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## Impact of the Transfer Directive on the transparency and efficiency of the arms export control

### ENAAT Position Paper

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The European Network Against Arms Trade considers the Transfer Directive is having serious negative impacts on the -already insufficient- transparency and efficiency of the arms export control regime, in other words on the proper implementation of the **2008 EU Common Position on arms exports control**<sup>1</sup>.

In this Position paper we will focus on our three major concerns using some national examples as illustration. However similar effects can be witnessed in other countries not mentioned in this Paper.

In a nutshell, the Directive loosens governmental control over actual transfers and exports with a particular impact on components, shifts the responsibility for controlling deliveries and export restrictions to the arms industry and reduces transparency, thus impacting the capacity for scrutiny from national and European Parliaments and civil society. The simple fact that Member States can use the opportunity of the Directive's implementation to dismantle their own arms export regime shows that the minimum standards set up by the Directive are far too low.

**Under such circumstances, we call the European Commission to:**

- **Critically assess the Transfer Directive in light of its negative impact on arms exports control rather than as an internal trade issue. Arms are not 'normal' goods, they have a severe impact on conflicts and on the international political situation: human rights and peace considerations must prevail over commercial interests of the arms industry and short-sighted national strategies.**
- **Refrain from opening further the liberalisation process of the trade of arms within the EU as this could only further undermine Member States capacity to control arms exports. On the contrary, any revision of the Directive should aim at raising up the minimum standards and avoid self-regulation by the arms industry in order to allow for a stricter control of arms trade.**
- **The Directive must allow Member States to impose restrictions on re-exports and final user guarantees on both end products and components without any form of limitation.**
- **The Directive must impose very strict transparency rules on the trade of arms and related goods within the EU, in order to allow for public scrutiny by national and European parliaments and by civil society.**

If this does not happen, the current standards of the Directive and any further liberalisation will de facto increasingly interfere with national competences in terms of arms trade control without proposing any alternative and improved means of control.

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<sup>1</sup> Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment

## 1. A loosened control over arms licenses and deliveries including for exports outside the EU, with a particular impact on components

The Directive obliges Member States only to issue a prior authorisation for transfers of defence-related goods falling under the scope of the Directive (art.4.1), and companies to keep detailed records of actual deliveries for a minimum of three years (art.8.3), without specifying what a “regular” control by public authorities means. It also promotes the use of general and global licences which enable unlimited amounts and quantities of the listed goods to be actually transferred over several years (art.5 & 6).

Moreover, the Directive severely limits the possibility for a Member State to impose exports restrictions for components (art.4.8) when the country of the integrator decides to export the final product outside of the EU, which de facto reduces the level of control that a Member State can have on arms-related spare parts and components produced by its national industry. The Directive also prohibits the use of a 'catch all-clause' for transactions within the EU. This clause enables a government to still control goods that are not in the EU military list when they are then integrated and used for military means (for example, rugged screens made for fighter jets or armoured vehicles). Because of this prohibition some countries are losing further control on goods produced by their industry integrated into or used as military goods.

Whether this was intentional or not makes no difference, the fact is that **the Directive is encouraging Member States to giving up public control over licences and actual deliveries of arms** while “washing its hands” of export control. Moreover the Directive does not impede Member States from extending the facilities of the general and global licences to non-EU countries, and some have been using the opportunity of its transposition to weaken their general arms export regime, as in the cases of France and Belgium.

*France has undergone a substantial overhaul of its export control system which entered into force in June 2014 and whose effects are visible in the 17<sup>th</sup> EU Annual Report. Taking advantage of the transposition of the Transfer Directive, this new export regime loosens the control over the arms industry activities by suppressing the 2-steps approach (first a Prior Authorisation -AP- and then an export authorisation - Authorisation of War Material Exportation - AEMG 'autorisation d'exportation de matériel de guerre' in French) and replacing it by a “single licence” only, which provides much more freedom of action to the industry (be it a general, global or individual licence).*

*In Flanders (Belgium), the implementation of the Transfer Directive has also introduced a system of general licensing which makes it more difficult to know and intervene beforehand when weapons are leaving the country, in particular because the Flemish defence industry mainly produces components which are later on integrated into bigger weapon systems.*

*Much of the defence industry in Flanders produces goods which are not on the EU military list of controlled weapons. Because of the prohibition to use the catch-all-clause within the EU, 13% of goods which used to be controlled by Flanders are not any more even if they are integrated in military goods or used for military purposes. Moreover, the government decided to substantially weaken this clause also for third countries, due to which another 40% of arms exports are not controlled any longer by the Flemish authorities. Of course, this is not purely due to the EU Directive (which leaves the possibility to use such a 'catch-all' for third countries), but the government used this opportunity to go further than the Directive necessarily proscribed.*

*Due to the nature of the Flemish defence industry (mainly production of components), a major part of the end use of the Flemish arms export is unknown. According to a study of the Flemish Peace Institute, up to 70% of the end use of Flemish arms transfers is unknown. This means that most exported arms are not properly assessed by the Flemish government according to the 8 criteria of the common position. This problem is exacerbated with the introduction of general and global licenses, of which the end use of transferred arms is de facto always unknown.*

*In conclusion, partly due to the Transfer directive, 50% of the Flemish arms trade is no longer controlled. And for 70% of the 50% which is still being controlled, the end-use is unknown.*

*In the UK and in Italy, general licences are also being used for exports in the case of big collaborative projects, while in Belgium (Flanders) general and global licenses are not applicable for exports outside the EU. In France single licences apply both for transfers and exports.*

## **The lack of common understanding of the 2008 EU Common Position on arms exports control renders the principle of mutual trust invalid....**

When re-exporting a good or a component that was first transferred within the EU, the national export control system of the (transfer) recipient country will be in charge of the authorisation, and the principle of mutual trust applies on the basis of the *EU Common Position on arms exports control* that all Member States are supposed to respect. However this is highly problematic due to the diversity of interpretations of the EU Common Position and the weight of national interests in arms exports policies...

Civil Society actors like ENAAT and its members regularly report about highly problematic cases of arms exports to countries in conflict or severely violating human rights and point out the lack of consistency in the implementation of the Common Position. In 2014 only, many problematic cases of transfers can be listed: for example, despite the Israeli bombardment of Gaza in 2014, 192 million € worth of arms were exported to Israel, mostly from **Italy** (158 million €) and including explosives and explosives devices, aircraft, imaging and electronic equipment and weapon firing equipment. Other cases are French exports to Qatar (contract of 24 Rafale air fighter issued), or to Egypt (deliveries of 3 Rafale air fighter and contract about Mistral warship issued), as well as Czech small arms and weapons exported to Egypt (all despite an EU Council call to suspend arms deliveries to Egypt<sup>2</sup>). More recently arms exports to Saudi Arabia from several EU Member States have been regularly pointed out, like the French deliveries of several Caesar canons since march 2015 that could be used during the Yemen war, The Eurofighter Typhoon and the Paveway bombs delivered by the United Kingdom.

Moreover, although The Transfer Directive allows in principle for export restrictions of transferred goods to be introduced in the licences, in practice it does not resolve the issue for different reasons:

Firstly, imposing adequate restrictions becomes rather complicated as general or global licences allow for unlimited quantities and amounts of a potentially wide range of listed goods to be transferred over several years. In such case the minimum standards set by the Directive do not include information about the end-users at the time of delivering the licences, which can be particularly problematic when the transfer goes to another arms company. How could a Member State anticipate all the different possible risks under such circumstances? The only safe solution would be to impose as wide restrictions as possible, in other words to prohibit any form of re-exportations in the licences...

A clear example can be taken from very recent developments, e.g. arms export to Saudi Arabia in the context of the war in Yemen: The Netherlands has currently decided to de facto suspend authorisations of arms exports to Saudi Arabia, due to its involvement in severe violations of the International Humanitarian and Human Rights Laws in Yemen, while many other Member States like the UK and France continue to send arms and related goods to the Saudis. In case of general or global licences issued 2 or 3 years ago, arms or related goods (be it components or end products) from the Netherlands could very well end-up to be used in the Yemeni war by Saudi Arabia through the UK or France, and it would prove very difficult, if not impossible for the Netherlands to stop that.

Secondly, the Directive severely limits the possibility to impose export restrictions for components and spare parts only to "sensitive" ones, but without giving clear criteria of what sensitive means, thus opening the door to many forms of abuse. **We consider that the directive must allow member states to impose restrictions and final guarantees to re-exports on components and spare parts without any form limitation.**

## **2. A responsibility shift from governments to the industry**

The minimum standards imposed by the Directive put the arms companies at the heart of the system, thus inducing a responsibility shift which puts the industry in a position to be both judge and party; indeed controlling that the actual transfer deliveries correspond to what was licensed and ordered, and that export restrictions are respected, rely mainly on the information provided by the transfer recipients, which very often are the arms companies themselves.

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<sup>2</sup> [Council Conclusions on Egypt, 21.08.2013](#)

According to the Directive, arms companies have to keep detailed and complete records of their arms deliveries for a minimum of 3 years (art.8.3 & 8.4) and Member States have to “regularly” check this records (art.8.3 gives no definition of what “regularly” means). This is a very low standard compared to the sensitivity of the concerned goods. And the fact that several Member States have imposed longer periods and regular publication of the records is not an excuse for such low standard. Moreover this means that Member States do not control the actual deliveries against the licences, in particular in the cases of multi-annual general or global licences<sup>3</sup>.

This shift is particularly problematic when it comes to the re-exporting outside the EU of goods that benefited from an intra-EU transfer licence.

Indeed, art. 8.1. of the Directive says that “suppliers of defence-related products inform recipients of the terms and conditions of the transfer licence, including limitations relating to the end-use or exports of the defence-related products”, and art.10 says that “recipients of defence-related products, when applying for an export licence, declare to their competent authorities (...) that they have complied with the terms of those limitations (...)”.

In other words, company A informs company B of export restrictions, and then company B inform its competent authority that it has respected those restrictions. There are no provisions for Member State A to inform Member State B of exports restrictions and Member State B is supposed to trust company B. the underlining principle is the one of mutual trust, first between Member States and second between Member States and the arms industry (it is to be noted that articles 8.1 & 10 apply to all cases of transfers, not only those conducted by certified companies).

There again taking a concrete case can make it clearer:

*France:*

*In return to the removal of the export authorisation, companies have to keep a register of their operations at the disposal of the French authorities for ten years. Therefore this “Single Licence” leads to shifting the responsibility of controlling the adequacy between licences granted and the actual deliveries from public authority to the industry, which is now the sole responsible for ensuring that the actual transfers or exports correspond to what was licensed and ordered...*

*The French DGA (General Directorate for the Armament) admitted that self-regulation by the users of the licence now replaces in most cases controls by the administration. This new regime both raises the “political risks” for the administration (for ex. In 2015, 72 infractions have been detected over a total of 570 operations by 74 companies) and creates a ‘favourable’ environment for possible abuses. The arms export report to Parliament in 2016 (covering the year 2015) notes that over the last year 60 cases records were established by the Monitoring Committee, under the supervision of Prime Minister. But there wasn't any prosecutions launched against this companies, in accordance with what arms exports law authorizes in this case.*

This also means that the information channels, first between the supplier and the recipient and then between the recipient and the state authorities, must not fail; with again a central role given to the industry on whom public authorities will depend to be aware of export restrictions.

**In other words, this shift of responsibility is prejudicial to a proper implementation of the 2008 Common Position on arms exports control which is the responsibility of Member States, not of private companies. Moreover, both arms companies and Member States could also use the Directive to by-pass the Common Position by first transferring goods to another Member State with a less scrupulous interpretation of the Common Position and/or subject to less public control over its arms exports.**

And the certification process of companies does not change anything to this problematic shift of responsibility, whatever the standards are: self-regulation has far too often proven to be inefficient when commercial interests are at stake, and arms are not goods as any other. Much stricter rules must apply to arms trade and **we therefore call the Commission to put an end to any form of self-regulation by the arms industry when it comes to arms trade.**

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<sup>3</sup> Some countries such as the UK do not control deliveries against any licences

### 3. Decreased transparency renders public scrutiny on arms exports more difficult

The Directive includes no obligation regarding public transparency for intra-EU transfers: it does not require the Member States to publish Reports about the transfer licences granted (except for general licences) nor about the use of the companies' records.

The fact that for the time being transfer licences are still included in the *EU Annual Report on the control of exports of military technology and equipment* is not sufficient: nothing makes it compulsory and this Annual Report itself falls short of minimum standards of transparency, as regularly pointed out by ENAAT.

*In France, the new system makes it impossible now to distinguish between prior agreements granted and the actual exports. Furthermore it now includes operations such as disseminating documentation, demonstrations, or participation in call for tenders, which has hugely inflated amounts while at the same time there is no mention any more of the categories of military equipment delivered in the reporting.*

*This negatively impacts the already limited transparency of the French arms trade: from July 2014, only the number of licences by country have been communicated in the French reporting to the EU 17<sup>th</sup> Annual Report, without any mention of the categories of military equipment delivered nor of the related amounts of actual deliveries. France should from now on provide the information on the basis of the companies' records that the latter have to provide every 6 months (for 2015 the French government has disclosed the amounts of actual deliveries).*

Such situation is very detrimental to a proper accountability of EU governments to their parliaments and their citizens. Public scrutiny is rendered much more complicated as general and global licences provide for huge amounts that can be far from what is really happening, and at the other end the publication of raw data taken from the companies' record, sometimes without any proper classification or analysis like in *Italy*, makes it also very difficult, if not impossible to monitor actual deliveries. Too much information is also a way to impede transparency.

#### **conclusion :**

A proper implementation of the Directive relies on mutual trust and on the quality of the exports control regimes of the different Member States in order to compensate reduced controls prior to transfers. And that is where the problem is: there isn't a common vision and even less common and sufficient standards about the Common Position, let alone sufficient transparency, democratic control and possible sanctions. Moreover, arms companies should not be both judge and party about the arms exports control.

Arms trade is increasingly integrated but the export control remains purely governmental: the arms industry and Member States cannot choose to take the advantages of market integration and liberalisation without the obligations, that is to say without increased transparency and increased democratic control including over exports, and including sanctions in case of infringement. If not, this integration and liberalisation trend will soon make the Common Position a very nice paper but a useless paper.

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