

THE REVIEW OF THE EU COMMON POSITION ON ARMS EXPORTS: PROSPECTS FOR STRENGTHENED CONTROLS

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I. INTRODUCTION

In recent years there have been ongoing efforts at the European Union (EU) level to strengthen and harmonize member states' arms export policies.¹ The most important element of these efforts has been the 1998 EU Code of Conduct on Arms Exports (EU Code) and its successor, the 2008 EU Common Position defining common rules governing control of exports of military technology and equipment (EU Common Position).² The EU Code and the EU Common Position were aimed at harmonizing EU member states' arms export policies in line with agreed minimum standards. They created mechanisms of consultation and information exchange to achieve a common interpretation of agreed criteria for assessing arms transfers. They also form part of a wider EU agenda aimed at strengthening and harmonizing member states' arms export policies. Other examples of efforts include the Council joint actions on small arms and light weapons (SALW) of December 1998 and July 2002, and the Council common position on arms brokering of June 2003.³ The EU also regularly

¹ Bromley, M., *The Impact on Domestic Policy of the EU Code of Conduct on Arms Exports: The Czech Republic, the Netherlands and Spain*, SIPRI Policy Paper no. 21 (SIPRI: Stockholm, May 2008).

² Council of the European Union, 'European Union Code of Conduct on Arms Exports', 8675/2/98 Rev 2, 5 June 1998; and Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L335, 8 Dec. 2008.

³ Council Joint Action 1999/34/CFSP of 17 Dec. 1998 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons, adopted on the basis of Article J.3 of the Treaty on European Union, *Official Journal of the European Communities*, L009, 15 Jan. 1999, pp. 1–5; Council Joint Action 2002/589/CFSP of 12 July 2002 on the European Union's contribution

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SUMMARY

In recent years there have been ongoing efforts at the European Union (EU) level to strengthen and harmonize member states' arms export policies, particularly through the 1998 EU Code and its successor, the 2008 EU Common Position on arms exports. During 2012 EU member states are undertaking a review of the EU Common Position. Coincidentally, this review comes at a time when several EU member states have been criticized for their arms exports to states in the Middle East and North Africa in the years preceding the Arab Spring. These revelations have reignited long-standing debates about the extent to which the EU Common Position has truly led to a harmonization of member states' arms export policies.

This paper analyses the history of the EU Code and the EU Common Position and, through a discussion of arms exports to Libya—one of the states that was later affected by the Arab Spring—explores the extent to which member states' arms export policies have become harmonized. Finally, the paper presents ideas for the review of the EU Common Position focusing on, among other things, the development of improved systems of information sharing, better guidance on export licensing decision-making and improved engagement by the European Parliament.

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imposes arms embargoes which are legally binding for all member states.⁴ Further, the EU has established a regulation covering the trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (the Torture Regulation).⁵ The EU actively seeks to promote its standards in the field of conventional arms transfer control by agreeing common EU positions at international conferences such as the United Nations (UN) Programme of Action on SALW, by promoting the adoption of a legally binding arms trade treaty and by running workshops on arms export controls targeted at states in the EU neighbourhood.⁶

Despite these efforts at the EU level, states continue to maintain final control of all aspects of arms export licensing, leading to ongoing differences in how states license arms exports as well as in their decision making on transfers to particular end-users and destinations. During 2012 EU member states are undertaking a review of the EU Common Position. Coincidentally, this review comes at a time when several EU member states have been criticized for their arms exports to states in the Middle East and North Africa in the years

to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP, *Official Journal of the European Communities*, L191, 19 July 2002, pp. 1–4; and Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, *Official Journal of the European Union*, L156, 25 June 2003, pp. 79–80.

⁴ For complete details of current and past EU and UN arms embargoes, see the SIPRI Arms Embargoes Database, <<http://www.sipri.org/databases/embargoes>>.

⁵ Council Regulation (EC) no. 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, *Official Journal of the European Union*, L200, 30 July 2005. The regulation entered into force on 30 July 2006.

⁶ See Council Decision 2009/42/CFSP of 19 January 2009 on support for EU activities in order to promote among third countries the process leading towards an Arms Trade Treaty, in the framework of the European Security Strategy, *Official Journal of the European Union*, L17, 22 Jan. 2009; Council Decision 2010/336/CFSP of 14 June 2010 on EU activities in support of the Arms Trade Treaty, in the framework of the European Security Strategy, *Official Journal of the European Union*, L152, 18 June 2010; Council Joint Action 2008/230/CFSP of 17 March 2008 on support for EU activities in order to promote the control of arms exports and the principles and criteria of the EU Code of Conduct on Arms Exports among third countries, *Official Journal of the European Union*, L75, 18 Mar. 2008; and Council Decision 2009/1012/CFSP of 22 December 2009 on support for EU activities in order to promote the control of arms exports and the principles and criteria of Common Position 2008/944/CFSP among third countries, *Official Journal of the European Union*, L348, 29 Dec. 2009. For more information on activities in the EU neighbourhood, see Holtom, P. et al., 'The development of EU outreach activities in the field of conventional arms', Non-proliferation Papers, forthcoming 2012.

preceding the Arab Spring. In addition, questions have been asked about the true degree of harmonization in member states' arms export policies and whether more should be done at the EU level to promote improvements in this area.

Section II of this paper provides a brief history of EU-level efforts aimed at strengthening and harmonizing member states' arms export policies via the EU Code and the EU Common Position. Section III explores the level of harmonization of EU member states' arms export policies through a discussion of how states applied the criteria of the EU Common Position when assessing applications for arms export licences to Libya—one of the states that was later affected by the Arab Spring. The paper also examines how EU member states responded to events in the Middle East and North Africa in their decision making on arms export licensing. Section IV provides conclusions and recommendations, including ideas for how the EU Common Position could be improved and strengthened in the review.

II. THE EU COMMON POSITION AND OTHER RELATED ACTIVITIES

Since the 1957 Treaty of Rome established the EU's predecessor (the European Economic Community, later renamed the European Community), arms exports, along with other defence- and security-related issues, have been largely exempted from European Community and EU rules.⁷ EU member states traditionally pursued widely divergent arms export policies and, with the exception of multilateral arms embargoes, were reluctant to give up any element of national control in this area.⁸ However, since the early 1990s, EU member states have agreed a range of policy instruments aimed at making their national arms exports more uniform. The drive to harmonize EU arms export policies was largely motivated by

⁷ The Treaty Establishing the European Economic Community (Treaty of Rome) was signed on the 25 March 1957 and entered into force on 1 January 1958. The formal title was changed in 1992 to the Treaty Establishing the European Community and again in 2009 to the Treaty on the Functioning of the European Union. Article 223 of the original treaty, Article 296 of the 1992 treaty and Article 346 of the 2009 treaty exempted 'the production of or trade in arms, munitions and war material' from EU treaty provisions. The various versions of the Treaty of Rome are available at <<http://eur-lex.europa.eu/en/treaties/index.htm>>.

⁸ Davis, I., SIPRI, *The Regulation of Arms and Dual-Use Exports: Germany, Sweden and the UK* (Oxford University Press: Oxford, 2002).

four factors.⁹ First, attempts to harmonize EU foreign and security policy, which began in the 1970s and intensified with the adoption of the Common Foreign and Security Policy (CFSP) in 1993 and the European Security and Defence Policy (ESDP) in 1999, created a legal basis for EU activity in this area. Second, the consolidation and internationalization of the EU defence industry during the 1990s provided a strong economic rationale for more coordinated export policies.¹⁰ Third, a growing emphasis on conflict prevention after the end of the cold war led to calls for foreign policies, including on arms exports, to be more ethical.¹¹ This was strongly driven by the significant role that EU member states played in supplying arms to states in the Middle East in the 1980s—particularly to Iraq—and the impact that this had on regional stability.¹² Fourth, a series of scandals were uncovered during the 1980s and 1990s that implicated nearly all the major arms-producing countries in Europe. These scandals exposed the extent to which arms manufacturers in the EU, often with the connivance of their governments, were able to bypass national regulations and transfer arms to embargoed destinations.¹³

In March 1991 the Council of the EU established the Working Group on Conventional Arms Exports (COARM) to compare national practices and discuss the potential for harmonization. In 1991–92 the Council of the EU adopted eight criteria against which EU member states agreed to assess their arms exports. These criteria reflected broader concerns in EU foreign and security policy, including issues relating to conflict prevention, human rights and economic development. They also drew strongly on the 1991 Five-Powers Guidelines drawn up by the five permanent members of the UN Security Council in response to arms build-

ups in the Middle East during the 1980s.¹⁴ In June 1998 EU member states adopted the EU Code, under which the member states committed themselves to set ‘high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers’ and ‘to reinforce cooperation and to promote convergence in the field of conventional arms exports’ within the framework of the CFSP.¹⁵ The EU Code was a Council declaration, which contained political commitments but was not legally binding. The EU Code further elaborated the eight criteria from 1991–1992 (see box 1). The Code required member states to deny an export licence if the transfer was deemed to conflict with any of criteria 1–4 and to ‘take into account’ the factors listed in criteria 5–8 when considering a licence application.

The EU Code also outlined reporting procedures and consultation mechanisms intended to ensure more consistent interpretation of the criteria by member states. EU member states agreed to exchange confidential information on their denials of arms export licences along with aggregated data on their export licence approvals and their actual exports. Member states also agreed to consult other member states when considering the granting of an export licence which is ‘essentially identical’ to a licence that another member state has denied within the past three years. The data on licences and exports is compiled in the publicly available annual report according to Operative Provision 8 of the EU Code (EU annual report). Originally intended to be a confidential exchange of information, the EU annual report has been publicly accessible since 1999 following pressure from the European Parliament, non-governmental organizations (NGOs) and the 1999 Finnish EU Presidency.¹⁶ Officials from EU member states also meet regularly in COARM to exchange views on individual recipient countries and discuss the interpretation and implementation of the criteria of the EU Code. Until December 2010, COARM meetings were chaired by the state holding the rotating Presidency of the Council of the EU; they are now

⁹ Arms export policies are defined here as policies that govern the actual shipment or transmission of arms out of the physical jurisdiction or customs boundary of a state.

¹⁰ See Bauer, S., ‘The EU Code of Conduct on Arms Exports: much accomplished, much to be done’, ed. Haglin, K., *Arms Trade: Final report from the 2nd ecumenical conference in Gothenburg* (Christian Council of Sweden: Sundbyberg, 2007), pp. 32–33.

¹¹ See Smith, K. E., ‘The EU, human rights and relations with third countries: “foreign policy” with an ethical dimension?’, eds Smith, K. E. and Light, M., *Ethics and Foreign Policy* (Cambridge University Press: Cambridge, 2001), p. 187.

¹² Cornish, P., *The Arms Trade and Europe* (Royal Institute for International Affairs: London, 1995), p. 4.

¹³ Pythian, M., ‘The illicit arms trade: cold war and post-cold war’, *Crime, Law and Social Change*, vol. 33, nos 1–2 (2000), p. 9.

¹⁴ Goldblat, J., International Peace Research Institute Oslo and SIPRI, *Arms Control: The New Guide to Negotiations and Agreements* (Sage Publications: London, 2002), pp. 241–46.

¹⁵ Council of the European Union (note 2).

¹⁶ Bauer, S. and Bromley, M., *The European Union Code of Conduct on Arms Exports: Improving the Annual Report*, SIPRI Policy Paper no. 8 (SIPRI: Stockholm, 2004), p. 5. EU annual reports are available at <<http://www.consilium.europa.eu/showPage.aspx?id=1484&lang=en>>.

Box 1. The criteria of the EU Common Position on arms exports

1. Respect for the international obligations and commitments of member states, in particular the sanctions adopted by the United Nations Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations.

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

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

4. Preservation of regional peace, security and stability.

5. National security of member states and of territories whose external relations are the responsibility of a member state as well as that of friendly and allied countries.

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

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

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

Source: Council Common Position 2008/944/CFSP of 8 Dec. 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L335, 8 Dec. 2008.

chaired by an official from the European External Action Service (EEAS) (see below).

During its lifespan, the coverage of the EU Code expanded as EU membership increased from 15 to 27 states and as the agreement itself developed and evolved. First, a regularly updated common list of military equipment—the EU Common Military List—was established, describing the equipment to which the EU Code should be applied.¹⁷ Second, COARM set up a database of export licence denials for EU member states to consult when reviewing an export licence application. Third, the amount of information on arms exports which states exchange

¹⁷ The first edition of the EU Common Military List was adopted in June 2000. For the latest version, see Council of the European Union, ‘Common military list of the European Union’, adopted by the Council on 21 Feb. 2011, *Official Journal of the European Union*, C86, 18 Mar. 2011.

with each other and publish in the EU annual report greatly increased. Fourth, member states developed a regularly updated and publicly accessible user’s guide to assist with the implementation of the EU Code.¹⁸ Fifth, guidelines were included in the user’s guide to clarify how each of the eight criteria of the EU Code should be interpreted. Sixth, text was included in the user’s guide committing states to apply the criteria of the EU Code to transit licences and licensed production deals. One improvement to the EU Code, which was discussed during 2004 but never implemented, was the introduction of a ‘toolbox’ for exports to destinations that had previously been the subject of EU arms embargoes. Under the toolbox, EU member states would have agreed to exchange detailed information on export licences granted to the previously embargoed destination every three months—including the quantity and type of military equipment, the end-use and the end-user.¹⁹ However, the plan, which was closely tied to debates about lifting the EU arms embargo on China, was never enacted.

In December 2008 the EU Code was replaced with the legally binding EU Common Position.²⁰ The EU Common Position included a number of changes which were agreed in 2005 and which had already been reflected in the user’s guide. However, consensus on adopting the EU Common Position could not be reached until 2008, partly because of linkages with the debate on lifting the EU arms embargo on China.²¹ For the first time, the EU Common Position formally identified the range of activities that should be covered by member states’ arms export licensing systems. In addition to ‘physical exports’, member states’ arms export licensing systems should also cover: licensed production; brokering; transit and transshipment; and intangible transfers of software and technology.²² Other changes included modifications to the eight criteria (see box 1). Criterion 2, regarding the respect for human rights in the country of

¹⁸ The current version of the user’s guide is Council of the European Union, ‘User’s Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment’, 9241/09, 29 Apr. 2009.

¹⁹ See Anthony, I. and Bauer, S., ‘Transfer controls’, *SIPRI Yearbook 2005: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2005), pp. 715–18.

²⁰ Council Common Position 2008/944/CFSP (note 2).

²¹ Anthony and Bauer (note 19), p. 718. France, in particular, was keen for an agreement to be reached on lifting the embargo on China prior to the adoption of the EU Common Position.

²² Council Common Position 2008/944/CFSP (note 2).

destination, was expanded to include language on international humanitarian law. Additional language was also introduced in criterion 7, regarding the risk of diversion. Finally, under the EU Common Position, arms-exporting member states are now obliged to produce a national report on arms exports.²³

The criteria of the EU Common Position prominently feature respect for human rights and the internationally agreed ‘laws of war’, issues which have received prominent attention during the Arab Spring uprising. Criterion 2 requires member states to deny an arms export licence if there is a ‘clear risk’ that the goods being transferred might be used in the commission of ‘serious violations of international humanitarian law’.²⁴ The language on international humanitarian law reflects established global norms in this field. In particular, Article 1 common to the Geneva Conventions of 1949 is generally seen as placing an obligation on all states to ensure that violations of international humanitarian law are not facilitated by their arms exports.²⁵ Similar language appears in a number of documents on international best practices in arms transfer controls.²⁶ Criterion 2 also requires member states to deny an arms export licence if there is a ‘clear risk’ that ‘the military technology or equipment to be exported might be used for internal repression’ and calls for special attention to be paid to destinations ‘where serious violations of human rights’ have taken place.²⁷ The language reflects the EU’s professed commitment to the promotion of human rights as a major foreign policy objective.²⁸ As the user’s guide points out, the use of terms ‘clear risk’ and ‘might be used’ ‘requires a lower burden of evidence than a clear

risk that the military technology or equipment will be used for internal repression’.²⁹

Improvements and developments in the EU Code and the EU Common Position were largely driven by member states, often the state holding the Presidency of the Council. In many cases, states took policies or positions developed at the national level, often under pressure from NGOs or parliaments, and sought to get these standards adopted across the EU.³⁰ Following the entry into force of the 2007 Lisbon Treaty in December 2009 and the launch of the EEAS in December 2010, COARM meetings are now permanently chaired by a representative of the EEAS. A permanent chair is presumed to facilitate consistency in the working group over time and maintain a high level of expertise.³¹ Not being a representative of a member state may give the chair freer rein to make suggestions and proposals.³² However, the chair will still need the consent of all 27 EU member states in order to have a proposal adopted.³³

The European Parliament also played a strong role in the creation and development of the EU Code.³⁴ Beginning in July 2000 the European Parliament’s Committee on Foreign Affairs has published regular responses to the EU annual report, including assessments of steps taken and recommendations for future action.³⁵ The reports included recommendations for improvements in transparency, end-use monitoring and controls on arms brokering. The EU annual report regularly mentions dialogue with the European Parliament as a key objective.³⁶ In addition, for several years a representative of the European Parliament

²³ For more information, see Anthony, I. and Bauer, S., ‘Controls on security-related international transfers’, *SIPRI Yearbook 2009: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2009).

²⁴ For a brief summary of the 1949 Geneva Conventions and their 1977 protocols—which are the basis for international humanitarian law—see annex A, *SIPRI Yearbook 2011: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2011).

²⁵ International Committee of the Red Cross (ICRC), *Arms Transfer Decisions: Applying International Humanitarian Law Criteria* (ICRC: Geneva, June 2007).

²⁶ International Committee of the Red Cross (note 25), p. 4.

²⁷ Council Common Position 2008/944/CFSP (note 2).

²⁸ The European Security Strategy states that ‘establishing the rule of law and protecting human rights are the best means of strengthening the international order’. Council of the European Union, ‘A secure Europe in a better world: European Security Strategy’, 12 Dec. 2003, p. 10, <<http://www.consilium.europa.eu/>>.

²⁹ Council of the European Union (note 18), p. 41.

³⁰ Bromley (note 1), p. 10.

³¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed 13 Dec. 2007, entered into force 1 Dec. 2009, <http://europa.eu/libson_treaty/>.

For more information, See Grip, L., ‘Mapping the European Union’s institutional actors related to WMD non-proliferation’, Non-Proliferation Papers no.1, May 2011, EU Non-Proliferation Consortium, <http://www.nonproliferation.eu/documents/nonproliferationpapers/01_grip.pdf>, pp. 6–7.

³² EU official, Interview with author, 10 Oct. 2011.

³³ EU member state official, Interview with author, 17 Nov. 2011.

³⁴ Bromley (note 1), p. 10.

³⁵ E.g. European Parliament Committee on Foreign Affairs, Report on the Council’s Seventh and Eighth Annual Reports according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports (2006/2068(INI)), doc. A6-0439/2006, 30 Nov. 2006.

³⁶ E.g. Council of the European Union, Ninth Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, *Official Journal of the European Union*, C253 (26 Oct. 2007), p. 3.

regularly addressed COARM meetings during each six-month presidency, and the chair of COARM addressed the Parliament at a hearing of the Subcommittee on Security and Defence.³⁷ However, the level of engagement of the European Parliament has fallen in recent years. It has yet to provide an assessment of the EU Common Position along the lines of the reports it produced on the EU Code and no hearings of the Subcommittee on Security and Defence were held on the EU Common Position in 2010. Nonetheless, members of the European Parliament (MEPs) continue to table questions on issues relating to EU member states' arms exports.³⁸ In addition, a hearing of the Subcommittee on Security and Defence on the EU Common Position took place in December 2011.³⁹

Although the EU Common Position is legally binding, the substance of what states are obliged to do is essentially the same as it was under the EU Code. States are committed to apply the criteria of the EU Common Position when making decisions on issuing export licences, to apply controls on the export of all goods covered by the EU Common Military List, and to take part in the mechanisms of consultation and information exchange. However, member states decide how to implement their obligations.⁴⁰ Finally, the EU Common Position still leaves decision making on the granting and denying of arms export licences entirely in the hands of EU member states.

Article 15 of the EU Common Position states that the agreement 'shall be reviewed three years after its adoption'. The EEAS began preparations for the review in mid-2011, distributing a questionnaire seeking EU member states' views on the potential scope and coverage of the review to be conducted during 2012.⁴¹

³⁷ Council of the European Union (note 36), p. 3.

³⁸ 'Military exports: More coordination between countries needed say MEPs', European Parliament, 13 Sep. 2010, <<http://www.europarl.europa.eu/en/headlines/content/20100910STO81931/html/Arms-sales>>.

³⁹ Della Piazza, F., Chair of COARM, Presentation to the European Parliament Subcommittee on Security and Defence, 5 Dec. 2011, <<http://www.europarl.europa.eu/ep-live/EN/committees/video?event=20111205-1500-COMMITTEE-SEDE&vodtype=Vod>>.

⁴⁰ Nonetheless, elements of the EU Code of Conduct and the EU Common Position have spilled over into national law. In particular, several states include a direct reference to the criteria of the EU Common Position in their national legislation. Under the EU Common Position, states are also legally obliged to ensure that their national legislation enables them to control the export of the goods on the EU Common Military List. As a result, the national control lists of all EU member states match the coverage, although not always the categorization, of the EU Common Military List.

⁴¹ Della Piazza (note 39).

A number of issues have been raised for potential inclusion in the review, such as: the consideration of enhanced consultation mechanisms for destinations of particular concern, including post-embargo destinations; modifications to the content and layout of the user's guide; an analysis of how the EU Common Position is implemented via states' national laws and regulations; the submission of data to the EU annual report; the implementation of controls on transit, transshipment and brokering at the national level; the way in which COARM functions and operates; the amount of information provided when states share information on export licence denials; and states' use of global and general licences.⁴² Interestingly, many of these issues have emerged as topics for serious discussion within COARM as a result of EU member states collectively coordinating their positions on an international arms trade treaty.⁴³ While the potential scope of the review is wide, there are also doubts among member states about the necessity of altering the actual text of the EU Common Position. One COARM official noted that the scope of the current eight criteria adequately cover the full scope of issues that need to be addressed in the national licensing process.⁴⁴ In addition, the official noted that the mandate laid down in the EU Common Position is that it should be reviewed three years after its implementation, not revised.⁴⁵

The impact of the EU Code and the EU Common Position

All aspects of policy implementation in the field of arms exports remain in the hands of EU member states. This raises the question of what impact the EU Code and the EU Common Position have had at the domestic level. One clear impact has been the increased transparency of member states' arms exports, particularly via the information published in the EU annual report. Since the sixth EU annual report—published in 2004—EU member states have been asked to submit data on the financial value of both arms export licences and actual arms exports, broken down by destination and the 22 categories of the EU Common Military List. This information is reproduced in the EU annual report along with aggregated data on export licence denials.

⁴² EU official (note 32).

⁴³ EU official (note 32).

⁴⁴ EU member state official, Interview with author, 11 Oct. 2011.

⁴⁵ EU member state official (note 44).

In recent years, there have been other improvements in the amount of information contained in the EU annual report. Examples include the addition of tables showing the number of consultations carried out for each destination country, the number of consultations initiated and received by each EU member state, and information on brokering licences granted and denied by each EU member state.

The EU Code and the EU Common Position have also contributed to the production of more national reports on arms exports as well as more detailed reports.⁴⁶ In particular, the EU Code and the EU Common Position created a political obligation to collect and report data and made states more aware of transparency levels in other member states.⁴⁷ Under the EU Common Position, arms-exporting member states are now obliged to publish a national report on arms exports.⁴⁸ However, while the impact of the EU Code and the EU Common Position on the transparency of member states' arms export has been significant, there are signs that this dynamic may be losing its momentum. The increase in the number of states making full submissions to the EU annual report has halted (see table 1); 17 states provided full submissions to the 12th and 13th EU annual reports—covering arms transfers in 2009 and 2010—down from 19 for the 11th EU annual report.⁴⁹ Notably, the three largest arms exporters in the EU—France, Germany and the United Kingdom—all failed to make full submissions to the 12th and 13th EU annual reports. Several states continue to have difficulties with collecting and submitting data on actual arms exports disaggregated by EU Common

Military List categories and it remains unclear if and how this issue will be resolved.⁵⁰ In a further blow to transparency, the 13th EU annual report was the joint second most delayed report produced to date—the most delayed being the 12th EU annual report, which was published over a year after the time period covered. Finally, there are also indications that less detail is being published in some of the national reports on arms exports produced by EU member states.⁵¹

The impact of the EU Code and the EU Common Position on decision making on when to grant and deny arms export licences is harder to measure, particularly in light of the limitations of available data. EU member states regularly claim to have increasingly restrictive arms export policies.⁵² It is also common practice among national defence industry representatives to complain that the governments of other member states are interpreting the criteria of the EU Common Position less strictly than their own, leading to a loss of competitive advantage.⁵³ Among NGOs and in academia, critical voices dominate. In particular, several reports have highlighted examples of lax and conflicting interpretations of the criteria by member states.⁵⁴ These doubts about implementation extend to other aspects of the EU's efforts to promote more

⁵⁰ Weber and Bromley (note 47).

⁵¹ 'For example, the first reports on arms exports by the Czech Republic and France—which covered transfers in 2003 and 1998, respectively—contained more information on export licence denials than the most recent editions', Bromley, M. and Holtom P., 'Transparency in arms transfers', *SIPRI Yearbook 2011* (note 24).

⁵² Bromley, M. and Brzoska, M., 'Towards a common, restrictive EU arms export policy? The EU Code of Conduct on major conventional arms exports', *European Foreign Affairs Review*, vol. 13, no. 2, 2008.

⁵³ 'There are always going to be discrepancies in decision making between the national governments on export licence applications which they receive from their companies.' Salzmann, B., Exports Director of the Defence Manufacturer's Association and Secretary of the Export Group for Aerospace and Defence, Evidence before the British House of Commons Quadripartite Select Committee, 31 Jan. 2006.

⁵⁴ For example, see Crowley, M., 'Transfers to undesirable end users: loopholes in European arms controls', Paper presented at the International Conference on Public Transparency and Arms Trade, Nyköping, 5 May 2001, <<http://svenska-freds.se/transparency/>>; Amnesty International, 'Undermining global security: The European Union arms exports', Feb. 2004, <<http://web.amnesty.org/library/index/engact300032004>>; Thurin, A., Marsh, N. and Jackson, T., 'The efficacy of EU export control measures concerning small arms and light weapons', UNIDIR, *Small Arms and Light Weapons Transfers*, 2005, pp. 53–78, <http://www.unidir.org/html/en/EU_project_conference.htm>; Cooper, N., 'What's the point of arms transfer controls?', *Contemporary Security Policy*, vol. 27, no. 1. (2006), pp. 118–137; Saferworld, 'Good conduct? Ten years of the EU Code of Conduct on Arms Exports', June 2008, <<http://www.saferworld.org.uk/smartweb/resources/view-resource/318>>; 'Lessons from MENA: Appraising EU transfers of military and security equipment to the Middle East and

⁴⁶ Since the early 1990s an increasing number of governments have chosen to publish national reports on their arms exports. For more information, see <http://www.sipri.org/research/armaments/transfers/transparency/national_reports>.

⁴⁷ Bromley (note 1); Weber, H. and Bromley, M., 'National reports on arms exports', SIPRI Fact Sheet, Mar. 2011, <http://books.sipri.org/product_info?c_product_id=423>.

⁴⁸ Six EU member states—Cyprus, Greece, Latvia, Lithuania, Luxembourg and Malta—have yet to produce such a report.

⁴⁹ Council of the European Union, 13th Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, C382, 30 Dec. 2011; Council of the European Union, 12th Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, C9, 13 Jan. 2011; Council of the European Union, 11th Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, C265, 6 Nov. 2010.

Table 1. European Union member states' submissions to the EU annual report on arms exports, 1998–2009

Years refer to the year reported on, not the year of publication.

State	1998	1999	2000	2001	2002	2003 ^a	2004	2005	2006	2007	2008	2009	2010
Austria	x*	x*	x	x	x	x*	x*	x*	x*	x*	x*	x*	x*
Belgium	x*	x*	x*	x*	x*	x	x	x	x	x	x	x	x
Bulgaria	..	..	..	..	..	..	..	..	..	x*	x*	x*	x*
Cyprus	..	..	..	..	..	..	x	x*	x*	x*	x*	x*	x*
Czech Republic	..	..	..	..	..	x	x*	x*	x*	x*	x*	x*	x*
Denmark	x	x	x	x	x	x	x	x	x	x	x	x	x
Estonia	..	..	..	..	..	..	x*	x*	x*	x*	x*	x*	x*
Finland	x*	x*	x*	x*	x*	x*	x*	x*	x*	x*	x*	x*	x*
France	x*	x*	x	x	x	x	x*	x*	x	x	x	x	x
Germany	x*	x*	x	x*	x	x	x	x	x	x	x	x	x
Greece	x	x*	x	x	x	x	x	x*	x*	x*	x*	x	x
Hungary	..	..	..	..	..	x	x*	x*	x*	x*	x*	x*	x*
Ireland	x*	x*	x	x	x	x	x*	x*	x*	x*	x*	x	x
Italy	x*	x*	x*	x*	x*	x	x	x	x	x	x	x	x
Latvia	..	..	..	..	..	x	x*	x*	x*	x	x*	x*	x*
Lithuania	..	..	..	..	..	..	x	x	x*	x*	x*	x*	x*
Luxembourg	x*	x*	x*	x*	x*	x*	x*	x*	x*	x*	x*	x*	x*
Malta	..	..	..	..	..	x*	x*	x*	x*	x*	x*	x*	x*
Netherlands	x	x	x	x	x	x	x	x*	x*	x*	x*	x*	x*
Poland	..	..	..	..	..	x	x	x*	x	x	x	x	x
Portugal	x*	x*	x	x*	x	x*	x*	x*	x*	x	x*	x*	x*
Romania	..	..	..	..	..	..	..	..	..	x*	x*	x*	x*
Slovakia	..	..	..	..	..	x	x*	x*	x*	x*	x*	x*	x*
Slovenia	..	..	..	..	..	x*	x*	x*	x*	x*	x*	x*	x*
Spain	x*	x*	x	x*	x*	x	x	x	x	x	x*	x*	x*
Sweden	x*	x*	x*	x*	x*	x	x	x	x	x	x	x	x
UK	x	x*	x*	x*	x*	x	x	x	x	x	x	x	x
Total	15	15	15	15	15	22	25	25	25	27	27	27	27
Total providing full submissions	11 (73%)	13 (87%)	6 (40%)	9 (60%)	7 (47%)	6 (27%)	13 (52%)	17 (68%)	16 (64%)	16 (59%)	19 (70%)	17 (63%)	17 (63%)

x = data submitted; * = full submission; .. = not applicable.

Note: Reporting requirements for the EU annual report have changed since the instrument was first created. A 'full submission' for reporting years 1998–99 is taken to be data on the total number of arms export licences issued, the total financial value of either arms export licences issued or actual exports. A 'full submission' for reporting year 2000 is taken to be data on the number of arms export licences issued, the financial value of both arms export licences issued and actual exports, broken down by region of destination. A 'full submission' for reporting years 2001–2002 is taken to be data on number of arms export licences issued, the financial value of both arms export licences issued and actual exports, broken down by country of destination. A 'full submission' for reporting years 2003–2010 is taken to be data on the number of arms export licences issued, the financial value of both arms export licences issued and actual exports, broken down by both country of destination and EU Common Military List category.

^a The 10 member states that joined the EU in May 2004 were invited, but not obliged, to submit data to the report on 2003, which 7 of them did.

Source: Council of the European Union, EU annual reports, <<http://www.consilium.europa.eu/showPage.aspx?id=1484>>.

harmonized and restrictive export controls. For example, questions have been raised about the extent to which EU member states are applying the EU Torture Regulation.⁵⁵ In addition, although the EU Common Position on brokering was agreed in 2003, six EU member states have yet to fully implement it.⁵⁶

A 2008 study based on data in the SIPRI Arms Transfers Database found that, following the introduction of the EU Code, there was a reduction in exports from EU member states to countries in conflict and countries where human rights abuses were taking place, and that this reduction has been larger than the global trend. However, the study found little evidence of any increase in the harmonization of member states' exports.⁵⁷ While it may not have led to truly harmonized policies, national export control officials stress the ability of the EU Code and the EU Common Position to inform and strengthen national decision making on export licensing.⁵⁸ In addition, officials maintain that this exchange of information, and the scrutiny by peers that it entails, has had an impact. Speaking with reference to the EU Code, one EU member state official noted that the instrument meant you can 'no longer ignore other states' assessments, policies, and procedures'.⁵⁹

Attempts to ascribe causality to EU-level processes in the field of arms export controls are complicated by the fact that the EU Code and the EU Common Position are not the only international instruments in this field with which EU member have engaged and continue to engage. For example, with the exception of Cyprus, all EU member states are members of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (WA). The WA was established in 1996 with the aim of promoting transparency and responsibility in transfers of arms and dual-use items in order to prevent 'destabilising

accumulations'.⁶⁰ There are also wider international and domestic pressures—over and above engagement with the EU Common Position and the various multilateral export control regimes—that influence government decision making in this area. These other factors include: the defence-industrial policy of the exporting government; the pressure exerted by NGOs and parliamentarians; the pressure exerted by major powers; industrial, political and security cooperation with potential recipients; the internationalization of the defence production process; the exporting government's wider foreign and security policy priorities; and the products produced by exporting states' defence industry and the international markets it has traditionally served.⁶¹

III. EU ARMS EXPORTS AND THE ARAB SPRING

In 2011 EU member states' arms exports to the Middle East and North Africa were thrown into the spotlight by events surrounding the Arab Spring. Anti-government protests in Algeria, Bahrain, Egypt, Libya, Syria, Tunisia and Yemen, along with the often violent response of those states' security forces, raised questions about member states' interpretation of the EU Common Position criteria as well as the level of harmonization in states' arms export policies. The first part of this section analyses EU arms exports to Libya in the years preceding the Arab Spring. EU member states granted arms export licences worth €1056 million to Libya in 2006–2010, the third highest amount for the states most severely affected by the Arab Spring (see table 2). However, the severity of the Gaddafi regime's crackdown on protests, the rapid and complete reversal in EU member states' arms export policies towards Libya, and the ensuing military intervention have brought EU member states' arms exports to Libya into sharper focus than has been the case for other destinations in the region. The second part of this section considers the response of EU member states to the uprisings with regard to their arms export licensing practices.

North Africa', Academia Press, Nov. 2011, <<http://www.saferworld.org.uk/smartweb/resources/view-resource/596>>.

⁵⁵ Amnesty International and Omega Research Foundation, 'From words to deeds: making the EU ban on the trade in "tools of torture" a reality', EUR 01/004/2010, 17 Mar. 2010, <<http://www.amnesty.org/en/library/info/EUR01/004/2010/en>>.

⁵⁶ Council of the European Union, 13th Annual Report (note 49), pp. 462–66.

⁵⁷ Bromley and Brzoska (note 52).

⁵⁸ Bromley, M., '10 years down the track—the EU Code of Conduct on Arms Exports', *European Security Review*, no. 39, July 2008, <http://www.isis-europe.org/pdf/2008_artrel_176_esr39-bromley-eucoc.pdf>.

⁵⁹ Bromley (note 58).

⁶⁰ Wassenaar Arrangement, 'Introduction', <<http://www.wassenaar.org/introduction/>>.

⁶¹ Bromley (note 1).

Table 2. Value of arms exports licenced by EU member states to states affected by the Arab Spring, 2006–10

Figures are euros.

	2006	2007	2008	2009	2010	Total, 2006–10
Algeria	84 834 736	177 353 687	80 761 961	275 171 520	932 972 335	1 551 094 239
Bahrain	15 988 938	16 261 518	60 235 359	39 833 976	55 938 795	188 258 586
Egypt	211 574 394	208 084 809	173 637 829	293 570 560	211 223 690	1 098 091 282
Libya	59 028 547	108 803 884	250 778 966	343 734 618	293 861 520	1 056 207 535
Syria	2 681 213	262 000	2 852 260	2 711 312	553 987	9 060 772
Tunisia	14 103 738	8 494 613	36 385 453	52 812 240	26 205 709	138 001 753
Yemen	12 085 292	14 101 391	52 433 830	100 591 097	34 442 011	213 653 621

Source: Council of the European Union, EU annual reports, <<http://www.consilium.europa.eu/showPage.aspx?id=1484>>.

EU member states' arms exports to Libya

UN and EU arms embargoes on Libya were lifted in 2003 and 2004, respectively. At the time it was expected that Libya would seek to modernize, upgrade and replace a significant quantity of the major conventional weapons that it had acquired in the 1970s and 1980s.⁶² As a result, Libya came to be regarded as a promising market for a number of major arms suppliers, including many located in EU member states. Several EU member states strongly supported their domestic arms manufacturers' efforts to sign contracts.⁶³ However, these efforts did not result in major orders for complete weapon systems. Between 2006 and 2010 the only exports of major conventional weapon systems to Libya from EU member states were MILAN anti-tank missiles from France and A-109K light helicopters from Italy.⁶⁴ Nonetheless, in November 2010 the Libdex 2010 arms fair in Tripoli attracted over 70 companies from at least 19 states, including 11 EU members.⁶⁵ In addition, EU member states issued licences for the export of

equipment which appears to have been used—or could potentially have been used—during the crackdown on anti-Gaddafi protests and the ensuing armed conflict. EU member states also actively promoted the export of a range of major conventional weapon systems to Libya until shortly before the uprising began. If any of these contracts had been signed and deliveries made it would have strengthened Libya's military forces and proved highly embarrassing for the companies and EU member states concerned.

Between 2006 and 2010 France issued licences worth €390 million for arms exports to Libya, the highest figure among EU member states. In 2008 Libya agreed to conduct exclusive negotiations with France for the sale of 14 Rafale combat aircraft, 8 Tiger helicopters, 15 EC-725 helicopters, 10 Fennec armoured vehicles and air defence radars. Libya was also reported to be interested in Gowind corvettes and 6 fast patrol vessels.⁶⁶ However, no contracts were signed for any of these deals. In 2007 it was reported that Libya had signed a €100 million deal for the upgrade of 12 of its Mirage F-1 combat aircraft.⁶⁷ Work was completed in late 2009.⁶⁸ In 2007 France also signed deals worth \$218 million for MILAN-3 anti-tank missiles.⁶⁹ Documents found in Libya after the fall of Gaddafi also revealed that French firms provided the Libyan intelligence services with monitoring equipment that

⁶² Holtom, P., Bromley, M., Wezeman, P. D. and Wezeman, S. T., 'International arms transfers', *SIPRI Yearbook 2010: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2010); and Lutterbeck, D. 'Arming Libya: transfers of conventional weapons past and present', *Contemporary Security Policy*, vol. 30, no. 3 (2009), pp. 505–28.

⁶³ Cowan, G. and Smith, M., 'Suitors eye Libyan market', *Jane's Defence Weekly*, 2 Jan. 2008, p. 19; Holtom, P., Bromley, M. and Wezeman, P. D., 'International arms transfers', *SIPRI Yearbook 2008: Armaments, Disarmament and International Security*, pp. 303–304; and Wezeman, S. T., Bromley, M. and Wezeman, P. D., 'International arms transfers', *SIPRI Yearbook 2009* (note 23), pp. 305–306.

⁶⁴ SIPRI Arms Transfers Database, <<http://www.sipri.org/databases/armstransfers>>, accessed 8 Oct. 2011.

⁶⁵ The EU members were: Austria, Belgium, Czech Republic, France, Germany, Greece, Italy, Poland, Slovakia, Spain, and the UK. The Second Libyan Defence, Security and Safety Exhibition (LibDex 2010), Exhibitors list, 11 Nov. 2010, <http://rusexpo.net/files/LibDex_2010_EXHIBITORS_LIST.pdf>.

⁶⁶ 'Libya, France sign MOU for purchase of 14 Rafale fighters', Agence France-Presse, 10 Dec. 2007; and Lewis, J. A. C., 'Libyan–French accord offers promise of major acquisitions', *Jane's Defence Weekly*, 19 Dec. 2007, p. 5.

⁶⁷ Lewis, J. A. C., 'France agrees Libyan arms sale', *Jane's Defence Weekly*, 8 Aug. 2007, p. 5.

⁶⁸ 'Libyan Mirage F1s Returning to Service', *Air Forces Monthly*, Dec. 2009, p. 23.

⁶⁹ Lewis (note 67).

was used to spy on opponents and collect information on their activities.⁷⁰

Between 2006 and 2010 Italy issued licences worth €315 million for arms exports to Libya, the second highest figure among EU member states. In 2010 Finmeccanica announced that it had signed a €28 million deal to overhaul 60 155-mm Palmaria self-propelled howitzers.⁷¹ Such howitzers were reportedly used by Gaddafi's forces during the conflict in Libya.⁷² Italy also licensed the export of SALW to Libya in the years preceding the uprising. In November 2009 Fabbrica d'Armi Pietro Beretta shipped 7500 PX4 storm pistols, 1900 CX4 semi-automatic rifles and 1800 M4 Super 90 shotguns to Libya in a deal worth €8 million.⁷³ The purchaser of the equipment was Gaddafi's General People's Committee for General Security.⁷⁴ The goods were classed as non-military items, meaning that the permit was issued by the local authority in Brescia rather than the Italian Government.⁷⁵

Between 2006 and 2010 the UK issued licences worth €98 million for arms exports to Libya, the third highest figure among EU member states. In 2008 a UK company was granted a licence to export armoured personnel carriers (APCs) and related components for the Libyan police force. The British Government reported that it considered the application closely, due to 'concerns with Libya's human rights record'. However, it decided that there was little risk that the weapons would be used to carry out human rights abuses since the unit that would take receipt of the equipment had received training in 'Public Order Tactics and command' from a UK-based company.⁷⁶ In

February 2011 footage emerged of UK-manufactured riot control vehicles being used against protesters in Libya.⁷⁷ While the footage did not show the APCs being used to kill or injure protesters, it emerged at a time when Libyan security forces were involved in serious violations of human rights.⁷⁸ In 2008 General Dynamics UK secured a \$165 million deal to improve communications systems on the Libyan Army's T-72 tanks, BTR-60 APCs, M-113 APCs, Palmaria self-propelled artillery pieces and Shilka anti-aircraft systems and provide related technical and training support.⁷⁹ General Dynamics UK was preparing to carry out the work when the protests began against the Gaddafi regime.⁸⁰ The intended recipient of the equipment was the Khamis Brigade, which played a leading role in cracking down on the Libyan uprising and was accused of committing serious violations of international humanitarian law.⁸¹

In 2009 Belgium granted permission for FN Herstal to export €11.5 million worth of SALW to Libya, also destined for the Khamis Brigade.⁸² The deal included 367 F-2000 rifles, 367 P-90 pistols, 50 'luxury' pistols, 30 'light' machine guns, 22 000 rifle grenades, 1.3 million ammunition cartridges and 2000 semi-automatic FN 303 'less lethal' anti-riot guns. Belgium's state court had initially blocked the licence but the local government in the Walloon region later reissued the permits.⁸³ In February 2011 video footage emerged showing anti-Gaddafi forces in possession of an FN 303 anti-riot gun, which they claimed had been captured from pro-Gaddafi mercenaries.⁸⁴ In May 2011 video footage emerged showing anti-Gaddafi

⁷⁰ 'Firms Aided Libyan Spies', *Wall Street Journal*, 30 Aug. 2011.

⁷¹ Kington, T., 'Winning in Emerging Markets: Finmeccanica Puts Prices on Major Pending Deals', *Defense News*, 23 Aug. 2010, p. 26; and Finmeccanica, 'Case Studies and Opportunities in Target Growth Countries—Libya: Strong Foothold in Africa', Amedeo Caporaletti Chairman AgustaWestland, London Investor Day, 17 Nov. 2010.

⁷² 'On Thursday last week an RAF Typhoon aircraft destroyed Libyan self-propelled artillery with Enhanced Paveway II bombs. The aircraft struck the two Palmaria self-propelled guns in an attack near Gaddafi's home town of Sirte', UK Ministry of Defence, 'RAF and Navy strike targets in Tripoli', 17 May 2011, <<http://www.mod.uk/DefenceInternet/DefenceNews/MilitaryOperations/RafAndNavyStrikeTargetsInTripoli.htm>>.

⁷³ Rettman, A., 'Italy—Libya arms deal shows weakness of EU code', *EUobserver*, 3 Mar. 2011, <<http://euobserver.com/9/31915>>.

⁷⁴ Rettman (note 73).

⁷⁵ Rettman (note 73).

⁷⁶ British Foreign and Commonwealth Office, Ministry of Defence and departments for Business, Innovation and Skills and International Development, *United Kingdom Strategic Export Controls: Annual Report 2008* (The Stationery Office: London, Aug. 2009), pp. 13–14.

⁷⁷ 'UK arms licensed to Libya', Amnesty International (UK), 21 Feb. 2011, <<http://www.protectthehuman.com/galleries/uk-arms-licensed-to-libya>>.

⁷⁸ Human Rights Watch, 'Libya: Security Forces Fire on Protesters in Western City', 26 Dec. 2011, <<http://www.hrw.org/news/2011/02/26/libya-security-forces-fire-protesters-western-city>>.

⁷⁹ Pickard, J., 'How ambassador to Libya aided General Dynamics military deal', *Financial Times*, 25 Oct. 2011; and Bingham, J., 'British contractors upgrading Qadhafi's tanks on eve of uprising', *Daily Telegraph*, 8 Sep. 2011.

⁸⁰ Bingham (note 79).

⁸¹ Dziadosz, A., 'Exclusive: documents detail Western arms firm's Libya deal', *Reuters*, 7 Sep. 2011; and 'Libya: evidence suggests Khamis Brigade killed 45 detainees', Human Rights Watch, 29 Aug. 2011.

⁸² Spleeters, D., 'Tracking Belgian Weapons in Libya', *New York Times*, 28 Dec. 2011.

⁸³ Rettman, A., 'EU arms to Libya: fresh details emerge', *EUobserver*, 23 Feb. 2011, <<http://euobserver.com/9/31863>>.

⁸⁴ 'Libya—Benghazi—weapons of mercenaries provided by Belgium', *YouTube*, 22 Feb. 2011, <http://www.youtube.com/watch?v=Snl_ObPngiE>.

forces in possession of an F-2000 rifle, which had previously been in the hands of the Khamis Brigade.⁸⁵ In 2007 Spain granted an export licence for the transfer of 1050 MAT-120 cluster munitions to Libya. They were delivered in March 2008.⁸⁶ In June 2008 Spain declared a unilateral moratorium on the use, production and transfer of cluster munitions and signed the 2008 Convention on Cluster Munitions in December 2008.⁸⁷ In April 2011 MAT-120 cluster munitions were used by Gaddafi's forces in indiscriminate attacks on residential neighbourhoods in Misratah.⁸⁸

During the period 2006–2010 EU member states also denied 54 applications to export military equipment to Libya.⁸⁹ Criterion 2 was cited 31 times when states were issuing denials; criterion 7—which relates to the risk of diversion—was cited 19 times; and criterion 5—which relates to the national security of the exporting state and its friends and allies—was cited 13 times. Because of limitations on reporting, it is not possible to know which EU member states issued these denials. However, additional information can be found through national reports on arms exports and other open sources. In October 2008 the UK reportedly refused an application for a brokering licence from the UK-based company York Guns, which was seeking to act as an intermediary in the transfer of 130 000 Kalashnikov assault rifles from Ukraine to Libya.⁹⁰ The British Government was reportedly concerned that Libya might re-export the weapons to the Government

of Chad or rebel factions in Sudan. In 2009 Germany denied three export licences for the transfer of goods to Libya worth €132 million, accounting for 43 per cent of the total value of all export licences denied.⁹¹

The available data reveals a possible lack of harmonization in EU member states arms exports to Libya. For example, in 2009 EU member states issued €5.6 million worth of licences for the export of 'Imaging or countermeasure equipment' to Libya, €5 million of which were issued by France. In the same year, EU member states also denied three licences for the export of the same category of military equipment to Libya.⁹² In 2007 EU member states issued €10.2 million worth of licences for the export of 'Ground vehicles and components' to Libya, €5.9 million of which were issued by the UK. In the same year, EU member states also denied two licences for the export of the same category of military equipment to Libya. In 2006 EU member states issued €1.6 million worth of licences for the export of 'bombs, torpedoes, rockets, missiles, other explosive devices and charges' to Libya, all of which were issued by the UK. In the same year, EU member states also denied seven licences for the export of the same category of military equipment to Libya.

EU member states' responses to the Arab Spring

On 26 February 2011—within two weeks of the start of the uprising in Libya—the UN Security Council unanimously denounced the gross and systematic violation of human rights by the Libyan Government and imposed sanctions, including an arms embargo.⁹³

⁸⁵ 'Misratah—Gaddafi's weapons 2 "English version"', YouTube, 25 May 2011, <<http://www.youtube.com/watch?v=mlZJhBLZrQM>>.

⁸⁶ Noriega, J. L., 'Bombas de racimo, un doble negocio' [Cluster bombs, a double business], *Cinco Dias* (Madrid), 11 July 2008; and Chivers, C. J., 'Down the rabbit hole: arms exports and Qaddafi's cluster bombs', *New York Times Blog*, At War: Notes From the Front Lines, 22 June 2011, <<http://atwar.blogs.nytimes.com/2011/06/22/following-up-part-ii-down-the-rabbit-hole-arms-exports-and-qaddafis-cluster-bombs/>>.

⁸⁷ Amnesty International, 'Misratah: under siege and under fire' Index MDE 19/019/2011, May 2011, <<http://www.amnesty.org/en/library/asset/MDE19/019/2011/en/4efale19-06c1-4609-9477-fe0f2f4e2b2a/mde190192011en.pdf>>, p. 18.

⁸⁸ Chivers, C. J., 'Qaddafi troops fire cluster bombs into civilian areas', *New York Times*, 15 Apr. 2011; 'Libya: cluster munitions strike Misrata', Human Rights Watch, 15 Apr. 2011; and Amnesty International (note 87).

⁸⁹ See the various annual reports according to Article 8(2) of Council Common Position 2008/944/CFSP at <<http://www.consilium.europa.eu/showPage.aspx?id=1484&lang=en>>.

⁹⁰ 'U.K. denies license for export of Kalashnikovs to Libya; GOL potentially seeking alternative sellers', US State Department via Wikileaks, 6 Nov. 2008, <<http://wikileaks.org/cable/2008/11/08TRIPOLI868.html#>>.

⁹¹ German Federal Ministry of Economics and Technology, 'Bericht der Bundesregierung über ihre Exportpolitik für konventionelle Rüstungsgüter im Jahre 2008 [Report by the Government of the Federal Republic of Germany on Its Policy on Exports of Conventional Military Equipment in 2008]', Berlin, Mar. 2010, <<http://www.bmwi.de/BMWi/Navigation/Service/publikationen,did=373452.html>>. The items involved were A0002 (large calibre weapons), A0006 (wheeled and tracked military vehicles), A0007 (equipment for NBC defence, irritants ("tear gas")), A0011 (military electronics), A0018 (manufacturing equipment for the production of military articles), and A0022 (technology).

⁹² Official figures on arms exports from EU member states are hard to interpret due to differences in the ways that states collect and report data and the lack of detail in the information provided. Licences issued for arms exports to Libya may refer to permanent exports or temporary exports for testing or exhibition purposes; transfers to the military or transfers to the police; or transfers of different types of equipment which are covered by the same category of the EU Common Military List.

⁹³ UN Security Council Resolution 1970, 26 Feb. 2011.

An EU arms embargo was imposed on 28 February 2011.⁹⁴ In May 2011 the EU imposed sanctions on Syria, including an embargo on the supply of arms, military equipment and equipment which might be used for internal repression.⁹⁵ No EU-wide restrictions on arms exports were placed on any of the other states affected by the Arab Spring uprisings. The issue of EU member states' arms exports to states in the Middle East and North Africa was discussed during every COARM meeting in 2011 and states shared information about their exports and denials to the region.⁹⁶ Several EU member states responded to events with full or partial embargoes on different recipients while others announced that certain export licences had been suspended or revoked. On 18 February 2011 the British Government announced a review of arms export licences issued to states affected by the Arab Spring.⁹⁷ In March 2011 the British Government announced that it had revoked 122 export licences that had been previously granted for exports to Bahrain, Egypt, Libya and Tunisia.⁹⁸ Other states suspended the issuing of new licences for exports to affected countries. On 27 January 2011 France suspended the issuing of export licences for transfers of military equipment to Egypt and stated that all shipments of law enforcement and explosive materials were also halted.⁹⁹ On 17 February 2011 France suspended the issuing of export licences for transfers to Bahrain and Libya.¹⁰⁰ On 6 March 2011 it was reported that Germany had suspended the issuing of new licenses for all arms exports to Libya,

Tunisia and Bahrain.¹⁰¹ The German Government also asked companies that held relevant licences for countries in the region to not use them until they had been reviewed in light of the current situation.¹⁰² Other EU member states appeared to be far slower to respond to events in the Middle East and North Africa. For example, as of late February 2011 there were no indications that Italy had suspended any arms export licences for transfers to destinations affected by the Arab Spring.¹⁰³ Events in the Middle East and North Africa have prompted EU member states to reassess their arms export policies. The British Government plans to create new powers that will allow for export licensing to be suspended for countries 'experiencing a sharp deterioration in security or stability' as well as new systems for collecting information relevant to export licence risk assessments.¹⁰⁴ In addition, the Swedish Government is examining ways to include issues relating to the recipient state's level of democracy within its arms export licensing criteria.¹⁰⁵

IV. CONCLUSIONS AND RECOMMENDATIONS

Many EU member states would argue that it was not possible to predict the events that took place in Libya and other parts of the Middle East and North Africa in 2011. Nonetheless, the human rights situation in the region has long been a source of concern.¹⁰⁶ Such concern could have been taken into greater account when deciding whether to grant arms export licences. More generally, EU member states' arms exports to states affected by the Arab Spring serve to underline long-standing concerns about the manner in which the criteria of the EU Common Position are interpreted at the national level and the extent to which the instrument has succeeded in achieving more harmonized arms export policies. Recent exports to the region also serve to highlight a range of potential areas

⁹⁴ Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya, *Official Journal of the European Union*, L58, 3 Mar. 2011. The EU arms embargo went further than the UN arms embargo by placing additional restrictions on the transfer of equipment which might be used for internal repression.

⁹⁵ Council Decision 2011/273/CFSP of 9 May 2011 concerning restrictive measures against Syria, *Official Journal of the European Union*, L121, 10 May 2011.

⁹⁶ EU member state official (note 33).

⁹⁷ British Foreign and Commonwealth Office, 'Foreign Office Minister comments on arms exports to Bahrain', 17 Feb. 2011, <<http://www.fco.gov.uk/en/news/latest-news/?view=News&id=553368782>>.

⁹⁸ The states concerned were Bahrain (23 licences), Egypt (36 licences), Libya (62 licences) and Tunisia (1 licence), <<http://services.parliament.uk/hansard/Commons/ByDate/20110309/writtenanswers/part023.html>>.

⁹⁹ 'Les ventes d'armes françaises à l'Égypte sont suspendues depuis le 27 janvier, selon Matignon [French arms sales to Egypt have been suspended since January 27, according to Matignon]', *Le Monde*, 5 Feb. 2011.

¹⁰⁰ 'France: Export of Weapons to Libya and Bahrain Suspended', ANSAMED, 18 Feb. 2011, <<http://www.ansamed.info/en/francia/news/ME.XEF57063.html>>.

¹⁰¹ 'EU schickt Erkundungsteam nach Libyen [EU sends assessment team to Libya]', *Welt Online*, 6 Mar. 2011, <<http://www.welt.de/politik/ausland/article12710946/EU-schickt-Erkundungsteam-nach-Libyen.html>>.

¹⁰² German official, Interview with author, 2 Dec. 2011.

¹⁰³ Speciale, A., 'Is Libya using Italian equipment to strafe protesters?', 24 Feb. 2011, <<http://www.globalpost.com>>.

¹⁰⁴ 'Foreign Office review of export policy', 13 Oct. 2011, <<http://www.fco.gov.uk/en/news/latest-news/?id=669255682&view=PressS>>.

¹⁰⁵ 'Avskaffa hyckleriet [Abolish hypocrisy]', 11 May 2011, <<http://www.sydsvenskan.se/opinion/huvudledare/article1464743/Avskaffa-hyckleriet.html>>.

¹⁰⁶ Human Rights Watch, <<http://www.hrw.org/legacy/english/docs/2008/01/03/libya17674.htm>>.

of focus for the review of the EU Common Position. The following sections offer recommendations on areas to address during the review of the EU Common Position in 2012.

Conduct a detailed assessment of how states implement the EU Common Position

One of the issues to emerge from events surrounding the Arab Spring is how differently states operationalize their commitments under the EU Common Position. There continue to be broad differences in terms of which government ministries are involved in assessing licence applications, what powers states have to suspend or revoke previously granted export licences, and how states handle the export of ‘civilian’ SALW. Bringing more of these differences to light in the context of the review of the EU Common Position could point to areas where particular member states’ arms export controls need to be strengthened while also highlighting other areas of best practice.

During the review of the EU Common Position, states should conduct a detailed assessment of their commitments at the national level. This could be achieved by a process of peer review, as has already taken place in the field of EU member states’ controls on exports of dual-use goods.

Create an expanded post-embargo toolbox

If the 2004 discussions on the creation of a post-embargo toolbox had been successful, Libya would have been the first state to which it would have applied. States would then have been sharing detailed information every three months on licences granted for arms exports to Libya—including the quantity and type of military equipment, the end-use and the end-user. That information could have been used as the basis for more detailed discussions on the wisdom of certain transfers and could have been a catalyst for greater restraint. The 2004 toolbox discussions represented a tacit acknowledgement of the deficiencies of the current system of information sharing as it applies to licences granted and arms exports. While member states currently exchange detailed information on their denials of arms export licences, the shared information on export licences and actual exports remains limited to what is available in the EU annual report—financial values broken down by EU Common Military List categories. This allows only a limited understanding

of how states are interpreting the criteria of the EU Common Position.

During the review of the EU Common Position, member states should give serious thought to applying the mechanisms envisaged under the post-embargo toolbox. States should also consider expanding the mechanisms to cover a wider range of states, including non-members of the EU and the North Atlantic Treaty Organization (NATO).

Improve the utility of COARM meetings

COARM meetings are confidential, so it is impossible to say how useful they are in guiding and informing EU member states’ arms export policies. According to the officials involved, particular destinations and regions of concern are discussed in depth, although some member states are more forthcoming and open than others. One way of making meetings as fruitful as possible would be to ensure that the officials that are responsible for day-to-day licensing decisions at the national level regularly attend. States could also be asked to provide detailed information on destinations of concern—not just on their granted and denied licences but also on their broader attitude towards the destination as a potential recipient of military equipment. In addition, states could consider exchanging additional information that could assist others with their licensing decisions. Additional types of information that could be shared—either at COARM meetings or via secure communication channels—could include forged end-user certificates, suspect brokers or air and maritime transport companies, and suspended or revoked export licences.

During the review of the EU Common Position, member states should give serious thought to ensuring that the officials that are responsible for day-to-day licensing decisions at the national level regularly attend COARM meetings and to improving the quality of information shared.

Improve controls on exports of surveillance technologies

Some of the more damning revelations concerning exports from EU member states to the Middle East and North Africa in the wake of the Arab Spring uprisings have concerned transfers of surveillance software and other types of technology for monitoring

regime opponents.¹⁰⁷ Neither the EU Common Military List nor the EU Dual-Use List cover many of the technologies concerned and member states have admitted that they currently do not have systems for exerting control over where they are exported.

During the review of the EU Common Position, the EU and its member states—either under the rubric of the Common Position or elsewhere—should explore the development of mechanisms for exerting control over the export of software and other types of technology which can be used for surveillance purposes.

Factor governance and democracy into arms export criteria

Some of the weaknesses in EU member states' decision making on arms exports to the Middle East and North Africa stem from too narrow an interpretation of the EU Common Position criteria and limited assessment of how recipient states might use equipment provided in the event of civil unrest. Developing language that would encourage states to take stronger account of the extent to which a recipient state respects democratic processes and human rights and maintains effective systems of good governance could help to fill this gap.

During the review of the EU Common Position, the EU and its member states should explore ways in which the issues relating to democracy and good governance could be factored into decision making on arms export licences, either through the wording of the Common Position or the user's guide. In particular, states' records in relation to respect for human rights and fundamental freedoms should play a stronger role in assessing how they might use equipment supplied in the event of civil unrest.

Improve the quality and timeliness of the EU annual report

Several states continue to have difficulties making full submissions to the EU annual report because of problems with their national data-collection methods. As noted above, the number of states making full submissions fell from 19 in the 11th EU annual report

¹⁰⁷ Grey, S., 'UK firm denies "cyber-spy" deal with Egypt', BBC News, 20 Sep. 2011, <<http://www.bbc.co.uk/news/technology-14981672>>; and Elgin, B. and Silver, V., 'Syria Crackdown Gets Italy Firm's Aid With U.S.-Europe Spy Gear', Bloomberg, 4 Nov. 2011, <<http://www.bloomberg.com/news/2011-11-03/syria-crackdown-gets-italy-firm-s-aid-with-u-s-europe-spy-gear.html>>.

to 17 in the 12th and 13th EU annual reports. In particular, several EU member states continue to have difficulties with the collection and publication of data on actual arms exports disaggregated by the categories of the EU Common Military List. Although export licence information can be useful for indicating the interpretation of the criteria of the Common Position, it is not a reliable indicator of when, or even if, a delivery takes place. Moreover, the information contained in the annual report lacks detail and can be up to two years out of date. As it stands, the EU annual report does not allow for informed assessments to be made about how EU member states are implementing the criteria of the EU Common Position at the national level. In order for the data on export licences and actual exports to effectively contribute to an understanding of how the EU Common Position is implemented, states would need to provide descriptions of the goods licensed for export and actually exported as well as the number of items involved and a description of the end-user. Several states already provide this level of detail in their national reports on arms exports. However, standards in this area are mixed.

During the review of the EU Common Position, member states should give serious thought to taking steps to increase the number of states making full submissions to the EU annual report, including by sharing and discussing good practice in this area. States should also consider increasing the amount of information which they make public on their arms export licences and actual arms exports, both via the EU annual report and their national reports on arms exports.

Create a role for the EU delegations

Smaller EU member states frequently complain that the resources at their disposal to carry out end-user checks or post-shipment verification are limited. Meanwhile, larger EU member states—which have more embassies abroad—are reluctant to share their resources with others. The EU delegations—a part of the newly established EEAS—provide a potentially useful resource that could be drawn on by EU member states. Relevant areas could include information for export licensing risk assessments, checks on end-user certificates and post-shipment verification.¹⁰⁸

¹⁰⁸ Grip (note 31), p. 8.

During the review of the EU Common Position, member states should give serious thought to the role that EU delegations could play in assisting states with the implementation of their arms export licensing control systems and their decision making in this area.

Enhance the guidance and sources of information provided to export licensing officials

While the user's guide is a useful and detailed document, its format is static and hard to navigate. Greater thought could be given to transforming the user's guide into a dynamic, regularly updated, online resource. Such a resource could also draw more actively on open sources that could help to guide member states in their risk assessment activities. The user's guide already emphasizes the value of open-source information when applying the criteria. However, the sources listed are limited. These efforts could link up with existing EU-level efforts aimed at improving the quality of open-source intelligence work. Examples include the European Open Source Intelligence forum (EUROSINT), an attempt to improve practices in this area, and the Budapest Club, which seeks to facilitate the sharing of open-source information on security and foreign policy issues among EU member states.

During the review of the EU Common Position, member states should give serious thought to improving the user's guide. In particular, states should consider transforming the user's guide into an online resource, which member states could use to share reports and websites that they have found useful when making licensing decisions, along with other types of open-source intelligence .

Improve public and parliamentary oversight

Despite the limited activity on the EU Common Position by the European Parliament's Foreign Affairs Committee, MEPs continue to raise questions about EU member states' arms exports in plenary sessions and in writing form. This indicates that the interest in monitoring EU member states' arms exports remains strong. However, MEPs' questions frequently focus on the particularities of member states' arms exports, something on which the EU institutions are not competent to speak. The European Parliament needs to re-engage with the EU Common Position while focusing its efforts on areas where EU institutions have a mandate to act. These include the information-

sharing and transparency mechanisms as well as the overall content of the EU Common Position. In addition, the European Parliament needs to focus on the way in which the EU Common Position interacts with other areas of EU activity within arms export policy. This includes SALW-related activities as well as efforts to support the development of a stronger and more competitive European defence industry by reducing controls on arms transfers between EU member states.¹⁰⁹

During the review of the EU Common Position, the European Parliament should re-engage with this area of policymaking and policy implementation. At the same time, the European Parliament should focus its efforts on issues relating to the information-sharing and transparency mechanisms as well as the overall content of the EU Common Position and its relationship with other areas of EU activity within arms export policy.

¹⁰⁹ Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community, document COM(2007) 765 final, Brussels, 5 Dec. 2007.

ABBREVIATIONS

APC	Armoured personnel carrier
CFSP	Common Foreign and Security Policy
COARM	Council Working Group on Conventional Arms Exports
EEAS	European External Action Service
EU	European Union
MEP	Member of the European Parliament
NGO	Non-governmental organization
SALW	Small arms and light weapons
WA	Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies

A EUROPEAN NETWORK

In July 2010 the Council of the European Union decided to create a network bringing together foreign policy institutions and research centres from across the EU to encourage political and security-related dialogue and the long-term discussion of measures to combat the proliferation of weapons of mass destruction (WMD) and their delivery systems.

STRUCTURE

The EU Non-Proliferation Consortium is managed jointly by four institutes entrusted with the project, in close cooperation with the representative of the High Representative of the Union for Foreign Affairs and Security Policy. The four institutes are the Fondation pour la recherche stratégique (FRS) in Paris, the Peace Research Institute in Frankfurt (PRIF), the International Institute for Strategic Studies (IISS) in London, and Stockholm International Peace Research Institute (SIPRI). The Consortium began its work in January 2011 and forms the core of a wider network of European non-proliferation think tanks and research centres which will be closely associated with the activities of the Consortium.

MISSION

The main aim of the network of independent non-proliferation think tanks is to encourage discussion of measures to combat the proliferation of weapons of mass destruction and their delivery systems within civil society, particularly among experts, researchers and academics. The scope of activities shall also cover issues related to conventional weapons. The fruits of the network discussions can be submitted in the form of reports and recommendations to the responsible officials within the European Union.

It is expected that this network will support EU action to counter proliferation. To that end, the network can also establish cooperation with specialized institutions and research centres in third countries, in particular in those with which the EU is conducting specific non-proliferation dialogues.

<http://www.nonproliferation.eu>



FOUNDATION FOR STRATEGIC RESEARCH

FRS is an independent research centre and the leading French think tank on defence and security issues. Its team of experts in a variety of fields contributes to the strategic debate in France and abroad, and provides unique expertise across the board of defence and security studies.

<http://www.frstrategie.org>



PEACE RESEARCH INSTITUTE IN FRANKFURT

PRIF is the largest as well as the oldest peace research institute in Germany. PRIF's work is directed towards carrying out research on peace and conflict, with a special emphasis on issues of arms control, non-proliferation and disarmament.

<http://www.hsfc.de>



INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES

IISS is an independent centre for research, information and debate on the problems of conflict, however caused, that have, or potentially have, an important military content. It aims to provide the best possible analysis on strategic trends and to facilitate contacts.

<http://www.iiss.org/>



STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE

SIPRI is an independent international institute dedicated to research into conflict, armaments, arms control and disarmament. Established in 1966, SIPRI provides data, analysis and recommendations, based on open sources, to policymakers, researchers, media and the interested public.

<http://www.sipri.org/>