common Criteria in full when assessing both transfers and exports. *Germany*[295] and *Sweden*[296] make a distinction between countries of end use. For allies, a principle of immediate approval applies. In *Germany,* this principle is valid for EU, NATO and NATO-equivalent countries (Australia, New Zealand, Switzerland and Japan);[297] in *Sweden*, this includes the Scandinavian countries, EU Member States and neutral states. In the remaining countries an export ban applies, except for national security and foreign policy reasons. *Flanders* uses separate regulations for intra-EU transfers and extra-EU exports. It assesses licence applications for intra-EU transfer only administratively and technically.[298]

3.6.1.2 National formulation of the eight Common Criteria

Are the Common Criteria included in national legislation or policy, and, if so, in what way? We discuss this in this section and compare the different formulations of these criteria. We make a distinction between two groups of Common Criteria. Explicit **grounds for denial** apply to Common Criteria **1 to 4,** so that governments are obliged in certain circumstances to deny a licence application. Criteria 5 to 8 function only as grounds for consideration that governments must take into account when assessing licence applications for the export of military equipment.

Common Criteria 1 to 4: differences in national formulations

The Common Position formulates explicit grounds for the denial of a licence application for the first four criteria. Applications for the export of military equipment must be denied in the following cases:

- 'approval would be inconsistent with inter alia international arms embargoes and other international (non-proliferation) treaties and obligations';[299]
- 'there is a clear risk that the military technology or equipment to be exported might be used for internal repression or in the commission of serious violations of international humanitarian law';[300]
- 'for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination';[301] and
- 'there is a clear risk that the military technology or equipment would be used aggressively against another country or to assert by force a territorial claim'.[302]

The Common Position is legally binding on all Member States. These grounds for denial therefore apply in full to all the governments in this study (and to all EU Member States in general). Five governments explicitly include the Common Criteria, either in their own legislation (such as *Flanders and Wallonia)* or in official policy documents (*Germany, the UK* and *Sweden).*[a]

An analysis of the national wording of these criteria (table 3.26) suggests that four systems operate additional refusal grounds. *Flanders, Wallonia, Sweden* and *Germany* formulate an additional ground for refusal in case of clear risks of human rights

a Despite being merely official policy documents, these documents have an indirect legal basis in two countries. In the UK, these criteria are the elaboration of a competence explicitly delegated to the competent minister under the Export Control Act of 2002. In Sweden, the criteria were formally voted on and approved in the Swedish parliament.

violations. Moreover, *Sweden* and *Germany* omit the causal link between participation in an internal or regional armed conflict and the product in question. *Sweden* also omits this causal link for serious human rights violations, and also under this criterion only looks at the situation in the country of end use, and not at the end use of the product and the end user.

In other words, the governments who include the Common Criteria in their national legislative framework interpret them differently, and link them with **additional constraints**: either by formulating **additional grounds for denial**, or by **omitting** the **causal link** between the product in question and the breaching of one or more of these criteria. The latter means that they do not look at the effective end use of the product and the risk of a violation of human rights, or the use of the product in an internal or regional conflict. For an application to be refused, it is sufficient that the country of end use be involved in armed conflict or characterised by systematic human rights violations. It is then not necessary to carry out a risk analysis of the possibility that the product could be used in the violation of human rights or in armed conflict.

Table 3.26: Interpretation of Common Criteria 1-4 in the national criteria of five systems

	International commitments	Human rights	Internal tensions	Regional conflict
Flanders	"approval would conflict with international commitments"	"if a clear risk exists that the products may be used in the commission of serious violations of human rights or international humanitarian law"	"products may be used for internal repression" "products may be used in armed conflict and the end user is involved in armed conflict in the country of end use"	"products may be deployed in armed conflict and the end user is involved in a regional armed conflict"
Germany	"if there is reason to assume that the granting of a licence would violate the international obligations"	"License should be denied where there are reasonable grounds for suspecting such exports may be used for the sustained and systematic abuse of human rights"	"Not grant a license if there is a clear risk that the items might be used for internal repression or in the case of armed conflict"	"No licenses will be granted to countries involved in armed conflict or where armed conflict is imminent, except in cases covered by Art. 51 of the UN Charter"

UK	"if it would be inconsistent with international obligations"	"Exercise special caution and vigilance in granting licenses to countries where serious violations of human rights have been established"	"Not grant a license if there is a clear risk that the items might be used for internal repression"	"Not grant a license if there is a clear risk that the intended recipient would use the items aggressively against another country"
Sweden	"not be granted if this would contravene an international agreement"	"Licenses should not be granted where the recipient country is a state where there are widespread and serious human rights violations"	"Licenses for military equipment should not be granted if the state in question is involved in an armed conflict with another state (...), is embroiled in an international conflict that is in danger of becoming an armed conflict or is the site of internal unrest"	
Wallonia	"refused if incompatible with international obligations"	"if sufficient indications exist that the goods will contribute to grave violations of human rights or if it is found that child soldiers are enrolled in the armed forces"	"clear risk exists that the goods are used for internal repression " "If the goods will provoke or prolong armed conflicts or aggravate existing tensions or conflicts, or in case of a civil war in the country of final destination"	"if a clear risk exists that the recipient uses the goods aggressively against another country or to assert by force a territorial claim"

Common Criteria 5 to 8: from considerations to grounds for denial

Criteria 5 to 8 of Common Position 2008/944 function merely as *considerations for a licence application. These criteria consequently contain no explicit mandatory grounds for denial and refer to:*

- the national security of the EU Member State and its allies (criterion 5);
- the attitude of the recipient country to international terrorism (criterion 6);
- the risk of undesirable diversion (criterion 7); and
- the technical and economic capacity of the country of end use (criterion 8).

Although the Common Position obliges governments to take these criteria into account in determining a licence application, several systems link explicit grounds for denial to these four criteria, particularly in relation to considerations of national security (criterion 5) and the risk of undesirable diversion (criterion 7). *Flanders*

links three grounds for denial to criteria 5, 7 and 8. Licence applications must be refused:

- if 'a clear risk exists that the export will directly or indirectly threaten the defence- and security-related interests of the Flemish Region, Belgium, other EU or NATO Member States or friendly countries or allies, or that the products will be used against our own troops or troops of the countries stated' [303];
- if 'competent bodies have established that the country of end use supports or encourages terrorism or international criminality' [304]; or
- if 'a clear risk exists that the products or technologies will be diverted from their purpose or destination or re-exported in a way that does not comply with the stipulations of the Decree' [305]

National security (criterion 5) also constitutes grounds for denial in *Hungary*,[306] *Germany*[307] and *Sweden*.[308] In the Swedish context, it is even one of the two 'decisive criteria' whereby a licence is only issued if necessary for national security or to supply the Swedish armed forces. In Germany too, the export of military equipment to non-EU or non-NATO countries is only permitted if this is in line with foreign and security policy.

Sweden[309] and *Germany*[310] equally cite the risk of illegal diversion as a ground for denial of a licence and determine in principle systematic grounds for the denial of licence applications if proof of illegal diversion of exported goods emerges (see also sec. 3.6.4.4).

3.6.1.3 Additional (national) assessment criteria

Governments are free to formulate additional criteria over and above the Common Criteria: the Common Position explicitly states that the Common Criteria function as minimum criteria and governments have the right to apply more restrictive export policies.[311] Moreover, Article 10 of the Common Position allows governments to take national economic, strategic and industrial interests into account in the assessment of export applications, provided that these factors do not affect the application of the Common Criteria.

1. With the exception of the *Netherlands*, all governments formulate additional assessment criteria. Most systems refer to national and economic interests in their assessment frameworks (table 3.27).

'National interests' as an assessment criterion are explicitly referred to by *Flanders,*[312] *Portugal,*[a] *Hungary,*[313] *France and the UK.*[314] In a similar way, several systems include an explicit link with national **foreign policy**. This is the case in *Wallonia, Sweden* and *Germany,* which all state that arms exports can also take place if they in accordance with 'national foreign policy principles' and goals. In the two latter countries, exports could even only be allowed if they are in line with national foreign policy.

Economic interests are explicitly referred to by *Hungary,*[315] *France*[316] and the *UK.*[317] The British *Consolidated Criteria* indicate that the government assesses the potential effect of the licence application on British economic, financial and commercial interests. The protection of the UK's essential strategic industrial base is also taken into account. France has a similar interpretation. The Hungarian formulation states that licence applications are to be refused if they might adversely affect Hungary's economic interests.

Flanders,[318] *Wallonia and the UK*[319] apply additional criteria linked to **specific human rights.** The British *Consolidated Criteria* take account of gender-related violence and serious violence against women and children. Flanders and Wallonia both have a specific ground for refusal with regard to the presence of child soldiers in the official armed forces of the country to which the licence applies.[b] Flanders has also formulated other assessment criteria that refer to children's rights, gender-related violence, the attitude towards capital punishment and the prevalence of gun violence in the country of end use.

a Article 21 of Act No. 37/2011 states that besides the requirement of having the necessary authorisation to be active in the defence industry and to test the application against the EU criteria, the proposed transaction 'does not conflict with the interests of the Portuguese state'.

b This specific common ground of denial related to the use of child soldiers is a historical product from the Federal Law of 2003 on the export of military equipment, in which this criterion had already appeared.

Table 3.27: Additional criteria for the assessment of licence applications in the EU Member States

	National interests	Foreign policy goals & principles	Economic interests	Specific human rights
Flanders	X			X
Germany		X		
France	X		X	
Hungary	X		X	
Netherlands				
Portugal	X			
UK	X		X	X
Sweden	X	X		
Wallonia		X		X

Assessment criteria to control end use. Diversity in national implementation

All governments use the Common Criteria in the assessment of licence applications for the export of military equipment. However, they do so in very diverse ways.

This is mainly reflected in the way they implement the principles of the Common Position in their own legislative frameworks. EU Member States' freedom in this regard results in a wide variety in how these principles are nationally implemented: inclusion in the legal framework, the use of national assessment frameworks with similar criteria or simply a reference to the Common Criteria in official policy reports.

Most governments operate a **stricter assessment framework** than the system that is forwarded in the Common Position:

- Several systems have added grounds for denial with regard to human rights violations, risks to national security and risks of illegal or undesirable diversion.
- Some countries omit the causal link in certain cases between the product in question and possible violations of human rights or use in internal or regional conflict. The analysis thus shifts from the relevant product and the potential end use or end user to an assessment of the country of end use as such.

EU Member States' governments also make use of the possibility to formulate additional assessment criteria. Besides referral to national interests and accordance with national foreign policy principles, national economic interests also appear as criteria that governments take into account. This reflects the fact that **national considerations (still) play a pivotal role in the assessment of licence applications in the various EU Member States**.

Point of focus: restricted access to information

Access to information about the way in which assessment criteria are maintained and interpreted in practice in the assessment of licence applications remains limited. National governments are only willing to communicate in a limited way on the actual implementation of their assessment criteria. And when stricter assessment criteria or the removal of the causal link in the legal framework are included, the question remains as to how they are interpreted and applied in national policy and the assessment of licence applications.

3.6.2 Basic concepts: differentiating consignee and end-user?

After the formulation of the assessment criteria, the next crucial step is the specific actors and countries to which the criteria will be applied. It is highly relevant to see how governments deal with the end use and end users of exported defence-related goods. It is essential to understand how the surveyed governments define the scope of these concepts and which types of actors they see as acceptable end users.

Such differences will impact the assessment of the Common Criteria in specific licence applications, as the concrete assessment will be different whether the criteria are evaluated on the country of first destination or the country of final end use. Certainly in the case of components being transferred or exported, whether or not for integration into larger weapons systems, the first recipient is usually not the effective user of the product. The goods in which the components are integrated will eventually be used by another actor, in the same country or in another country, the latter then becomes the country of final destination. The question therefore is to the degree to which governments distinguish between the first recipient of the exported or transferred products and the final end user? Differences between Member States in the extent to which they actively search or demand for information on the final end user of the products will result in diverging assessment practices.

We therefore look at the ways in which the governments define and deal with concepts such as 'consignee', 'recipient country' 'end user' and 'country of end use (or final destination)'.

1. All governments distinguish between 'consignee' and 'end user', and between 'recipient country' and 'country of end use or final destination'. In most cases the licensing authorities define these concepts in administrative documents or guidelines. Only *Flanders* defines the four concepts in its own legislative framework (table 3.28).[320] *Germany*[321], *France*[322], *Wallonia*[323] and the *UK*[324] formulate explicit definitions for one or more of these concepts. *Portugal, Sweden, Hungary* and *the Netherlands* also distinguish between these concepts, but do not define them explicitly in legislation, policy documents or administrative guidelines.

Table 3.28: Overview of the legal or administrative definitions of consignee, recipient country, country of end-use and end user in the EU Member States.

	Consignee	Recipient country	End use (country of)	End user
Flanders	Natural person or legal person in the country of destination to whom the products are transferred, exported or transited from Belgium	Country to which the products are transferred, exported or transited from Belgium	Country where, at the time of the decision on the licence application, the last known use of the transferred or exported products will take place	at the time of the decision on the licence application, the last known natural or legal person who will have the use of the exported or transited products
France	Natural or legal person based in France or an EU Member State, who is responsible for receiving the transfer			
Germany	Contractual partner of the German exporter and/or the first recipient of the products who can exercise a direct or indirect influence on the products or their use	Country where the products are used, consumed, treated or processed, or if this country is not known, the last known country to which the products are exported		The person, company or entity that consumes, uses, integrates etc., the products
Hungary	No explicit definitions of end use, consignee, country of destination or country of end use			

Netherlands	No explicit definitions of end use, consignee, country of destination or country of end use	
Portugal	No explicit definitions of end use, consignee, country of destination or country of end use	
Sweden	No explicit definitions of end use, consignee, country of destination or country of end use	
UK	Initial recipient of the products outside of the UK	Entity that uses or processes the products in any way. If a consignee integrates the products into another product, he is considered to be the end user since the products lose their identity with the integration process
Wallonia	Legal or natural person who is legally responsible for receiving an export of defence-related products	

2. Several governments provide additional clarifications on what they mean by 'end use' or 'end user'. This refers to entities that they accept as end users, additional information on the context of the end use, and further subdivisions in the types of end users. *Flanders,*[325] *Germany*[326] and the *UK*[327] also formally consider entities that further integrate the products into their own finished systems as end users. Importantly, however, in practice Germany appears not to accept a defence company as the last known end user in a transfer or export licence application. As in Germany, in Sweden only government bodies or recipients authorised by the government may act as end users.[328] 'Recipients authorised by the government' are generally entities that are responsible for purchasing weapons and equipment on behalf of the armed forces or other government recipients.[329]

3. All countries (seem to) **differentiate between recipient countries and countries of final destination**, and apply the Common Criteria against the country of final destination. This is especially relevant in case of transfers or exports of components of military equipment: most often is the defence-industry in other western countries in such cases the first recipient of these goods. The outcome of the procedure of may differ whether the assessment is done for the recipient country, or for the country to which the finalized weapons are eventually exported to.

4. However, differences exist between governments in the extent to which they actively demand for information on the effective end-user of the goods, and accept a (defence-)industrial actor as the last known end-user of the transferred or exported goods. While some governments allow the defence-industry to be the last known end-user, especially in case of transfers of components for integration in larger weapons systems, other governments will only issue a licence when the effective end-user of the finished goods is reported. In reality, most governments make a division in between traditional allied countries and other countries in determining whether the defence industry is accepted as last known end-user of the military goods, especially in case of components.

The distinction between consignee and end-user – substantial impact on assessment outcomes

All Member States apply the assessment criteria on the country of final destination of the defence-related goods. This is crucial in the assessment of a licence application, because the result of the evaluation can be very different if the assessment of the Common Criteria is carried out with the recipient and the country of destination in mind, or if it focuses on the effective end-user and the country of end-use.

Significant differences however exist between member states **in the extent to which they actively seek for information on the effective country of end-use**, in particular with regard to the trade in components. Current differences between governments in the acceptance of the defence industry as end-user, are **the result of national foreign and security policy choices and priorities**.

However, an important limitation is **that these concepts are not always properly or explicitly defined**. In addition, current practices to actively determine the country of end-use diverge between governments or are not formally written down in official documents and could only be identified through direct contacts with the competent licencing authorities. It is therefore not evident to reliably compare the Member States' policy on distinguishing recipients and end users, because such information is not available for all governments. It is **difficult to assess to what extent governments request licence applicants to give information about the effective end-use of the products**.

3.6.3 Control of end use: required documentation

A related issue involves the formal documents governments require from licence applicants to prove the intended country of end use, the end user and other detailed information on the transaction. Such obligations in the context of the control of end use are the primary instruments that enable governments to assess the desirability and legitimacy of the transfer or export of military products.[330] Consistent control of the end use is also necessary for the prevention of the undesirable or illegal diversion of exported products.[331]

Common Position 2008/944 emphasises that export licences can only be issued on the basis of reliable knowledge about the end use in the country of final destination.[332] In principle an 'end-use certificate' (EUC) and/or other form of official approval from the country of destination is required for this purpose. An EUC is a document in which the consignee indicates the intended end use of the products and confirms that it will act as end user of the products. In contrast, Directive 2009/43 lays down no specific rules regarding the formal documents necessary for controlling the end use and assessing the legitimacy of the transfer.

In terms of the formally required documents that applicants must supply to indicate the end use, the systems surveyed here differ in three areas: the type of documents required; the type of licences for which these documents are required; and the geographical scope of these documents. Table 3.29 provides a schematic overview of the officially required documents for control of the end use of the exported or transferred products, according to type of licence.

1. In general, most governments make an EUC mandatory, certainly for individual licences. The licence applicant is responsible for supplying this document. All governments have their own EUCs that end users must complete. The document contains the contact details of the consignee and the end user, the type of equipment, the quantity and the value. The EUC must in principle be submitted to the licensing authority before a licence application can be approved. Only in France can an end-user document be supplied after the licence has been approved.[333] This results partly from the French government's emphasis on *a posteriori* controls of the end use (see sec. 3.4.1).

Four governments formally allow other documents to be submitted to indicate the end use of the goods. *Wallonia* accepts official import certificates in case of transfers or exports to a specified list of countries. An EUC is always formally required in case of exports to other countries. *Flanders*,[334] *the Netherlands*[335] and *Hungary*[336] do not legally require an EUC for individual licences: they also allow a copy of the

import licence or an international import certificate (IIC) to establish the goods' end use. These two documents are supplied by the government of the recipient country, which thus takes responsibility for the control of the stated end user and end use. However, these three governments in practice also give preference to EUCs.

Some EU Member States impose additional conditions and only accept their own official EUC, or place restrictions on the entities that may draw up the EUC. *Sweden* is the only country to only accept its own EUCs for supplies to non-EU armed forces or to companies that supply armed forces. These declarations of end use (DEUs) are printed on banknote paper. They must be completed by recipients and returned via the local Swedish embassy.[337] In *Germany*, applicants must always submit an EUC based on a licensing authority template.[338] For two categories – weapons of war and small arms and light weapons – the EUC can only be issued by a government body in the importing country. The *UK* uses an 'end-user undertaking' (EUU) for individual licences.[339] The information required in this document is similar to that of the EUC. Pursuant to the additional subdivisions in the various types of end user (see sec. 3.6.2) the UK also provides for a specific end-user document for a 'stock-holding end user' ('stockist undertaking').[340]

2. The extent to which EUCs are required to control the end use depends on the licence. The required end-user documents vary greatly according to the type of licence. For trade in military equipment using global licences, most governments require a formal document to determine the end use, which, however, often contains less strict requirements regarding the information to be supplied. Only limited requirements of end-user documents exist for transfers using general licences.

– *Flanders*[341], *Wallonia* and *the Netherlands*[342] impose legal obligations for end-user documents for individual licences, not for global or general licences

– *Sweden*,[343] *Germany*,[344] *France*[345] and the *UK*[346] require end-user documents for individual and global licences. For global licences, the UK requires a 'consignee undertaking'.[347] This document is less demanding than an EUC, since a consignee may also complete it; it can include a list of possible end users if the effective end user is not yet known.

– *France* and the *UK* impose no general obligations on the supply of end-user documents for general licences, but can do so for specific general licences. In the UK, a 'consignee undertaking' is required for the general licence 'military goods'.[348] *France* may request an end-user document for general licences for

transfers to armed forces, certified companies, police, customs, and coastguard and border control agencies.[a]

– *Hungary*[349] and *Portugal*[350] make end-user documents mandatory for individual, global and general licences. In Hungary, this is possible via an EUC, an IIC and/or a copy of the import licence; in Portugal an EUC is mandatory for all types of licences.

3. The **geographical scope** of the required documents for the control of end use also differs. Whether formal EUCs are required varies according to the country of end use. Although six of the surveyed governments make no formal distinction between countries of destination, the others have a more flexible arrangement and decide on the need for end-user documents according to the country of end use.

– *Germany*[351], *Flanders*[352], *the Netherlands*[353], the *UK* [354], *Hungary*[355] and *Portugal* do not differentiate between destinations: the required end-user documents apply to both intra-EU transfers and extra-EU exports.

– In *Sweden,* an EUC is sufficient for transfer and export to EU Member States and some other countries *(Norway, the United States, Canada, Australia, New Zealand and Japan);*[356] for these countries a DEU is not mandatory, because Sweden has sufficient trust in documents supplied by the end users in these countries.

– *France* uses a list of countries exempted from the EUC requirement, including EU and Wassenaar Arrangement Member States, but also specific countries in the Middle East (Saudi Arabia, the UAE, Qatar and Kuwait), Asia (Singapore and India) and South America (Chile and Brazil).[357] The *Walloon* system in an analogue manner exempts a list of countries from the requirement to submit an EUC, and suffices with an official import certificate (see above).

a There is some confusion in this area, because in these general licences the French term 'clause de non-reexportation' appears to be translated into English as 'end-use certificate', which does not have the same meaning.

Table 3.29: Legally required documents for the control of end use, according to type of licence

	Individual licence	Global licence	General licence
Flanders	IIC, copy of import licence or EUC for exports and transfers	No obligation for control of end use	No obligation for control of end use
Germany	EUC for exports and transfers, EUC from government for weapons of war and small arms and light weapons	EUC for exports and transfers, governmental EUC for war weapons and small arms and light weapons	No obligation for control of end use
France	EUC, with list of exempted countries	EUC, with list of exempted countries	EUC for specific general licences
Hungary	EUC, IIC or other document to certify end use	EUC, IIC or other document to certify end use	EUC, IIC or other document to certify end use
Netherlands	EUC or IIC for exports and transfers	No obligation for control of end use	No obligation for control of end use
Portugal	EUC and IIC or equivalent import document for exports	EUC	EUC
UK	EUU	Consignee undertaking	Consignee undertaking in the general licence for 'military goods'
Sweden	DEU for exports, EUC for transfers or EUU for exports and transfers of components	DEU for exports EUC for transfers or EUU for exports and transfers of components	No obligation for control of end use
Wallonia	IIC or import certificate for intra-EU and for a list of other countries[4], EUC for remainder of the countries	No obligation for control of end use	No obligation for control of end use

4. Besides *a priori* control on the end use of the products – i.e. before the licence is approved – end-use control can also take place retrospectively – i.e. after the licence is issued or the export has effectively taken place. Such **a posteriori controls** are in principle the most effective way of controlling the end use. However, in practice they are often difficult to implement. A considerable financial investment is required from the government in order to systematically control its own companies or to carry out controls in the country of end use. Moreover, recipient countries are not always prepared to allow such controls on their territory.

Some governments formally provide for the possibility of carrying out post-shipment controls on the end use. The importance of such a-posteriori controls is often emphasised, but are they only rarely applied.

Flanders[358] and *Portugal*[359] make it legally possible to physically inspect the products in the country of end use. However, in practice this does not happen. In Flanders, the government attaches most importance to the *a priori control of end use*:[360] the applicant has an active duty to gather all the available information on the end use of the products up to the time of the application's approval. In addition, the user of the licence has a passive obligation to inform the competent authority: in case of knowledge of a change of purpose or destination of the export of the goods during the term of the licence, he must communicate this information to the licencing authority.

Sweden announced its intention to develop *a posteriori* controls, but owing to a lack of financial resources, this has never taken place systematically. At present, on-site inspections no longer take place in practice. In the current process of revising the existing legal framework, however, the possibility to actively make use of post-shipment controls in the countries of end use is again a topic of debate.

At the moment only two countries – *Germany and France* – carry out controls on end use after a licence has been issued. This is done with inspections by the licensing authority of the relevant companies, inspections by the customs authority, or local inspections in the country of destination or end use. *Germany* announced *'post-shipment inspections'* at the beginning of 2016. Since March 2016 a public end user must agree in an EUC for small arms and light weapons that the German government has the right at all times to inspect the stated arms on site upon its request.[361] The German government intends to set up these inspections in practice, but in view of the time period between concluding a contract, including the new stipulations in the EUC and the effective delivery of the products, such inspections will begin at the earliest during the course of 2017. *France* is strongly committed to the *a posteriori* inspection of end use. This involves primarily the strict monitoring of the conditions of the licence and the products that are effectively exported and transferred, but also on-site inspections in the country of end use.[362]

3.6.4 Export restrictions

3.6.4.1 Possibilities for restricting re-export: general principles

The extent to which governments wish to control the further trade in the transferred or exported products is another aspect of end-use controls. Is the competence to decide over the further export or transfer of the goods handed over to the government of the recipient country, or does the government issuing the licence attempt to have a say in the re-export or retransfer of the goods? Accordingly, we

look at the extent to which governments have incorporated the option of imposing re-export restrictions and whether these restrictions are systematically imposed.

In general, governments appear to use various types of re-export restrictions. The **most common** is **the obligation to request written permission from the country of origin in advance for the re-export** (temporary, permanent, partial or complete) **of the products**. Analysis shows that all the surveyed governments use this type of re-export restriction. Two countries apply some more specific or more stringent re-export restrictions. An example of the former is the *UK*, which only imposes two specific re-export restrictions. A first restriction states that defence-related goods may not be re-exported to countries on which there is an (UN, EU or OSCE) embargo. The second restriction the UK system includes is that defence-related goods may not be re-exported if it is known/suspected that they will be used or could be used for purposes connected with WMD or missiles that can carry such weapons.[363] An example of the latter is the *Swedish* DEU, which includes the principle of the *formal prohibition* of the re-export of products constituting military equipment for foreign armed forces or suppliers of armed forces.[364]

In general however, variations in the systematic imposition of these restrictions (1) and the types of licences in terms of which such restrictions can be imposed (2) exist.

1. Most systems have integrated re-export restrictions systematically into official end-user documents. Official EUCs systematically contain a clause that obliges the end user to request written permission in advance from the licensing government to re-export the products. Only *France* applies re-export clauses in an ad hoc way. The CIEEMG decides whether re-export restrictions should be imposed, depending on the nature of the export/transfer, the type of equipment and the end user.[365]

Although most governments include re-export clauses systematically in their EUCs, they also allow for exemptions in the application of these re-export restrictions, based on geographical (specific countries) or material (specific types of products) criteria.

– *Flanders* combines geographical and material criteria. It only makes re-export restrictions mandatory for the export of 'sensitive goods' to non-EU, non-NATO or non-Wassenaar countries, the Russian Federation and Ukraine.[366] This is also the case when the competent authority decides that the end user or the end use gives rise to concerns over illegal diversion.[367] The same applies where there is cause for concern over the export control policy and the effectiveness of the export control system in the country of destination or end use.[368]

– *Germany* also combines a geographical and material approach: the re-export restriction applies to the export of weapons of war and small arms and light weapons to non-EU and non-NATO (or NATO-equivalent) countries.[369] A new EUC for the intended end user should accompany the re-export request.[370]

– *The Netherlands* operates a material delineation and only imposes re-export restrictions in licences for complete military systems. For components, such restrictions are not usually included in licences, and account is also taken of the degree of trust in the recipient country's control system.[371]

– *Sweden* operates a geographical restriction by only systematically imposing re-export restrictions on exports to non-EU countries; for intra-EU transfers, the Swedish government in principle imposes no re-export restrictions.

– *Wallonia* integrates a systematic re-export restriction in its End-Use Certificate. Because this document is only required in case of export to non-EU, non-NATO (with the exception of Turkey) or non-EEA countries, re-export restrictions are only applied in these cases.

2. The systematic character of the various re-export restrictions are partly dependent on the scope of application of the required end-user documents and thus vary according to the various types of licences. All the surveyed governments provide for the possibility of including restrictions on the re-export in individual and global licences; in specific cases they also provide for this in cases of foreign trade using general licences.

– *Wallonia* foresees the possibility to include re-export restrictions in case of individual licences

– *Flanders,*[372] *Germany* and *the Netherlands* make re-export restrictions possible for individual and global licences.

– *Portugal*[373] and *Sweden*[374] impose re-export clauses in individual and global licences.

– The *UK* allows re-export restrictions in individual and global licences. A restriction is only included in the general licence 'military goods, software and technology': the consignee agrees not to export or transfer the acquired products, or guarantees that the products are only destined for retransfer and re-export to countries listed in the licence, or guarantees that the products (in their present state or after integration) are only destined for governments and NATO

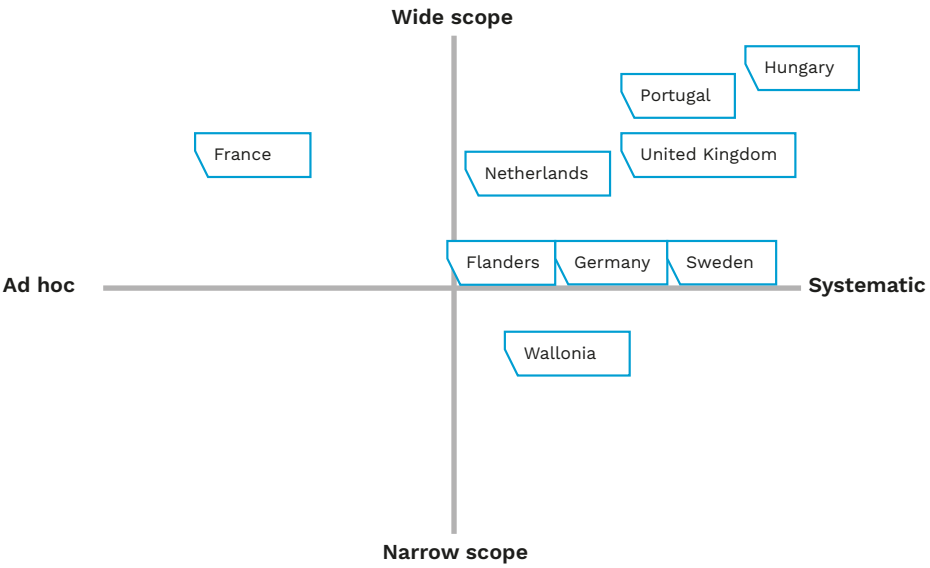
organisations in the countries listed in the licence (if the retransfer or re-export takes place from a country that is included in the licence).[375]

– *France*[376] can impose specific re-export restrictions in individual, global and certain general licences.[377]

– *Hungary* [378] imposes re-export restrictions in all types of licences.

Figure 3.10 combines both dimensions, i.e. 'scope' and 'application'. 'Scope' refers to the number of types of licences in which export restrictions can be included; i.e. individual, global and/or general licences. 'Application' refers to the extent to which these restrictions are *systematically applied, ranging from completely ad hoc to the automatic integration of such a clause for all types of licences or to all countries.*

Figure 3.10: Scope and application of export restrictions in the legal control of end use in nine European arms export control systems



3.6.4.2 Possibilities of restricting re-export: components

Foreign trade in military equipment not only involves finished products, but also **components** that are integrated by a consignee in another country into complete weapons systems. These weapons systems are subsequently sold to the effective end user in the same or another country. The trade in components for military equipment is becoming increasingly important in the international arms trade. This finding and the realisation that strict national control systems make it more difficult for its Member States to set up international cooperation programmes were incentives for the EU to develop Directive 2009/43.

It is therefore not surprising that the trade in components has an important place in this Directive. As a principle, EU Member States must avoid export re-export restrictions as much as possible for the intra-EU transfer of components for military equipment.[379] Export restrictions may only be imposed if the transfer is considered to be sensitive. This 'sensitivity' is assessed according to the nature of the components in relation to the finished products, any end use that may give cause for concern, and the significance of the components in relation to the products into which they are incorporated.[380] If the transfer is not considered to be sensitive and the purchaser declares that the relevant components will not be exported as such, then in principle no restrictions need to be imposed.[381]

1. Seven systems use a specific system that restricts the possibilities of imposing re-export restrictions. Four of them make a distinction based on the proportion of the components in the finished systems, and reserve the right to control re-export if it involves important components; the other countries only require a guarantee of the components' integration.[a]

- *Flanders*[382] and *Portugal*[383] adopt the principles set out in Directive 2009/43. They make a distinction according to the sensitivity of the component: restrictions are only possible for sensitive transfers, which is partly determined by the nature and importance of the components in the finished product. Flanders explicitly excludes components for 'sensitive goods from this regime.[384]

- *Sweden*[385] uses the concept of components with a '*Swedish identity*' (based on their importance in the complete weapons system); for finished products that

a The UK applies specific criteria for foreign trade in components: the incorporation criteria. These criteria determine that the government also takes account of (the effectiveness of) the arms export control policy of the recipient state, the reputation of the recipient entity, the sensitivity of the shipment (as determined by European legislation), the weight of the defence and security relationship of the recipient country with the UK, and the ease with which the relevant products can be removed from the finished system of which they form a part.

retain a largely Swedish identity, re-export restrictions can be imposed on the components. However, the interpretation of this concept remains unclear. Also, if Sweden cooperates in terms of defence policy with the country of destination, the control of re-exports is also transferred to that country.[386]

- *The Netherlands* have no formal legislation on this topic, but in practice does not appear to apply re-export restrictions in case of transfers or exports of components on a regular basis.

- *Germany* also formally states that in principle the partner country becomes the country of origin of the goods for German-made components integrated into weapons systems in the partner country.[387] However, current policy is stricter and all components are seen as sensitive. As a result, in general Germany currently also applies re-export clauses to transfers of components.

- The *UK*[388] and *France*[389] only require a *guarantee of incorporation* by the consignee to consider the country of destination to be the new country of origin following the integration of a component into another product. Control of re-export is thus fully transferred to the country of destination. *Wallonia* uses the same principle for components transferred or exported to EU or NATO member states. In these cases, responsibility of the further export is transferred to the recipient country.

- *Hungary* explicitly does not distinguish between finished products and components, nor does it do so for intra-EU transfers. That does not mean that it cannot impose export restrictions: this is possible via the above-mentioned (general) export restrictions

2. An additional finding is that the transfer of control over the re-export of products is also subject to **geographical restrictions.** In general, handing over control of re-exports is in practice limited to intra-EU transfers or to exports to other countries in a military alliance such as NATO.

- *Flanders*[390] and *Portugal*[391] limit the more relaxed regime for the control of re-export to intra-EU transfers.

- *Germany* limits this regime to EU, NATO and NATO-equivalent countries,[392] while the *UK*[393] limits it to countries with which it has a strong defence and security relationship, i.e. other countries in a military alliance.

3.6.4.3 Suspension and/or withdrawal of licences

Another aspect of restrictive measures is the possibility of amending the conditions of licences that have already been issued. Because the situation in the country of destination or end use can alter significantly in the period in which the licence is valid, the situation or conditions on the basis of which the original licence application was approved may also have changed. Furthermore, during the term of the licence, the licence holder might not keep to the conditions in terms of which the licence was approved.

All systems provide for the possibility of withdrawing or suspending issued licences. In three countries these restrictions are of a more binding nature: the national government is thus in principle obliged to withdraw a licence if the situation in the country of end use has changed such that the Common Criteria are being violated.

- *Flanders*[394], *Portugal*[395], *Wallonia*[396] and *France*[387] provide for the possibility of suspending, withdrawing or restricting the use of licences in three cases:
  (1) if the conditions for granting the licence are no longer being met or if the conditions of use and restrictions are not being observed;
  (2) if since the licence was granted specific circumstances have changed that could have a significant effect on an evaluation in terms of the assessment criteria; and
  (3) if security interests or reasons of public order or security warrant a suspension, withdrawal or restrictions.

- *The Netherlands*[398] only provides for explicit grounds for the suspension or withdrawal of an issued licence following formal or procedural breaches.

- In the *UK*,[399] the competent minister can suspend or withdraw issued licences, but no specific conditions are prescribed for when this may (or must) take place.

- *Hungary*,[400] *Germany*[401] and *Sweden*[402] have mandatory grounds for the withdrawal of an issued licence, i.e. if the Common Criteria are violated or serious threats arise to the (internal or regional) peace in the country of end use. In the event of such violations, the competent authorities are in principle obliged to suspend or withdraw an issued licence.

Germany is the only country to indicate what should be done with the products after a licence has been withdrawn: "*the licensing authority shall make arrangements for the disposition or use of weapons of war. In particular it may direct that (...) the war*

weapons be rendered unusable or be transferred to a person authorised to acquire them and that proof of this be furnished to the supervisory authority. If the period expires without such action, the war weapons may be seized and confiscated."[403]

3.6.4.4 Systematic refusal of licence applications

Common Position 2008/944 states in its first article that in assessing applications for the export of military equipment, EU Member States should use a *case-by-case* approach. Traditionally, international institutions supervise arms embargoes, i.e. the systematic prohibition of exports of military equipment to specific countries or specific conflict parties. In particular, the UN Security Council, EU and OSCE can impose arms embargoes that are binding on EU Member States. This international approach is logical in terms of effectiveness, because an embargo can only have a significant impact if a large group of countries agree not to supply military equipment to the embargoed country.

No government explicitly cites the possibility of a unilateral embargo in its own legislation; the case-by-case approach to licence applications is therefore the norm in the EU. Nevertheless, in certain circumstances some countries systematically refuse the export of military equipment to specific countries of destination and specific end users without this being orchestrated internationally. Considerations concerning illegal diversion in particular and an involvement in armed conflict (unsupported by international law) act as criteria here.

- In the period between March 2011 and January 2016, *Flanders implemented an 'on-hold policy'*.[404] As a policy response to the Arab Spring, this instrument developed into a restricted list of countries for which licence applications for the export of defence-related goods were systematically refused.

- The *Swedish* criteria state that 'a state which, despite undertakings given to the Swedish Government, allows, or fails to prevent, unauthorized re-export of Swedish military equipment will not, as a rule, be eligible to receive such equipment from Sweden as long as these circumstances persist'.[405] Since 2009 Sweden has maintained a de facto embargo on licence applications for Venezuela, after Swedish military equipment was illegally diverted to the FARC rebels in Colombia despite a ban on re-export.[406]

- The *German* Policy Principles state two principal systematic grounds for refusal. The first states that 'exports to countries involved in external armed conflicts or where there is a danger such conflicts may erupt are therefore ruled out in

principle except in cases covered by article 51 of the UN Charter'.[407] A second criterion states that countries that illegally re-export German military equipment should 'be excluded from receiving any further deliveries of war weapons or other military equipment related to weapons of war'.[408] In practice, however, no German national arms embargoes are in force.

– In its Consolidated Criteria the *UK* cites the possibility of a national arms embargo as a commitment on the basis of which licence applications must be refused.[409] Since April 2012 a British national arms embargo has been in force against Argentina, with that country's armed forces as end user,[410] owing to tensions over the Falkland Islands.

Control of end use: required documents and export restrictions

Control of the end use of transferred or exported defence-related goods is the cornerstone of an effective export control system. Although all the governments surveyed distinguish between recipient(s) countries and (countries of) end-use(rs), **differences exist in the extent to which governments actively seek to have information on the country of final destination, in particular in transfers or exports of components.**

This is related to issues such as the end-user documents required and the extent to which re-export clauses are included in these documents. With regard to the former aspect, some harmonisation exists among the various national systems. The use of an EUC is mandatory for individual licences in almost all systems; in practice, governments that allow other documents give preference to EUCs. **Differences** between the various systems exist, however, **in the extent of end-use controls in global and general licence**s.

In practice, governments in countries with a strong focus on the production of components of military equipment aim to retain a certain degree of control over the further foreign trade in the finished products into which these components will be integrated. However, most of these governments make a distinction based on the significance of the components and the recipient country.

The implementation of re-export clauses, in particular for components, lies at the heart of discussions on arms export controls. **Foreign policy principles and the nature of their respective national defence industries determine the way in which governments deal with such re-export controls.** Especially in the EU context, governments are confronted with a

tension between the desire to retain control over the destination of their domestically produced military goods, on the one hand, and their faith in other governments and their desire to strengthen international cooperation, on the other. **Balancing and reconciling both factors is therefore a constant challenge confronting the governments of EU Member States.**

3.7 Transparency and democratic control

3.7.1 Public transparency on arms exports

Publicly accessible information on the export of military equipment is a necessary condition for making parliamentary (and societal) control of national arms export policy possible. However, public and parliamentary supervision of this policy has traditionally been less evident. For reasons of commercial confidentiality, national security, the security interests of recipient countries and the fear of negative effects on bilateral relations, governments have been unwilling to make information on arms exports public.[411] Since the 1998 Code of Conduct, EU Member States have been publishing national reports on arms exports. The Common Position imposes a legal obligation on EU Member States to publish a national report on the export of military equipment.[412] However, no further substantive guidelines on which information should be made public are included in the Common Position.

Transparency can be measured by means of various **indicators. Relevant indicators in this context are:**

- *'availability'*: the accessibility and frequency of reporting;
- *'comparability'*: the ability to compare information across time and between countries;
- *'range'*: type, extent and scope of the report; and
- *'disaggregation'*: the degree of detail of the information that is included.[413]

For each of these indicators it is possible to assess how the surveyed EU Member States relate to one another in terms of public transparency on arms exports.

Table 3.30: Formal aspects of official reports on arms exports

	Reports since	Legally binding frequency	Additional reports
Flanders[414]	2004	Annually + bi-annually	Monthly
Germany[415]	1999	No legal obligation, but stated in the Policy Principles	Annually and bi-annually + parliament informed within two weeks after decision by Federal Security Council
France[416]	1998	Annually since 2013 by 1 June at latest	None
Hungary[417]	2003	Annually	Annually
Netherlands[418]	1997	Annually	Bi-annually and monthly + ad hoc for licences worth over €2 million
Portugal	1996	No legal obligation	Annually
UK[419]	1998	Annually	Quarterly
Sweden[420]	1984	Mandatory annually in March	Monthly
Wallonia[421]	2004	Annually and bi-annually	None

1. In terms of availability, all the surveyed governments report (at least) annually since the end of 1990s on exports of military equipment (see Table 3.30). In most national systems this obligation is explicitly foreseen in national legislation. Only two countries do not include an explicit obligation to report on arms exports in their national legal framework, but refer to their international commitments to report on arms exports:

- *Sweden* has been publishing an annual report on arms exports since 1984. This long tradition of reporting is explained by the position of neutrality that the Swedish government maintained during the Cold War (see sec. 3.2) and the salience of arms export controls in the Swedish parliament and society.
- *Germany* and Portugal do not have an explicit legal obligation to publish annual reports on arms exports. Portugal refers for this obligation to article 8 of the Common Position, while Germany includes this obligation in its 'Policy Principles', but this policy document is not part of primary legislation.

At the same time, however, significant differences exist in the extent to which these governments report more frequently on arms exports. Most governments publish information several times a year on arms exports, although the frequency varies. *France, Hungary* and *Portugal* only issue annual reports on arms exports. *Germany*

and *Wallonia* produce an additional bi-annual report, while the *UK* publishes three-monthly reports on licensed arms exports. *Flanders*, *the Netherlands* and *Sweden* have the highest frequency of publishing data on arms export and report on a monthly basis. The *Flemish* and *Dutch* reports in particular provide detailed information up to the level of issued (and denied) licences. Swedish reports are limited to aggregated data per country of destination with a distinction between 'weapons of war' and 'other military equipment'; they contain no values for or numbers of licences issued.

A few national systems also have an ad hoc reporting obligation to parliament in cases of (politically) sensitive licences. *Germany and the Netherlands* have an ad hoc reporting requirement in cases of extensive or sensitive approved licence applications: such approvals have to be reported to parliament within two weeks of the licence being issued.

Neither Common Position 2008/944 nor Directive 2009/43 provides specific guidelines on which information should be made publicly available. EU Member States are therefore free to decide on the degree of detail provided in the information they publish on arms exports. This results in considerable variations in the extent of data made available in national reports[422] (Table 3.31).

2. In terms of ***comparability***, a high degree of harmonisation in the **data on the type of exported or transferred products** is to be found in the various annual reports. All the surveyed governments use the EU Common Military List's system of categorisation; some also use a national system. *The Netherlands, Sweden, France, the UK* and *Germany* also include additional data on the products concerned, such as a brief substantive description of the products besides the specific ML category.

3. In terms of the indicator ***range***, we also see a degree of harmonisation in that **the elements reported in national reports are similar**. Data on denied applications and the different types of licences are also included, with a few exceptions. On the other hand, there are differences in the reporting on the different types of licences issued, while the information made available on the value of the effective exports is also less clear. Finally, various reports contain additional specific information:

– *Hungary* is the only country that does not include information on **denied** applications.

– *Sweden, Portugal, Flanders* and *Hungary* report on the (licensed) value and/or the use of individual, global and general licences.

In contrast, the other governments – *France, Germany, the Netherlands, Wallonia* and the *UK* – do not report on the use of general licences.

- *France, Portugal* and *Sweden report* on the **effective value** of implemented transfers or exports; *Germany* only reports the actual value of exports of weapons of war and surplus defence equipment; and *Flanders* only reports on the effective use of global and general licences. *Wallonia* includes an aggregated percentage of the value of actual exports in relation to the licensed value of arms exports.

- A number of reports contain **specific information**, such as details of the sale of surplus defence equipment (*the Netherlands, Germany* and the *UK)* or detailed information on the foreign trade in small arms and light weapons (*Germany, Sweden* and *France*).

- The *Swedish* annual report is the only one to provide an overview of actual **exports** by individual **defence-related** companies in Sweden.

A striking finding is that national authorities report only in a very limited way on the implementation of the legislative framework dealing with arms exports. In other words, with only a few exceptions, very little information is made public on the assessment of licence applications. As a result, while there is increasing transparency on the outcomes of the procedure –approved and denied licences – only limited information is available on the procedure itself and the process that led to these outcomes. Only the *UK* report contains details on the time taken to process licence dossiers (with a distinction between intra-EU and extra-EU exports). Moreover, the report describes how the assessment criteria are interpreted in specific cases. *Sweden* and *France* report on approved re-exports by other countries, based on re-export restrictions linked to earlier exports or transfers.

Table 3.31. Substantive information in reports on arms exports

	Level of reporting	Type of licence	Categori-sation	End users	Refusals	Effective value	Additional information in reports
Flanders	Licence	Individual, global and general	ML	Ten types	Country of destination, ML, criteria	General and global licences	preliminary advice
France	Country of destination	Individual and global	ML	No information	geographical distribution (aggregated) and criteria	country of destination	- Ministry of Defence gifts by recipient country and value - Re-export approvals with overview of country of end use, ML category and number of applications - export of light weapons: country of destination, description of product and quantity
Germany	country of destination	Individual and global	National	No information	yes	export of weapons of war, incl. non-com-mercial export of surplus equipment by Ministry of Defence	- Non-EU and non-NATO countries exports of light weapons and munitions - Most important countries of destination with overview of products (description of content)
Hungary	Country of destination	Individual, global and general	ML	No information	No	Yes	/
Netherlands	Annual report: Country of destination Monthly report: licence	Individual and global	National + ML	refusals and surplus defence equipment	date, country of destination, description of product, recipient, name of end user, criteria	No	- surplus defence equipment (end user, description of product, value) - renewed licences
Portugal	Country of destination	Individual, global and general	ML	No information	number of refusals	Yes	/
Sweden	Country of destination	Individual, global and general	national + ML	No information	country of destination, ML, and value	yes, general value	- approvals for re-export with exporting state, type of products and recipient countries - effective export per company divided between MEC and OME - small arms and light weapons by country of destination (no value)
UK	country of destination	Individual and global	National + ML	No information	Criteria	No	Case studies - Application processing time - donations (country, end user, products, donating department, value) - surplus defenceequipment (country, type of product, quantity)
Wallonia	Country of destination	Individual	ML	Private vs. public end-user	Number of denials, countries of destination, total value	General percentage	/

4. In terms of *disaggregation* – the degree of detail in the reporting – *Flanders* and *the Netherlands* are the only countries to report in terms of licences issued. The other seven governments aggregate this information by country of destination or type of products. A result of reporting in terms of the licences issued is that detailed information on country of destination, consignee and country of end use/end user is provided. *The Netherlands* includes the names of end users in its reports on surplus defence equipment and denied licences, and distinguishes in its monthly reports between country of destination and country of end use. *Flanders* has the only system in which the type of consignee and type of end user are reported consistently for each licence issued or denied.

3.7.2 Parliamentary control of national arms export control policy

All competent parliaments have access to information on arms exports and the government's arms export policy. Nevertheless, there are significant differences in the degree to which parliaments exercise effective control over and are actively involved in this policy area. Those differences are seen in a parliament's general focus on the government's arms export policy; the influence of parliamentary activity on the degree of transparency; and the existence and role of specific parliamentary committees dealing with arms export control.

1. Five parliaments place a substantial focus on the arms export policy of their respective governments. It is notable that parliamentary attention in most of the parliaments in this study has increased considerably since the start of the Arab Spring in 2011, often in response to specific shipments of military equipment to Saudi Arabia. The involvement of this country in the conflict in Yemen since 2015 and the identification of grave violations of international humanitarian law by the UN Panel of Experts have significantly increased the focus on arms transfers to Saudi Arabia.

- The *Flemish, Dutch, Swedish, German* and *British* parliaments are actively involved in the control of arms export policy, with parliamentary questions on specific issues, public debates in response to the presentation of annual report on arms exports, parliamentary resolutions and so on.

- The *Walloon* government pays some attention to the topic of arms exports, but this remains relatively little compared to the other governments.

- In *Portugal* and *Hungary* there is no significant parliamentary control of these governments' arms export policies.

– *French* parliamentary debate on the issue is limited and takes a specific economic and strategic approach, in which the National Assembly exercises no systematic supervision of the country's arms export policy, but primarily supports the promotion of arms exports. This reflects the wider French political approach to arms exports in terms of national security, France's international position and French employment.

2. In *Germany, Sweden, the Netherlands* and *Flanders*, parliamentary initiatives strongly stimulate increasing transparency on arms exports. Several recent amendments to these countries' reporting policies result from parliamentary initiatives such as resolutions and parliamentary questions. This suggests an interaction between transparency and parliamentary involvement: transparency is not only a necessary condition of control and involvement: active parliamentary involvement can also be an important stimulus for greater transparency.

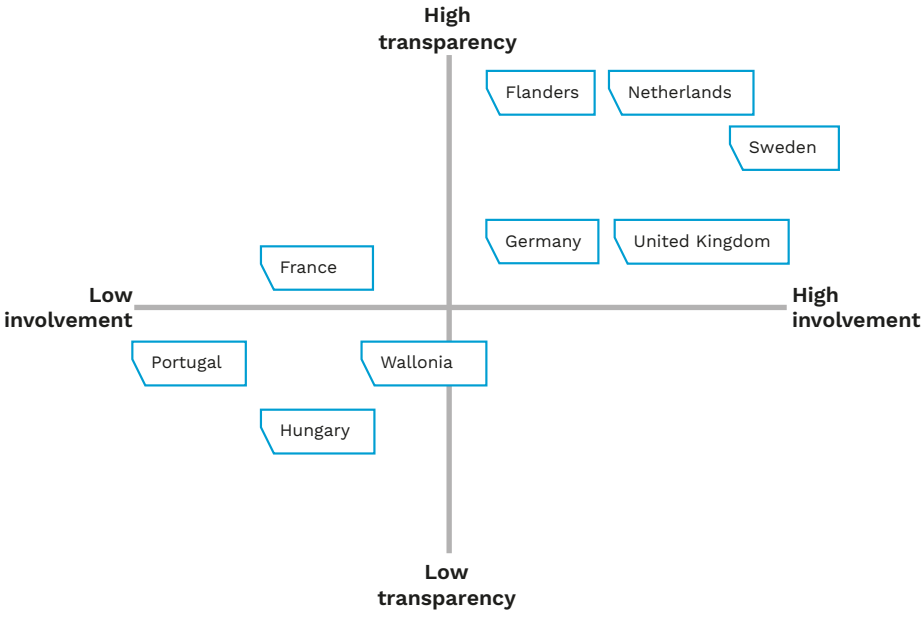
– In *Germany*, a parliamentary motion in 2014 led to the introduction of six-monthly reports and to the obligation to communicate to parliament decisions taken by the Federal Security Council (which handles politically sensitive and extensive licence dossiers) within two weeks of a licence being approved or declined.[423]
– In *the Netherlands*, the publication of six-monthly reports on arms exports since 1997 and the obligation to inform parliament in advance on sales of surplus defence equipment are direct results of a parliamentary motion.[424]
  In 2011 another parliamentary motion[425] obliged the government to inform parliament within two weeks about issued licences with a value of more than €2 million

3. Three parliaments have a specific parliamentary committee that deals with arms exports control. In the *UK, the Committee on Arms Export Controls* (CAEC), comprising four parliamentary committees: 'Business, Innovation and Skills', 'Defence', 'Foreign Affairs', and 'International Development' has controlled the UK's arms export policy since 1999.[426] Since 1984, the *Swedish* parliament has had the Export Control Council in place to which 'matters of special importance' are referred.[427] This committee is composed of twelve members of parliament (from all political parties) and advises on the procedure before a licence application is approved. In this way the Swedish parliament participates actively in the country's arms export policy, specifically with regard to sensitive cases (such as new countries of destination, extensive licence applications and sensitive products). The *Walloon* parliament has a 'Subcommittee on the Control of Arms Licences', which discusses the

licensing policy of the Walloon government. However, this subcommittee only meets behind closed doors and only a few times a year for very short periods.[a]

Figure 3.11 illustrates the correlation between the formal possibilities of parliamentary control – the degree of transparency – and effective parliamentary control. For this we use two axes: 'transparency' (from low to high) and 'parliamentary involvement' (from low to high). In order to assess the degree of transparency, we take into account the data that are reported and the frequency of reporting. For parliamentary involvement, we take into account the weight of the subject in national parliamentary debates, the number of related questions (and their content) asked in parliament, and the active participation of parliamentary institutions in this policy domain (proactive or reactive). On the basis of the above discussion and comparison, the nine surveyed systems are situated in this matrix in terms of both dimensions.

Figure 3.11: Transparency and parliamentary involvement in arms export policy



a In 2016, this sub-committee met two times, for a total period of 70 minutes.

3.7.3 Reporting to the European External Action Service (EEAS)

Under Common Position 2008/944, EU Member States undertake to submit data on exports of military equipment annually to the EU. Since 1999 these data have been used to produce the consolidated EU annual report that COARM, which forms part of the European External Action Service (EEAS, the EU's diplomatic service), publishes annually. These reports contribute significantly to the degree of harmonisation of the information available on arms exports, particularly through the use of the ML categorisation of exported products. Nevertheless, differences between EU Member States in their reporting to the EEAS are still to be found. These differences can have a negative effect on the reliability and comparability of the data and thus can reduce the level of European harmonisation.

1. **Some countries report only the values of the licences issued**, while others report the effective values of actual exports. That makes a reliable comparison more difficult, because these values can vary widely.

2. **All countries report on denied licence applications**, which for a country like *Hungary* in practice means that these denials reflect more information than the country's own national annual report. It is worth noting that governments only enter formal refusals in the 'denial notification' category. Governments that use informal procedures – such as the 'preliminary advice' in *Flanders* and the 'exploratory study' system in *the Netherlands* – do not report negative recommendations at the European level, for various reasons.

3. **Several countries do not report on the effective use of general licences**, including *Germany, the Netherlands, France* and the *UK*. This means in practice that the value of the transfers (or exports) that occur under general licences is not reported to COARM and is therefore also not included in consolidated EU national reports. Considering the importance of these general licences and the fact that the EU encourages the use of this type of licence, this could significantly jeopardise the reliability of European reporting in the (near) future.

Democratic control of and public transparency on arms exports

Partly as a result of the European regulatory framework, all the surveyed governments have published data on arms exports at least annually since the end of the 1990s. Moreover, there is some harmonisation in this area. The standardised categorisation laid out in the EU Common Military List is particularly important in this regard.

In recent decades all these countries have demonstrated a tendency towards greater transparency, which has increased considerably in several cases, particularly in recent years. At the same time, differences remain in the frequency of reporting and in the amount of information communicated by the respective governments.

A noteworthy finding is that the **high frequency of reporting and the degree of detail in these reports is strongly influenced by parliamentary initiatives**. Parliamentary focus on arms exports and parliamentary pressure on the government therefore stimulate the degree of transparency of these countries' arms export policies. Transparency is therefore not only necessary for parliamentary control: such control is also often a driving force behind growing transparency.

A point that should be noted: threats to the reliability and comparability of European consolidated annual reports

The high level of comparability and transparency that currently exists in national and European reporting is under pressure from several developments:

- Informal procedures and contacts between potential applicants and the relevant licensing authority to obtain a first informal assessment of the desirability of an intended export are useful instruments for companies and governments. However, they can also undermine the objectives of the formal 'denial notification' procedure, because such informal negative evaluations are not reported as formal denials to the European system and to other EU Member States.
- Several countries do not publish information on the use of general (and global) licences. At the same time, the use of this type of licence for intra-EU can be expected to increase in coming years. Moreover, mainly EU Member States with large defence industries do not report on this type of licence, which is currently leading to a deterioration in the quality and comparability of official consolidated reports.

Stakeholder perceptions of EU policy on arms export controls

04

The foregoing systematic comparison of the arms export control systems of eight EU Member States shows that, despite the EU's incremental involvement in this domain, significant differences still exist among the respective arms exports policies of these Member States. This finding calls into question both the EU's impact on national arms export control systems and whether the EU has been successful in its attempts to harmonise such controls. Furthermore, questions can be raised on the way forward for the EU in this quest, specifically as to both the *feasibility and desirability of* further initiatives at the European level to achieve greater convergence.

In this chapter we discuss the results of our comparative analysis of the eight national arms export control systems with some relevant EU stakeholders and reflect on the current state of arms export control regulation in the EU. Our goal is twofold: firstly, we will reflect on the findings of the analysis undertaken in the preceding chapters and discuss the possible causes of the similarities and differences we have identified; secondly, we will identify ways forward for EU policy on arms export controls in order to achieve greater EU-wide harmonisation.

4.1 Methods and sources

Selection of interviewees

This chapter discusses the views, opinions and perspectives of stakeholders involved in arms exports controls at the EU level; i.e. we have adopted a qualitative research method for this part of our study. We conducted several semi-structured in-depth interviews with a number of relevant actors involved in the domain of

arms export controls. This was the best way to allow these interviewees to express their opinions and perspectives on and interpretations of the subject of our study.

We selected three groups of stakeholders, whom we contacted by email or phone to ask them if they would be willing and able to participate in the study:

1. Representatives of **three key EU institutions** (the European Commission, EEAS and European Parliament). At least one person from all three institutions agreed to participate in the study. We were thus able to interview representatives from:

- the European Commission's Directorate-General Internal Market, Industry, Entrepreneurship and SMEs (**DG Grow**), and more specifically Unit 14: Defence, Aeronautical and Maritime Industries, which was responsible for Directive 2009/43 (the Intra-Community Transfer of Defence Goods Directive, or 'ICT Directive');
- the Working Party on Conventional Arms Exports (**COARM**), which is a part of the EEAS and deals with controls on extra-EU exports of conventional military equipment; and
- the **European Parliament**. Five members of the European Parliament (MEPs) from both the Internal Market and Consumer Protection Committee (IMCO) and the Subcommittee on Security and Defence (SEDE) were contacted by email and asked if they would agree to an interview. Only one MEP (from the Greens–European Free Alliance and also a member of the SEDE Subcommittee) participated. Statements referred to below are therefore not a representative reflection of the views of the European Parliament as a whole, but reflect only the opinions of this MEP.

2. **Defence industry representatives** at both the EU and national levels. Representatives of four interest groups participated in the study. Firstly, a representative from the AeroSpace and Defence Industries Association of Europe (ASD) was interviewed. The ASD represents the aeronautical, space, defence and security industries in Europe in all matters of common interest, with the objective of promoting and supporting the competitive development of this sector. Secondly, we contacted defence industry interest representatives at the national level in various EU Member States. Although several organisations we contacted did not respond and are therefore not included in our analysis, representatives of the defence industry and specific defence companies from Sweden, Flanders and the Netherlands participated in the study.

3. Representatives of **international peace organisations** were interviewed together in one focus group, including respondents from Saferworld, PAX, the Campaign

Against Arms Trade and the European Network Against Arms Trade. The latter organisation represents several NGOs in Europe that campaign against the international arms trade.

Structure and content of the interviews

During the individual interviews and the focus group we first shared the findings of our comparative analysis. Secondly, we reflected on possible explanations for the differences and similarities we found among the surveyed EU Member States' arms export control systems. Thirdly, we discussed possible ways forward at the EU level that respondents considered both desirable and feasible to stimulate further harmonisation. These reflections are structured in terms of the topics we used in the comparative analysis that appears in the previous chapter, i.e.

1. the material scope of the arms export control system;
2. licensing systems;
3. end-use controls; and
4. transparency and parliamentary control.

Besides these thematic discussions, we will also discuss the principles that guide the various stakeholders' engagement with and opinions regarding the EU policy on arms export controls. Differences in assessing what constitutes an ideal situation at the European level and different ideas on the principles and goals that should guide the EU's engagement with arms export controls shaped the opinions expressed by the interviewees, both in terms of the current situation and future direction of EU policies in this regard.

All the respondents were therefore asked to give a general appreciation of the process of EU-wide harmonisation of arms export controls, how they assess the current situation, and which steps they deem feasible and necessary to move the harmonisation process forward.

4.2 EU-wide harmonisation of arms export controls: a general assessment

EU-wide harmonisation of arms export controls

The EU's overarching goal is to work towards the further harmonisation and convergence of arms export controls across all EU Member States. However, the various EU institutions involved in this domain use different guiding principles to prioritise their work.

The *European Commission* aims to facilitate intra-EU trade in military equipment by reducing national administrative barriers. It also promotes the further development of a European defence industry and the creation of a liberalised common European market in defence-related goods. *COARM*, on the other hand, controls exports of military equipment to countries outside the EU. The implementation of EU principles on human rights and International Humanitarian Law (IHL) in the international trade in military equipment to non-EU is taken up in criterion 2 of the Common Position.

According to the member of the *European Parliament* who was interviewed, the SEDE Subcommittee focuses on extra-EU arms exports and the control of arms exports from the EU based on ethical and security-related principles. There appears to be little interest in integrating the intra-EU perspective in the SEDE's discussions.

This division in the perspectives and principles guiding these EU institutions' work reflects the diverging perspective the EU has adopted with regard to the intra-EU trade in military equipment, on the one hand, and the extra-EU trade in defence-related goods, on the other.

Interestingly, the added value of the EU's work in the field of arms export controls was recognised and acknowledged by the stakeholders we interviewed. These stakeholders accepted as a general principle the desirability of the EU-wide harmonisation of arms export control policies and legislation.

However, the interviewees' views on the priorities and direction of the harmonisation process differed. Although both the defence industry and NGO representatives agreed that human rights concerns, national security considerations and economic interests were key factors in the assessment of arms exports, they differed strongly on the principles they felt should be prioritised:

> ***"We obviously prioritise the ethical guiding principles. What you want as a peace organisation is to avoid human rights abuses and the aggravation of conflicts. These should be the overarching principles that dominate every decision on arms exports. Economic- and national security-related interests are still legitimate concerns, but only as second or third priorities."***
>
> **Peace organisations focus group**

The defence industry representatives, on the other hand, also acknowledged the relevance of ethical-normative considerations and the need for further EU-wide harmonisation, but saw the strengthening of the EU defence industry and the facilitation of intra-EU trade by reducing the administrative burden for defence companies as the most important issue.

EU-wide harmonisation: goal vs reality

As a consequence of the differing priorities discussed above, opinions diverged on the direction that EU harmonisation of arms export controls should take and the pace at which this process should proceed. In other words, there were concerns about the *feasibility and desirability* of the rapid EU-wide harmonisation of arms export controls.

More specifically, the representatives of peace organisations – and officials of countries that see themselves as having a more stringent arms control system than others – expressed doubts about the desirability of the immediate EU-wide harmonisation of arms export controls. They were concerned that this process of harmonisation would take place at the level of the **lowest common denominator:**

> ***"Theoretically, [harmonisation] sounds nice, but concretely speaking, with the current international context and the difficulties Europe is experiencing in its attempts to present a unified front, harmonisation would in reality undermine the effectiveness of attempts to apply high ethical common standards."***
>
> **Peace organisations focus group**

The representatives of EU institutions referred to a quintessential fact in this regard: the **EU-wide harmonisation of national policies and legislation is an incremental process**. The EU institutions involved in this process – DG Grow (which forms part of the European Commission) and COARM (EEAS) – are largely dependent on national governments to take the lead on further EU harmonisation.

Both in the context of intra-EU trade (e.g. the further facilitation of trade) and in terms of shared policies on extra-EU trade (e.g. a more stringent interpretation and application of high common standards on human rights and conflict prevention), these institutions have to rely on EU Member States.

As a consequence, minimum standards are formulated in both areas. It should be stressed, however, that individual EU Member States can go further than these minimum standards if they wish to. Individual Member States that play a leading role are therefore seen as necessary to incrementally push for raising the minimum standards applied to the arms trade. National governments therefore still play a central role in determining the speed and direction of EU harmonisation of arms export controls and the process of deciding on the mandates of the relevant EU institutions that work on greater harmonisation.

In other words, much depends on the political mandate given by EU Member States to move the process of European harmonisation forward. However, several interviewees stressed that the relevant EU institutions' current mandates remain limited. Due to a lack of political investment, significant changes are not expected in the short term:

> ***"Before the same foreign policy goals are agreed on among EU Member States, having a European Export Control Authority will remain a bit of a dream. … In the meantime, however, several steps can be taken to harmonise a bit more."***
>
> **Defence industry interview**

All the interviewees generally accepted the potential added value of harmonising EU Member States' arms export control systems. The EU-wide harmonisation of the various national systems could result in more efficient and effective arms export controls.

However, all the interviewees were aware of the lack of political will to achieve convergence, which is seen to originate from EU Member States' low level of willingness to harmonise their foreign and security policies. As a result, the defence industry representatives seriously doubted the *feasibility* of a substantial EU-wide harmonisation of arms export controls, while the NGO representatives doubted its *desirability*.

Interestingly, a clear division appears to exist in the EU's approach to arms export controls. While the European Commission works primarily on the liberalisation of the intra-EU defence market, COARM exclusively focuses on extra-EU exports of military equipment and aims to develop a more 'responsible' and restrictive arms export policy among EU Member States. As a result, the intra-EU trade in military goods is approached from an economic perspective, while the extra-EU trade in such goods is characterised by a focus on security and foreign policy considerations.

4.3 Material scope: the basis of arms export control systems

The development of the EU Common Military List has had an important effect on the EU harmonisation of Member States' arms export control systems. It has resulted in a common framework for determining the material scope of such systems for both the intra-EU and extra-EU trade in military equipment. The representatives of EU institutions in particular referred to the added value of the EU Common Military List and suggested that without this list, the differences among EU Member with regard to material scope States would be much larger than they currently are.

The defence industry and NGO representatives also agreed on the potential added value of the EU Common Military List. However, they both stressed that EU Member States still significantly differ in their interpretation of the concept 'goods especially designed for military use':

> ***"If you look at the EU Common Military List, a significant amount of discretionary space for interpretation still exists for national authorities. This possibility for interpretation is strongly influenced by the way in which regions or countries think about defence-related products."***
>
> **Defence industry interview**

All the interviewees acknowledged the need for a more harmonised approach and the development of a common European working definition of what constitutes 'goods especially designed for military use'. Such a common perspective on which goods should be controlled would result in greater clarity: 'the bigger the grey area, the bigger the problems'.

Several defence-industry representatives described these differences as one of the main impediments to the development of an EU-wide defence industry. National differences in the interpretation of which goods are 'especially designed for military use' not only cause competitive disadvantages among European companies, but also affect the competiveness of EU companies compared to the those of the US defence industry:

> ***"Since the U.S. export control reform, it has become easier to import American components and integrate them into European systems, rather than purchase a piece of equipment from another EU Member State. A common definition of what constitutes 'especially designed for military use' is necessary to generate a level playing field for the competiveness of the defence industry in Europe."***
>
> **Defence industry interview**

DG Grow recognizes that the different national interpretations of this concept can create some uncertainty for the European defence companies. Therefore, the development and implementation of a common working definition of what goods are 'specially designed for military purpose' is one of the ongoing projects of the European Commission under the Transfers Directive. DG Grow is therefore working together with the Letter of Intent group and the Working Group on the ICT Directive with Member State representatives to develop a working definition for this concept.

Not surprisingly, despite the obvious need to develop a common European definition of 'goods especially designed for military use', interviewees' views on the content of this definition diverged strongly. The defence industry representatives focused on the need for a balanced and product-based approach to determine which goods should fall into this category:

> ***"If a product can also go in any other kind of industrial equipment, besides its use in military goods, it is not specifically designed for military use and thus should not be controlled in the same way."***
>
> **Defence industry interview**

A practical and hands-on division between sensitive and non-sensitive goods, with controls on the latter category being strongly reduced, would strongly help to stimulate EU competiveness and the development of a Europeanised defence industry. According to the defence industry representatives, imposing greater restrictions on

the most sensitive goods and reducing controls on other goods should therefore be the central aim.

In contrast, the NGO representatives advocated a **user-based approach** to decide on what constitutes 'goods especially designed for military use'. The NGOs' primary goal is to have an effective export control system that prevents human rights violations and the aggravation of conflict as much as possible. They believed that the decision as to which goods should be controlled should not be determined by product characteristics, but by those of **the end user of the goods:**

> ***"If the goods have a military or security end user, they should be considered as goods that are especially designed for military use and thus should be controlled."***
>
> **Peace organisations focus group**

Similarly, NGO representatives also advocated the inclusion of **a catch-all clause in the EU Common Military List.** Such a clause, which would allow controls to be imposed on the trade in non-listed goods, is felt to be necessary in order to control the international trade in strategic goods and to prevent them from falling into 'dirty hands'. It would also **allow the arms export control system to keep pace with continuous evolutions in technology** and to ensure that new strategic goods can be controlled even when they are not yet integrated into official control lists.

There is a general consensus to further harmonise the material scope of EU Member States' national arms export control systems. A crucial step is the development of a common working definition of which goods are considered to be 'especially designed for military use'. However, the representatives of **EU Member States, the defence industry and peace organisations differed substantially on** the exact terms of such a definition.

Attempts thus far to establish such a definition remain relatively modest and appear to indicate a lack of motivation to deal with this issue. This reflects the lack of political will regarding and attention given to this topic, even though greater efforts are clearly needed to make significant progress in developing a definition of what constitutes 'goods especially designed for military use' that all EU Member States accept.

4.4 Licences: facilitating the intra-EU arms trade, with practical side-effects

The greater use of general (and global) licences in EU Member States' arms export control systems has been the European Commission's main priority. The shift from ex-ante to ex-post control would significantly reduce administrative constraints on EU companies participating in the intra-EU trade in military equipment. Further harmonisation in this regard is therefore a priority.

General and global licences have been very strongly welcomed by the defence industry, because they would stimulate the number of intra-EU defence-related transactions and strengthen the development of a Europeanised defence industry. The NGO representatives did not fundamentally oppose the implementation of general and global licences for intra-EU transfers of military equipment. Theoretically, these licences should allow government resources to be more effectively concentrated on the control of sensitive transactions and exports. General and global licences could therefore in principle increase the effectiveness and efficiency of the overall EU arms export control system.

However, both the defence industry and NGO representatives pointed out several important shortcomings in the current implementation and use of these (new) types of licences.

The defence industry representatives pointed out several problems affecting the low success rate of general and global licences. The significant differences among EU Member States in terms of the content of general licences (i.e. which goods can be traded under these licences) are the main reason for the lack of interest. As a result, because defence companies have to invest significant amounts of time and energy in working out which goods can be transferred to which countries under this licensing system, the **administrative burden** for companies **increases.**

A second comment by the defence industry representatives referred to certification procedures. Because the current system has **no added value for defence companies,** the number of companies applying to be recognised as certified companies remains low. The fact that the recipient company needs to be certified rather than the one exporting the defence-related goods is seen as an important limitation in the current system. A possible solution to increase the success of the certification process is to change the perspective from which it is viewed.

This is linked to the call by defence-industry representatives to address the lack of synergies between Customs procedures and national arms export control authorities:

> ***"There is a strong need for convergence between the procedures for AEO's (Authorized Economic Operators) that exist within the EU."***
>
> **Defence industry interview**

This last point once again refers to the need for the EU to avoid a silo approach to the various departments and institutions responsible for arms export controls and to break down the barriers between them. Due to the widely differing responsibilities of the various EU institutions, a more integrated and comprehensive perspective on arms export controls is urgently needed.

The NGO representatives also referred to several shortcomings in and problems affecting the current practical use of these new types of licences.

The **lack of public transparency** on the use of general (and global) licences is seen as the most pressing problem. Only very few countries include data on transactions using these licences in the various official reports on arms exports. As a consequence, the implementation of these licence types significantly threatens the level of transparency of reporting on arms exports in the EU. This becomes even more significant when some EU Member States extend the use of general or global licences to include extra-EU exports of military equipment and use the system to export goods that are clearly sensitive.

A second problem identified by the NGO representatives is that general and global licences potentially make it **easier for defence-related companies to 'hide' the effective end use and final end user of the goods**, especially in the context of international industrial co-productions. An increased use of these licences to trade military goods could therefore undermine the effectiveness of an EU arms export control system's goals of preventing human rights and international humanitarian law violations.

As confirmed in the recent evaluation of the ICT-Directive, the **European Commission acknowledges that difference in the material scope** of the Member States' general transfer licences are one of the reasons for a low take up of these licences for the intra-EU trade in military equipment. As a consequence, the Commission is currently looking into measures on harmonisation of general transfer licences across the Member States, both in terms of their content and conditions

of use, such as for instance re-export restrictions. Together with the 2016 report on the evaluation of the ICT-Directive, the European Commission published two recommendations that called upon the Member States to adapt their general licences in this way. The Commission is now working on further two recommendations.

However, the defence industry interviewees stressed the **non-binding nature of these recommendations**, which included little legal incentives for national governments to implement such changes:

> ***"The industry was disappointed by the lack of ambition in the ICT-review process, and in particular that the proposed general transfer licences were published as Recommendations (which have no legal enforcement value)."***
>
> **Defence-related industry interview**

The main reason for this lack of ambition and the limited legally binding character of these recommendations is the **lack of political will** among EU Member States. Foreign policy and arms export policy remain Member State competencies, and differences in national interests and priorities in terms of arms export controls strongly impact governments' views on this topic. This makes it very difficult to achieve even a minimum level of agreement.

Several interviewees referred to a second important reason for the low popularity of global and general licences, i.e. the tendency to stick with the **known and familiar.** National licensing authorities and defence companies have a long-standing tradition of using individual licences for the international trade in military equipment. In contrast, general and global licences have only been implemented for a period of five years in most EU Member States.

According to the defence-industry interviewees, a **'mental switch' or change in attitude among companies and governments** is therefore necessary. By organising so-called 'inreach activities', the EU could and should actively support efforts to make defence companies and governments better acquainted with the 'ins and outs' of the new licensing system. The EU should in particular make sufficient personnel and financial resources available to train and educate defence companies and national licensing authorities on the principles and practical use of the general (and global) licencing system.

4.5 End-use controls: the bedrock of arms export control systems

4.5.1 Assessment criteria

Various stakeholders we interviewed stress the need to harmonise EU Member States' interpretation of the Common Criteria. These criteria are seen as an important step forward because they provide principled guidance. From an industry perspective, the harmonisation of the interpretation of the Common Criteria would create a level playing field for EU defence companies; for the NGO representatives it would result in a profound and real respect for human rights and international humanitarian law, and would prevent EU-produced military goods from falling into the wrong hands.

However, a harmonised interpretation of the Common Criteria is currently far from being a reality. All the interviewees acknowledged the presence of important differences in how national governments interpret and apply the criteria:

> ***"It remains important to understand that all or most Member States already had their own rules and practices for a long time when the Common Criteria were formulated. They all adapted the criteria to their own rules."***
>
> **MEP interview**

An observation was made that the focus should be on encouraging greater convergence in the interpretation and improved implementation of the common criteria than creating new criteria. It is the prerogative of MS to implement additional national assessment criteria should they so wish, which could encourage others to do likewise.The introduction of such additional criteria might encourage other Member States to adapt their national criteria to more closely reflect the Common Criteria.

In contrast, the **NGO representatives** stressed the need to further update the Common Criteria. Including new aspects was an initial suggestion: in particular, 'corruption' should be dealt with in a separate criterion. Equally, criterion 8 should be rewritten to take into account the impact of arms exports on the developmental situation in the country to which the products are exported. Secondly, the NGO representatives stressed the need to **reduce the level of the direct causal relationship** between the exported military goods and violations of human rights and to formulate a more nuanced approach:

"If you're selling military products to a rogue dictatorship, for example, you should be aware of the political signal you're sending and that selling these products may be seen as an endorsement of the regime, even if the products in themselves cannot directly be used for human rights violations."

Peace organisations focus group

The MEP who was interviewed also referred to possible changes to the Common Criteria in their current form, and suggested that **more 'shall' formulations** – explicit grounds for denying a licence – should be included in the text of the criteria. This would reduce national differences in their interpretations of the criteria and would help to converge the risk assessment process in specific licence applications.

The defence industry representatives also stressed the need to develop a common interpretation of the assessment criteria. National differences in interpretation result in significant competitive disadvantages among defence companies in the various EU Member States. However, like the NGO representatives, the defence industry representatives referred to the low likelihood of a harmonised interpretation of the Common Criteria being established in the near future:

"Differences in interpretation reflect the diverging foreign policy priorities of the different EU Member States and it will be very, very difficult to harmonise this."

Defence industry interview

4.5.2 Controlling end use and the use of re-export clauses

EU Member States significantly differ in how they control the end use of transferred or exported military goods and how they apply re-export restrictions, in particular to intra-EU transfers of defence-related goods.

All the stakeholders who were interviewed recognised these differences between the various arms export control systems. On a theoretical level, all agreed that it seemed logical that such barriers to the intra-EU trade in military equipment should be significantly reduced. However, **important differences exist in the perceived desirability and feasibility of the removal of such controls** for the intra-EU arms trade.

The response of the European Commission concerning national practices in controlling the end use of the transferred goods, in the form of formal end-use documents, which in some Member States are even used in the case of global and general licences. Although the ICT-Directive allows end-use certificates for transfers, which sometimes even can facilitate transfers, in light of the goals of the Directive, using such certificates before the transfer takes place is not ideal as the aim of the Directive is to evolve from ex-ante to ex-post controls. The European Commission however argues that for the moment very little appetite among Member States exists to take up the issue of harmonisation of end-user certificates, so it is not a priority in its work.

The EU seems to acknowledge that there is little interest in significantly addressing the topic of end-use controls. EU Member States do not show much interest in working towards reducing existing controls on the end use of products, even after they have been transferred to other Member States. These differences between Member States are particularly apparent in the trade in the components of military equipment. Most EU governments are reluctant to transfer responsibility for the control of the end use of defence-related goods to another EU Member State. This conflicts with the aim of the European Commission to limit the use of re-export restrictions as much as possible. The removal of such restrictions was important for both the defence industry and European Commission interviewees. Existing national restrictions and continuing controls on the further trade in military goods are seen as important impediments to the facilitation and liberalisation of the intra-EU arms trade, which are the main goals of the ICT Directive.

The defence industry representatives had all experienced the vagueness of most governments in determining when re-export restrictions are applied as a major impediment to the EU defence industry and industrial cooperation across the EU. This vagueness negatively impacts the competitiveness of defence companies. These interviewees therefore suggested a different approach in which components should lose their national identity after they are integrated into higher-order weapons systems. In other words, if this were to become policy, the country of origin of the goods would change. Re-export controls could therefore only be applied by the country of origin of the finished weapons system, which would be the new country of origin.

Explaining differences in end-use and re-export controls

Both the defence industry and NGO representatives used the interrelatedness of the intra-EU and extra-EU aspects of the trade in military equipment to explain why EU

Member States continue to attempt to control transferred or exported products and even include additional conditions in general licences.

Perceived differences in national arms export policies still determine why governments are not willing to transfer control of the end use of defence-related goods to other EU Member States. The representatives of both the defence industry and the peace NGOs argued that priority should therefore be given to developing a more widely accepted interpretation of the common standards that should be applied (even though national governments have different views on the application of the Common Criteria) as a necessary condition for significantly reducing intra-EU controls on the trade in military equipment:

> ***"Again, in theory it sounds logical to remove such barriers for intra-EU trade, but in reality there are still big differences in the levels of control of the [various] Member States. It thus seems logical, but it will only be possible if Member States apply the same interpretation of the common standards. … Firstly, we have to properly control what is being exported from the EU, then we can start removing barriers between Member States."***
>
> **Peace organisations focus group**

In other words, further steps to liberalise the intra-EU trade can only happen in practice *after* EU Member States agree to converge their foreign policy and arms export policy priorities to a much greater degree than at present.

A second explanation of the existing differences in end-use controls is linked to why general and global licences remain little used in practice. **'Habit'** and **'caution'** were also indicated as important reasons for the continued use of re-export restrictions and the high levels of control on end use in global and general licences.

However, the interviewees suggested various ways of stimulating EU Member States' convergence in terms of how they control the end use of transferred or exported military goods in the current framework. These suggestions relate more specifically **to encouraging information sharing and increased cooperation among national governments**, which COARM should initiate and coordinate. This would empower national governments to control the end use of defence-related goods more effectively and efficiently:

> ***"It could be useful to share information between Member States for pre-licencing decision-making as a start. A specific example would be the possibility of sharing information on illegal diversion cases between Member States. COARM could play a role here in coordinating more formal ways of sharing such information between Member States."***
>
> **Peace organisations focus group**

COARM and EEAS have several sources of information that may be relevant for EU Member States in this regard. EEAS, for example, collects information on the human rights situations in numerous regions and countries. Equally, Conflict Armament Research's iTrace project – which the EU funds – could also be a relevant source of information. Such information could be more formally disseminated to EU Member States, who could use it to assess licence applications.

Similarly, **post-shipment controls** seem relevant here, and in theory an active role for EU actors in encouraging and coordinating this seems to be an interesting possibility. Individual EU Member States often claim that they do not have the resources to implement post-export controls. Building cooperation and encouraging EU Member States to help one another in terms of such controls could be a constructive role for COARM to take on.

However, the active involvement and willingness of EU Member States to participate in setting up such a system is once again a necessary condition for it to work. A point or observation was however made that in some Member States, this might feel like giving up a bit of independence as they would have to share much more information with other Member States when they would want other governments to control the goods they have exported. So, politically, the degree of feasibility and desirability will differ strongly among countries.

Although all the interviewed stakeholders stressed the need for a uniform interpretation of the Common Criteria, substantial steps towards a harmonised EU-wide interpretation of these criteria are not seen as feasible in the near future.

This lack of a harmonised approach to the extra-EU trade in military equipment has a significant impact on Member States' willingness to remove national barriers imposed on intra-EU trade. Although the creation of a liberalised internal market is felt to be crucial to stimulate the European defence industry, the defence industry and NGO representatives argued that a more fundamental removal of intra-EU barriers will

only occur when the extra-EU trade in military equipment is harmonised to a much greater extent.

However, EU institutions depend to a very great extent on **Member States' political will to further converge their interpretations of the Common Criteria**. This reflects the continued relevance of the national level: in reality, holding governments accountable for their application of the Common Criteria is often the function of national civil society and members of national parliaments. Again, the need is stressed for individual EU Member States to play a leading role by applying a more stringent interpretation of the Common Criteria or implementing additional national criteria.

Because the EU framework on arms export controls is not expected to change fundamentally, EU institutions could develop specific initiatives to stimulate the convergence of arms export control practices within the existing framework. These initiatives could encourage both the effectiveness and efficiency of national arms export controls. In the context of COARM, several concrete initiatives appeared to be feasible:

- **Specific initiatives to stimulate the convergence of the interpretation of the Common Criteria.** The online tool for the notification of denials and the User's Guide are seen as useful here.
- **The active dissemination of relevant information collected by EU institutions (mainly the EEAS) on specific countries.** Although governments can currently request such information and COARM sometimes makes it available, a formalised and structured top-down (from the EU to the national level) information-sharing process would be useful.
- **The horizontal coordination of information sharing among EU Member States** would be an advantage, because not all governments have the same capacity to collect relevant and qualitative information to assess the foreseen end-use of the military goods.

Because COARM is assumed to take a neutral stance, (small groups of) EU Member States could play a pivotal role in putting such initiatives on the agenda. In other words, the role of EU Member States in setting the pace and direction of European convergence remains extremely important.

4.6 Transparency and parliamentary controls

Compared to other parts of the world, public transparency on arms exports is high in the EU. Besides EU Member States, only a very limited number of countries (e.g. the United States, Canada and South Africa) regularly publish data on arms exports.

The lack of fundamental objections to transparency on arms exports

None of the stakeholders we interviewed raised fundamental problems with regard to the issue of transparency on arms exports. On the contrary, all these stakeholders acknowledged the positive effects of public transparency on (inter)national security and government accountability. Not surprisingly, the NGO representatives saw public transparency on arms exports as the most crucial condition for a more responsible and accountable arms export policy.

Other interviewees also pointed out the added value of such transparency. Especially in countries with a very salient public and parliamentary debate on arms exports, a high level of transparency helps to create public trust in the defence industry and supports the competitiveness of defence industry companies:

> ***"Secrecy on arms exports creates a very dysfunctional market, which leads to corruption and bad market ethics. Transparency is in other words essential to good business market ethics and therefore to equal market access for all companies."***
>
> **Defence industry interview**

The interviewees from the defence industry therefore advocated efforts to strengthen public transparency on arms exports on a more global scale. If other countries and regions also increase their level of transparency on arms exports, this could have positive effects on the image and competiveness of (European) defence companies.

However, at the same time they referred to specific limits to transparency. Some interviewees from the defence industry suggested that differences in transparency can cause a competitive disadvantage for defence companies, particularly when specific information is made public that allows **competing companies to identify the unit prices** of a particular product. As a consequence, the publication of information on both the actual values of the exports and the number of goods being exported would potentially negatively impact the competitiveness of EU defence companies.

Similarly, the publication of information that would allow the identification of individual companies responsible for specific transfers or exports is also considered as going 'a bridge too far':

> ***"Because of the low number of defence-related companies [in some countries], it is in practice easy to link licences to individual companies. As a consequence, we are making important information freely accessible to competing companies, but also to other civil society actors that are not attuned to us. We thus make information public that may damage the industry."***
>
> **Defence industry interview**

Despite these problems, generally the defence industry representatives did not have fundamental objections to increasing transparency on arms exports:

> ***"Objections to more transparency did not always come from business, but are actually often formulated by government, which wishes to limit transparency because of the potential negative effects of greater transparency on political relations with other countries."***
>
> **Defence industry interview**

The NGO representatives gave three important reasons that make the current **level of transparency in consolidated EU annual reports highly unsatisfactory.**

1. The data that are currently made public are very difficult to interpret. The reports are limited to a very long list of tables giving figures, without any interpretation, synthesis or analysis. A profound understanding of what the tables in the report mean is therefore crucial to effectively interpreting the contents of the report.

2. The EU report lacks important information, especially with regard to the use of general and global licences in the various Member States. Only a very limited number of countries include data on the value of the trade in military equipment that uses general and global licences. A further increase in the use of these licences by EU Member States may as a consequence gradually decrease the level of public transparency on arms exports.

3. The very late publication of the annual report is a problem, with, for example, 2015 data only being made available in March 2017. This extended time lag between actual licensing or exports and the publication of this information often makes societal and political attempts at oversight redundant.

Strengthening EU transparency on arms exports: ways forward

In general, transparency is discussed only occasionally in the various EU institutions. Even in COARM, Member States pay little attention to transparency. However, COARM recognises the importance of public transparency on arms exports, because it is considered to help the convergence of arms export policies and to hold Member States accountable for licensed arms exports.

More in particular COARM recognizes that some data in the COARM report could be interpreted in an ambiguous way. There seems to be a general recognition among MS that some data in the EU Annual Report on Arms Exports could be interpreted in an ambiguous way and that there should be a continuous effort to look for improvements in transparency and quality.

In contrast, the European Commission only pays very limited attention to the issue of transparency on arms transfers, which is not included in the legal framework of the ICT Directive. As a consequence, EU Member States have no obligations to report on the issues set out in the Directive, such as general and global licences.

> ***"We are aware of this, but the ICT Directive contains no regulations on this and there are no plans to amend the Directive. This could be the topic of a more profound evaluation of the aims of the Directive in the future."***
>
> **European Commission interview**

The ICT-Directive does not aim at transparency on transfers of defence-related goods. As a consequence, Member States have no obligation under the Directive to report on the use of its instruments, such as the general and global licences. Limited information in this regard is available in the annual reports on arms exports under the Common Position. *At this stage, the European Commission argues, amending the ICT-Directive is not foreseen. The issue of Member States reporting obligations on transfers could be however taken up at the occasion of the next evaluation of the Directive.*

Notably, the representatives of the various EU institutions had little knowledge of the impact of the ICT Directive's implementation on the level of public transparency on arms exports in EU consolidated annual reports. Neither the COARM or European Commission representatives were aware of the negative impact of the implementation of global and general licences on the level of transparency, which only the NGO representatives referred to.

The European Parliament and controlling arms exports

Despite the growing involvement and relevance of various EU institutions, the European Parliament pays very limited attention to arms exports. The EU consolidated annual reports' lack of readability is given as one of the reasons for this low level of involvement in arms exports. As a consequence, only national parliaments discuss arms exports and related policies.

The MEP interviewed for this study felt that it was essential to apply **external pressure on MEPs** to put arms exports on the European Parliament's agenda, and that simultaneous public and political attention in various countries is a necessary condition to increase the political salience of arms exports in the European Parliament. The MEP stressed the necessity of a bottom-up approach to heighten the political interest in arms exports among MEPs:

> ***"National civil society and member of national parliaments should therefore be more active in pushing the topic of arms exports on the agenda of the European Parliament."***
>
> **MEP interview**

Interestingly, there seems to be a **very specific focus on extra-EU exports** in the European Parliament, but intra-EU arms trade perspectives and developments are not discussed. The reason for this is the fundamental division between the predominantly economic approach at the intra-EU level and the foreign policy focus in terms of the extra-EU arms trade:

> ***"With regard to the intra-EU trade in military equipment, the EU sees political and ethical considerations of arms exports in abstract terms, and only the practical economic aspects are focused on. Therefore, IMCO should not be involved in the discussion on arms exports, because then the focus would be on economics and jobs, but this [discussion] is about security and foreign affairs."***
>
> **MEP interview**

As a consequence, comprehensive political attention to the various aspects of arms export controls is currently lacking in the European Parliament.

All the stakeholders interviewed for this study considered transparency on arms exports to be a worthwhile goal. None of them fundamentally objected to the levels of public transparency on arms exports within the EU. Even the defence industry representatives stressed the potential added value of increased transparency. Strengthening public transparency on a global scale could improve public trust in the defence industry and simultaneously increase the competitiveness of EU defence companies.

However, various stakeholders emphasised the need to significantly improve the quality of the EU consolidated reports on arms exports. The NGO representatives claimed that in their current form the reports lack significant information that would allow interested parties to properly scrutinise EU arms exports. A more timely and accessible report was also seen as a necessary condition for instigating a profound political discussion on EU arms exports in the European Parliament. National actors could play a pivotal role in increasing the political salience of the issue of arms exports in the European Parliament.

Within the EU, the issue of transparency is exclusively focused on the extra-EU trade in military equipment. In contrast, the relevant EU institutions are neither aware of nor recognise the ICT Directive's implications for public transparency. This is yet another example of the artificial division that exists between the intra-EU and extra-EU trade in military equipment.

EU-wide harmonisation of arms export controls: success or failure?

05

For almost a century national governments in Europe have developed systems to control the international trade in military equipment. The aftermath of the First World War saw most Western states establishing systems to control exports of defence-related goods. Gradually, exporting arms has become part and parcel of the national foreign policy of most industrialised countries.

Although arms exports were considered an exclusively national prerogative of its Member States, the EU has gradually become involved in this issue since 1991. EU regulation has essentially developed in two areas. In terms of the extra-EU trade in military equipment, the EU has developed common assessment criteria to encourage its Member States to implement a more convergent and responsible arms export policy. In terms of intra-EU trade, EU policy prioritises the facilitation of the trade in military equipment between EU Member States and the development of a genuinely European defence industry and common defence market.

The EU's involvement in arms exports has developed incrementally, gradually touching on more and more aspects of arms export controls, and gradually increasing the legally binding character of the various initiatives. This is, for example, apparent in the use of the Common Criteria, which were first formulated in 1991 and further formalised in the politically binding Code of Conduct in 1998. These initiatives have eventually been transformed into a legally binding Common Position in 2008. The legal enforceability of the common criteria remains non-existent, however, because national governments remain exclusively competent in applying the criteria. Moreover, the EU Court of Justice has no formal competence in this domain. The same holds for the EU Common Military List. While originally introduced as a political commitment, this list is now legally binding for both intra- and extra-EU trade in military equipment. However, despite the EU's growing involvement in regulating the international trade in military equipment, national

authorities continue to have significant discretionary power to develop their national arms export control systems and to privilege national priorities in their arms export policies. **The extent to which these EU regulatory initiatives have effectively resulted in the greater harmonisation of the national arms export systems of EU Member States is therefore a highly pertinent question.**

The goal of this study was twofold, and consisted of a descriptive and an evaluative part. The first part analysed and compared eight EU Member States' arms export control systems to determine the extent of harmonisation among them. As a result of the regionalised competence over arms export controls in Belgium, we in effect analysed and compared nine arms export control systems. Because the report applied a comprehensive approach and analysed the national context, legislation, policy and public debates on arms export controls in each of these nine systems, this descriptive comparison is the central part of the study.

The second part contains an evaluation of the findings identified in the first part. The results of the comparative analysis were discussed with various European stakeholders – representatives of EU institutions, NGOs and the defence industry – to reflect on the current situation, to discuss the various issues that had been raised in the first part and to suggest possible ways forward for EU policy on arms export controls.

Compared to other studies of arms export controls in Europe, the added value of the present study is its use of a comprehensive framework in which EU Member States' national systems of arms export controls are the unit of analysis. As a result, it discusses both Directive 2009/43 and Common Position 2008/944, and the interrelatedness between these two EU regulatory initiatives.

An important caveat is that our analysis is primarily based on a comparison of the legislative frameworks of the selected EU Member States. In order to analyse the policies and practices of the various national arms export controls systems, we mainly made use of publicly available policy documents and administrative guidelines. However, information on how the legislative framework is interpreted and applied in practice is not readily available. The political sensitivity of the topic, national security concerns and commercial confidentiality often do not permit those in the know to share their insights regarding the actual implementation of the relevant legislation.

This concluding chapter first describes the general findings of our analysis. We then reflect on possible ways forward for the EU and its Member States in terms of the EU-wide harmonisation of arms export controls.

5.1 EU-wide harmonisation of arms export controls: diverging convergence

The harmonisation of the national arms export control systems across the EU has been a stated goal of the EU. In terms of the national implementation of the two relevant EU regulatory initiatives (Common Position 2008/944 and Directive 2009/43), our analysis indicates that the general principles of these instruments have been implemented in national legislation or policy across EU Member States. Since 2008/2009, all the Member States that were surveyed in this study have developed national legislation to implement the various elements of the ICT-Directive and the Common Position, if these elements did not already form part of their existing national arms export control systems. Some countries, such as Germany and the UK, had been using general and global licences before the implementation of the ICT Directive. As a result, they only had to make minor changes to their national legislation in order to comply with this ICT Directive.

We have observed that EU Member States' arms export control systems have to a certain extent been harmonised. Although national governments are still able to develop their own systems and have the full competence to evaluate licence applications, the various EU initiatives have resulted in a shared Europeanised basis for national arms export control systems. However, national sensitivities and foreign policy priorities continue to influence national systems. As a result, complete EU-wide harmonisation is not to be found in any of the aspects of our analysis: institutional framework (1), material scope (2), licences (3), end-use controls (4) and transparency (5).

1. EU Member States differ in terms of their institutional framework, i.e. the administrative-institutional embeddedness of their arms export control systems. In the EU Member States we studied the competent licensing authorities are situated in different policy domains. In general, national licensing authorities are part of the ministries of foreign affairs, defence or trade/the economy.

Moreover, most systems include other relevant policy domains in the licensing process to provide (binding) advice or relevant information for the assessment of licence applications. Only in Belgium and Sweden are other government ministries not involved in the process. In Belgium, the regionalisation of arms export controls complicates the process of cooperation between regional and federal actors. As a consequence, the involvement of federal policy domains – foreign affairs, defence, development cooperation – in the implementation of the regional competences of Wallonia and Flanders is not self-evident. The autonomy of the Swedish licensing

authority (the ISP) is the result of an explicit government decision to avoid the undesirable influence of other policy actors.

2. The implementation of the EU Common Military List has significantly harmonised the **material scope** of EU Member States' arms export control systems. However, important differences remain. Firstly, most countries also use national lists to control extra-EU exports of goods they consider to be defence-related. Secondly – and most importantly – EU Member States' interpretations of the concept of 'goods especially designed for military use' diverge significantly. National interpretations – which originate from differing foreign and security policy priorities – result in different goods being subjected to a licensing requirement.

3. In their **licensing** systems, all the countries/regions studied have implemented general and global licences. Broadly speaking, therefore, a harmonised licensing system exists in all the selected EU Member States. Once again, however, governments continue to define the provisions of these licences, resulting in significant differences in the material and geographical scope of general and global licences. Moreover, these licences remain relatively little used, and the use of individual licences is still the norm in most EU Member States. Only countries with a longer tradition of the use of general and global licences seem to use them more frequently, although most governments make very little information public about the actual use of these licences.

4. With regard to the organisation of **assessing and controlling the end-use** of the defence-related goods, we find that EU Member States in general share common elements. All governments use the *Common Criteria* to assess licence applications. Most Member States moreover prefer to require end-use certificates for individual licence applications, in particular for extra-EU exports. Significant national differences however remain. Domestic sensitivities and priorities result in diverging forms of national implementation of the Common Criteria the existence of additional assessment criteria, and changes in the specific national formulation of the Common Criteria. Governments equally differ in the extent to which they demand formal documents to control the proposed end use of the exported goods. These differences reflect more general differences among EU Member States' perspectives on pre-shipment and post-shipment end-use controls. Governments continue to apply other interpretations of the extent to which the effective end use and end user of defence-related goods are identified, and the extent to which the defence industry is accepted as an end user in licence applications. The various governments also continue to have different policies on the use of *re-export restrictions*, especially for transfers or exports of components. It is clear that this remains an important

political assessment carried out by the government that is based on foreign and security policy-related priorities.

5. **Public transparency** also reflects our general conclusion on harmonisation. The implementation of a homogenised categorisation in the EU Common Military List has greatly improved the level of comparability of EU Member States' official arms exports reports. However, these official national reports diverge strongly in terms of frequency, comprehensiveness and disaggregation.

Additionally, differences in harmonisation among the selected EU Member States do not follow a linear logic; i.e. their national arms export control systems cannot be classified according to their level of harmonisation and do not display a simple progression from less harmonised systems to strongly harmonised systems. In other words, the reality of the EU harmonisation of arms export control systems is neither linear nor clear-cut. The extent to which national systems relate to the EU norm is different for each aspect of arms export controls and each national system: depending on the aspect in question, an arms export control system can conform to a greater or lesser extent to existing EU practice – to the extent that such an EU-wide 'standard' exists.

Explaining the lack of convergence and incomplete harmonisation

All the representatives of the EU institutions involved in our study – the European Parliament, European Commission and COARM – emphasised the EU's goal of creating EU-wide harmonisation of arms export controls, although they prioritise convergence on different aspects of such controls. Interestingly, the defence industry and NGO community interviewees both acknowledged the potential added value of a Europeanised approach to arms export controls, although for both groups the direction and focus of this process of convergence differed.

Why, then, is this process of harmonisation so difficult to implement in practice? Several explanations can be forwarded.

First, the EU's active involvement in arms export controls is relatively recent. In addition, the legally binding obligations for EU Member States have only been in place since 2009 and have in reality been implemented nationally since 2011/2012. It takes time for all the actors and institutions involved to get to know the newly introduced principles and practices and to understand their added value. Both national licensing authorities and defence companies therefore need to adjust their thinking to the new realities.

Similarly, most national systems have been in place for more than fifty years and have been shaped by their respective national political cultures and domestic defence industry characteristics. Path dependency therefore also helps to explain the lack of convergence among EU Member States. Each government had to integrate the new EU regulations into its own arms export control system and had to reconcile these regulations with pre-existing principles and practices. Policy and legislative choices depend to a large extent on cultural-political histories and foreign policy priorities, as well as the characteristics of the national defence industry in question (shape, size and traditional buyer countries).

On a more substantial level, the inextricable link between the intra-EU and extra-EU arms trade is the most important reason for the lack of convergence on arms export controls. The fact that the ICT Directive and the Common Position are fundamentally interrelated is the most significant finding of this study. This also helps to explain the remaining differences among EU Member States in the national implementation of these EU regulatory instruments. In other words, the difficulties experienced by the various stakeholders **in creating a common European defence market and defence industry in effect result to a significant extent from the lack of a substantial common EU foreign and arms export policy.** Although EU Member States are the most important recipients of EU-produced defence-related goods, most military equipment eventually crosses EU borders and is integrated into complete weapons systems or (much later on) sold as surplus military equipment.

As a consequence, those aspects of arms export controls that relate to foreign and security policy concerns and interests remain for the most part a national competence. Not surprisingly, the harmonisation of the various arms export control systems is most apparent in their formal elements, such as reporting requirements for the use of licences, archiving procedures, etc.

For aspects such as the content and scope of general (and global) licences, the use of re-export restrictions, end-use control procedures, and transparency, the EU regulatory instruments only set out a general framework. EU Member States therefore continue to implement them according to their own interests and priorities – but these elements lie at the heart of arms export controls. As a consequence, Member States differ in the national implementation of these elements, and will continue to do so without a more substantial common European foreign and security policy.

The international trade in components clearly illustrates the inherent link between intra-EU and extra-EU trade. The facilitation of the intra-EU trade in components of military equipment is a key priority for the European Commission. This would

contribute significantly to the Commission's goal of creating a European defence industry and common defence market. However, Member States continue to use re-export restrictions, even for transfers of components. The reality that, after being integrated into finished weapons systems, most components are eventually exported to non-EU countries is the main reason why EU Member States continue to use re-export restrictions. Governments are aware that significant differences exist in the interpretation of the Common Criteria; these differences are mostly the result of governments' respective foreign policy interests and priorities.

In general, this illustrates the EU's rather limited mandate. Member States are reluctant to transfer significant competences to EU institutions in order to substantially harmonise national arms export control systems. Even in the case of intra-EU trade in military equipment, governments are currently unwilling to allow the EU to further Europeanise their national export control systems.

5.2 Moving EU-wide convergence forward: acknowledging 'the elephant in the room'

The reasons we have identified to explain the current state of the process of EU-wide convergence of arms export controls raise questions as to the feasibility and desirability of ways forward for this process. On a practical level, several steps have been suggested that EU institutions could take to stimulate the convergence of EU Member States' arm export control systems. These institutions could:

- introduce initiatives to more actively familiarise the direct stakeholders in the licensing process – licencing authorities and defence companies – with the EU regulatory instruments' principles, in particular the elements of the ICT Directive dealing with the licensing system and the certification procedure;

- develop coordinated efforts to share nationally held information among licensing authorities to increase the ability of national authorities to evaluate the end use and end users of exported military equipment:

- more actively disseminate information collected by the EEAS on specific end users and the human rights situations in countries of concern;

- modify the COARM online tool to allow the sharing of information on cases of illegal diversion among EU Member States; and

– formalise the participation of representatives of the various EU institutions in each other's working groups. Not only should a DG Grow representative participate in COARM meetings, as is currently the case, but a COARM representative should also be present in meetings of the European Commission's Working Group on the implementation of the ICT Directive.

This latter element could help to strengthen awareness of the interrelatedness of intra-EU and extra-EU trade in military equipment within the relevant EU institutions. There seems to be little awareness and knowledge of how the ICT Directive and the Common Position affect each other's principles. The lack of knowledge about the effects of the implementation of global and general licences on the level of transparency of arms exports clearly illustrates this. Various EU Member States use general and global licences for extra-EU arms exports. Because most governments do not report on the value of arms exports, in reality they do not report on transfers or exports of military equipment using these types of licences. Several representatives of the EU institutions interviewed appeared not to be fully aware of this substantial effect of the implementation of global and general licences on the public transparency of arms exports.

This element also indicates that the topic of arms exports – both to other EU Member States and to countries outside the EU – is still mainly discussed at the administrative level. EU institutions' attempts to harmonise EU Member States' arms export control systems remain limited. Although some potential initiatives to achieve greater harmonisation can be identified, these institutions' mandate to achieve further convergence effectively depends on the level of political will to do so within the EU. The various national governments and parliaments, and MEPs play a pivotal role in determining these EU institutions' ability to effectively promote greater EU-wide harmonisation.

In order to significantly stimulate such harmonisation, arms exports should therefore become more politicised for both the intra-EU and extra-EU trade in military equipment. National economic interests dominate the current approach to the intra-EU arms trade. In contrast, EU institutions focus on foreign and security policy interests and concerns about human rights and conflict prevention.

As a consequence, EU institutions should be more aware of the 'elephant in the room', i.e. the inherent interrelatedness of economic, security and human rights concerns in intra-EU and extra-EU trade in defence-related goods. Governments continue to instrumentalise arms exports in their foreign and security policies. The incomplete development of a common European foreign policy is the reason why

Member States remain reluctant to fully implement the ICT-Directive and to create a common, liberalised EU defence market.

In general, this necessitates the development of an integrated and comprehensive EU approach to arms export controls. The international trade in military equipment does not stop at the borders of the EU. All the factors affecting this trade – economic interests, security and human rights – should be taken into account to understand both the extra-EU and intra-EU trade in defence-related goods. The current division between the intra-EU and extra-EU level in the EU's approach to the arms trade is artificial and neglects interests and concerns that inevitably influence both areas. A comprehensive approach to arms exports at the European level is therefore desirable, and the key initial step here is that the European Commission, the EEAS/COARM and the European Parliament should be more aware of the inherent interrelatedness of the various issues affecting the trade in defence-related products.

The politicisation of arms exports controls at the EU level necessitates that together with security interests, human rights and foreign policy principles, economic considerations should also play a role. In other words, a full acknowledgement of the interrelatedness of economic, national security and ethical-normative issues in arms export controls is both desirable and necessary. In the European Parliament, both IMCO (which deals with the intra-EU arms trade) and the SEDE (which is responsible for extra-EU exports) should therefore organise a more substantial and fundamental political discussion on matters related to the issue of arms exports, possibly in combined committee meetings.

Increased public transparency on arms exports at the European level is a necessary condition for a more profound parliamentary debate and the exercise of control in the European Parliament and the other relevant EU institutions. Improved *EU consolidated annual reports on arms exports* would therefore be beneficial to the democratic debate on arms exports. Making COARM consolidated reports more comprehensive and more readable is an immediate and practical initiative that could stimulate the political debate on arms export controls. With this aim in mind, COARM could:

- ensure the report's *comparability and comprehensiveness,* which at the very minimum necessitates including data on all types of licences (including global and general licences) and the actual values of completed arms exports. Despite the COARM-report formally only needs to include data on extra-EU trade, the inclusion of data on intra-EU trade flows of military equipment seems to be desirable in terms of transparency;

- ensure the *more timely publication* of the consolidated report, so that a parliamentary and societal debate on the data it contains is still relevant after it is published;

- *change the format of the report* so that it becomes more easily readable/understandable by the general public and other interested stakeholders; and

- organise a *substantial debate* on the annual report in the European Parliament that covers *all the factors affecting the trade in military equipment discussed above*. Although the report in itself is already discussed in the European Parliament, the debates could take a more fundamental direction on the substantial implications of the data presented in the report

Importantly, however, responsibility for achieving the harmonisation of national arms export control systems across the EU does not rest solely with the various EU institutions. National-level actors are equally relevant to the process of determining the pace and direction of the European harmonisation process.

The role of national governments and other national stakeholders is pivotal if the political debate on the arms trade is to have a more profound effect at the EU level. These actors' level of agency therefore needs to be stressed and acknowledged as a key factor driving the work of the EU. National actors need to take on a leading role, and initiatives to encourage harmonisation originating at the national level are necessary. In other words, EU-wide harmonisation necessitates both 'top-down' initiatives – initiated at the EU level - and 'bottom-up' pressures – driven by individual Member States - and is thus a shared responsibility of both EU institutions and national actors.

5.3 Conclusion: optimism or pessimism about EU-wide harmonisation?

In conclusion, how should we evaluate EU Member States' involvement in arms exports? To what extent has the EU been successful in its attempt to harmonise national arms export control systems? Should the EU continue to be involved in regulating the foreign trade in defence-related goods? In general, a consensus appears to exist that the EU should indeed be involved in the domain of arms export controls. Depending on the perspective taken by the different stakeholders, the role of the EU is seen as indispensable in stimulating the European defence industry,

guaranteeing national and collective security, or evolving towards a more human-rights-inspired and 'responsible' arms export control practice.

All the interviewees acknowledged the potential – and even the necessity – of the EU's involvement in this field and the need for the further EU-wide harmonisation of the arms export control policies of EU Member States. However, it is essential to bear in mind that national policy on this topic goes back a long way and each Member State has had its own national system of controlling arms exports for several decades. These national systems are the result of several decades of political negotiations and adaptations. Making significant changes to systems with such a long-standing tradition is not a self-evident process and will not take place overnight. It has taken and will continue to take time to further change these national systems and harmonise them substantially at the EU level.

However, we should keep in mind that the idea of 'an ever-closer Union' is not a foregone conclusion. It is therefore dangerous to take for granted the hypothesis that the harmonisation of national arms export control systems will occur by itself, because 'Europeanisation has always occurred'. It is also essential to take into account the current geopolitical context in which such harmonisation must take place. Recent developments such as Brexit, the changed security environment, and the role of NATO may all impact the speed and direction that the EU-wide harmonisation of arms export controls may take.

Two necessary conditions need to be in place to move such harmonisation forward at the EU level. A crucial point of focus for the EU lies in the recognition of the interrelatedness of economic interests, security concerns and human rights considerations in the international trade in military equipment. A more substantial, integrated politicisation of arms export controls within the EU is an essential first step to broaden the framework in which EU institutions can work towards further convergence of EU Member States' arms export control systems.

At the same time, national stakeholders will continue to play a pivotal role in determining the pace and direction of this process of convergence. National governments, civil society actors and defence industry representatives should take a leading role at the EU level to push the EU harmonisation process forward. In other words, it is absolutely essential to fully recognise the reciprocal relationship between the EU level and the national level in working towards the further harmonisation of arms export controls.

ANNEX 1. LIST OF EXTERNAL RESEARCHERS

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Germany	Dr. Sybille Bauer	Program director of the 'Dual-use and arms trade control'-program of the Stockholm International Peace Research Institute (SIPRI)
France	Yannick Quéau	Independent consultant and associated researcher at Groupe de Recherche et d'Information sur la Paix et la sécurité (GRIP)
Hungary	Chiara Bonaiuiti	Senior researcher and research coordinator at the Institute for Social and Economic Research (IRES) Toscana. PhD-student at the School of Geography and Politics of Newcastle University
Netherlands	Martin Broek	Freelance researcher
Portugal	Dr. Bruno Oliveira Martins	Assistant Professor, Department of Political Science, Aarhus University, Denmark; Affiliated researcher, Portuguese Institute of International Relations and Security (IPRIS)
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Sweden	Mark Bromley	Adjunct-program director 'Dual-use and arms trade control'-program of the Stockholm International Peace Research Institute (SIPRI)
Wallonia	Prof. dr. Quentin Michel & Lia Caponetti	Professor at the Department of Political Science, University of Liège & PhD-student at the Department of Political Science, University of Liège

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