

III

(Acts adopted under the EU Treaty)

ACTS ADOPTED UNDER TITLE V OF THE EU TREATY

COUNCIL COMMON POSITION 2008/944/CFSP

of 8 December 2008

defining common rules governing control of exports of military technology and equipment

THE COUNCIL OF THE EUROPEAN UNION,

Preventing and Combating Illicit Trafficking in Conventional Arms.

Having regard to the Treaty of the European Union, and in particular Article 15 thereof,

Whereas:

- (1) Member States intend to build on the Common Criteria agreed at the Luxembourg and Lisbon European Councils in 1991 and 1992, and on the European Union Code of Conduct on Arms Exports adopted by the Council in 1998.
- (2) Member States recognise the special responsibility of military technology and equipment exporting States.
- (3) Member States are determined to set high common standards which shall be regarded as the minimum for the management of, and restraint in, transfers of military technology and equipment by all Member States, and to strengthen the exchange of relevant information with a view to achieving greater transparency.
- (4) Member States are determined to prevent the export of military technology and equipment which might be used for internal repression or international aggression or contribute to regional instability.
- (5) Member States intend to reinforce cooperation and to promote convergence in the field of exports of military technology and equipment within the framework of the Common Foreign and Security Policy (CFSP).
- (6) Complementary measures have been taken against illicit transfers, in the form of the EU Programme for
- (7) The Council adopted on 12 July 2002 Joint Action 2002/589/CFSP on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons ⁽¹⁾.
- (8) The Council adopted on 23 June 2003 Common Position 2003/468/CFSP ⁽²⁾ on the control of arms brokering.
- (9) The European Council adopted in December 2003 a strategy against the proliferation of weapons of mass destruction, and in December 2005 a strategy to combat illicit accumulation and trafficking of SALW and their ammunition, which imply an increased common interest of Member States of the European Union in a coordinated approach to the control of exports of military technology and equipment.
- (10) The UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects was adopted in 2001.
- (11) The United Nations Register of Conventional Arms was established in 1992.
- (12) States have a right to transfer the means of self-defence, consistent with the right of self-defence recognised by the UN Charter.
- (13) The wish of Member States to maintain a defence industry as part of their industrial base as well as their defence effort is acknowledged.

⁽¹⁾ OJ L 191, 19.7.2002, p. 1.

⁽²⁾ OJ L 156, 25.6.2003, p. 79.

- (14) The strengthening of a European defence technological and industrial base, which contributes to the implementation of the Common Foreign and Security Policy, in particular the Common European Security and Defence Policy, should be accompanied by cooperation and convergence in the field of military technology and equipment.
- (15) Member States intend to strengthen the European Union's export control policy for military technology and equipment through the adoption of this Common Position, which updates and replaces the European Union Code of Conduct on Arms Exports adopted by the Council on 8 June 1998.
- (16) On 13 June 2000, the Council adopted the Common Military List of the European Union, which is regularly reviewed, taking into account, where appropriate, similar national and international lists ⁽¹⁾.
- (17) The Union must ensure the consistency of its external activities as a whole in the context of its external relations, in accordance with Article 3, second paragraph of the Treaty; in this respect the Council takes note of the Commission proposal to amend Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual use items and technology ⁽²⁾.

HAS ADOPTED THIS COMMON POSITION:

Article 1

1. Each Member State shall assess the export licence applications made to it for items on the EU Common Military List mentioned in Article 12 on a case-by-case basis against the criteria of Article 2.
2. The export licence applications as mentioned in paragraph 1 shall include:
 - applications for licences for physical exports, including those for the purpose of licensed production of military equipment in third countries,
 - applications for brokering licences,
 - applications for 'transit' or 'transhipment' licences,
 - applications for licences for any intangible transfers of software and technology by means such as electronic media, fax or telephone.

Member States' legislation shall indicate in which case an export licence is required with respect to these applications.

Article 2

Criteria

1. Criterion One: Respect for the international obligations and commitments of Member States, in particular the sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations.

An export licence shall be denied if approval would be inconsistent with, *inter alia*:

- (a) the international obligations of Member States and their commitments to enforce United Nations, European Union and Organisation for Security and Cooperation in Europe arms embargoes;
- (b) the international obligations of Member States under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;
- (c) the commitment of Member States not to export any form of anti-personnel landmine;
- (d) the commitments of Member States in the framework of the Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement and The Hague Code of Conduct against Ballistic Missile Proliferation.

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

— Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States shall:

- (a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;
- (b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe;

⁽¹⁾ Last amended 10 March 2008, OJ C 98, 18.4.2008, p. 1.

⁽²⁾ OJ L 159, 30.6.2000, p. 1.

For these purposes, technology or equipment which might be used for internal repression will include, *inter alia*, technology or equipment where there is evidence of the use of this or similar technology or equipment for internal repression by the proposed end-user, or where there is reason to believe that the technology or equipment will be diverted from its stated end-use or end-user and used for internal repression. In line with Article 1 of this Common Position, the nature of the technology or equipment will be considered carefully, particularly if it is intended for internal security purposes. Internal repression includes, *inter alia*, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

— Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, Member States shall:

- (c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.

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

Member States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

4. Criterion Four: Preservation of regional peace, security and stability.

Member States shall deny an export licence if there is a clear risk that the intended recipient would use the military technology or equipment to be exported aggressively against another country or to assert by force a territorial claim. When considering these risks, Member States shall take into account *inter alia*:

- (a) the existence or likelihood of armed conflict between the recipient and another country;
- (b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;

- (c) the likelihood of the military technology or equipment being used other than for the legitimate national security and defence of the recipient;

- (d) the need not to affect adversely regional stability in any significant way.

5. Criterion Five: National security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries.

Member States shall take into account:

- (a) the potential effect of the military technology or equipment to be exported on their defence and security interests as well as those of Member State and those of friendly and allied countries, while recognising that this factor cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability;

- (b) the risk of use of the military technology or equipment concerned against their forces or those of Member States and those of friendly and allied countries.

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

Member States shall take into account, *inter alia*, the record of the buyer country with regard to:

- (a) its support for or encouragement of terrorism and international organised crime;

- (b) its compliance with its international commitments, in particular on the non-use of force, and with international humanitarian law;

- (c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to in point (b) of Criterion One.

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

In assessing the impact of the military technology or equipment to be exported on the recipient country and the risk that such technology or equipment might be diverted to an undesirable end-user or for an undesirable end use, the following shall be considered:

- (a) the legitimate defence and domestic security interests of the recipient country, including any participation in United Nations or other peace-keeping activity;
- (b) the technical capability of the recipient country to use such technology or equipment;
- (c) the capability of the recipient country to apply effective export controls;
- (d) the risk of such technology or equipment being re-exported to undesirable destinations, and the record of the recipient country in respecting any re-export provision or consent prior to re-export which the exporting Member State considers appropriate to impose;
- (e) the risk of such technology or equipment being diverted to terrorist organisations or to individual terrorists;
- (f) the risk of reverse engineering or unintended technology transfer.

8. Criterion Eight: 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.

Member States shall take into account, in the light of information from relevant sources such as United Nations Development Programme, World Bank, International Monetary Fund and Organisation for Economic Cooperation and Development reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They shall consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid.

Article 3

This Common Position shall not affect the right of Member States to operate more restrictive national policies.

Article 4

1. Member States shall circulate details of applications for export licences which have been denied in accordance with the criteria of this Common Position together with an expla-

nation of why the licence has been denied. Before any Member State grants a licence which has been denied by another Member State or States for an essentially identical transaction within the last three years, it shall first consult the Member State or States which issued the denial(s). If following consultations, the Member State nevertheless decides to grant a licence, it shall notify the Member State or States issuing the denial(s), giving a detailed explanation of its reasoning.

2. The decision to transfer or deny the transfer of any military technology or equipment shall remain at the national discretion of each Member State. A denial of a licence is understood to take place when the Member State has refused to authorise the actual sale or export of the military technology or equipment concerned, where a sale would otherwise have come about, or the conclusion of the relevant contract. For these purposes, a notifiable denial may, in accordance with national procedures, include denial of permission to start negotiations or a negative response to a formal initial enquiry about a specific order.

3. Member States shall keep such denials and consultations confidential and not use them for commercial advantage.

Article 5

Export licences shall be granted only on the basis of reliable prior knowledge of end use in the country of final destination. This will generally require a thoroughly checked end-user certificate or appropriate documentation and/or some form of official authorisation issued by the country of final destination. When assessing applications for licences to export military technology or equipment for the purposes of production in third countries, Member States shall in particular take account of the potential use of the finished product in the country of production and of the risk that the finished product might be diverted or exported to an undesirable end user.

Article 6

Without prejudice to Regulation (EC) No 1334/2000, the criteria in Article 2 of this Common Position and the consultation procedure provided for in Article 4 are also to apply to Member States in respect of dual-use goods and technology as specified in Annex I to Regulation (EC) No 1334/2000 where there are serious grounds for believing that the end-user of such goods and technology will be the armed forces or internal security forces or similar entities in the recipient country. References in this Common Position to military technology or equipment shall be understood to include such goods and technology.

Article 7

In order to maximise the effectiveness of this Common Position, Member States shall work within the framework of the CFSP to reinforce their cooperation and to promote their convergence in the field of exports of military technology and equipment.

Article 8

1. Each Member State shall circulate to other Member States in confidence an annual report on its exports of military technology and equipment and on its implementation of this Common Position.

2. An EU Annual Report, based on contributions from all Member States, shall be submitted to the Council and published in the 'C' series of the *Official Journal of the European Union*.

3. In addition, each Member State which exports technology or equipment on the EU Common Military List shall publish a national report on its exports of military technology and equipment, the contents of which will be in accordance with national legislation, as applicable, and will provide information for the EU Annual Report on the implementation of this Common Position as stipulated in the User's Guide.

Article 9

Member States shall, as appropriate, assess jointly through the CFSP framework the situation of potential or actual recipients of exports of military technology and equipment from Member States, in the light of the principles and criteria of this Common Position.

Article 10

While Member States, where appropriate, may also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, these factors shall not affect the application of the above criteria.

Article 11

Member States shall use their best endeavours to encourage other States which export military technology or equipment to apply the criteria of this Common Position. They shall regularly exchange experiences with those third states applying the criteria on their military technology and

equipment export control policies and on the application of the criteria.

Article 12

Member States shall ensure that their national legislation enables them to control the export of the technology and equipment on the EU Common Military List. The EU Common Military List shall act as a reference point for Member States' national military technology and equipment lists, but shall not directly replace them.

Article 13

The User's Guide to the European Code of Conduct on Exports of Military Equipment, which is regularly reviewed, shall serve as guidance for the implementation of this Common Position.

Article 14

This Common Position shall take effect on the date of its adoption.

Article 15

This Common Position shall be reviewed three years after its adoption.

Article 16

This Common Position shall be published in the *Official Journal of the European Union*.

Done at Brussels, 8 December 2008.

For the Council
The President
B. KOUCHNER