EU NGO submission to COARM on harmonisation among EU Member States on end-use and post-export controls

May 2008

NGO Acknowledgements

This submission was written by Jacqueline Macalesher (Saferworld) with special thanks for contributions from Ilhan Berkol (Groupe de recherché et d'information sur la paix et la sécurité - GRIP), Roy Isbister (Saferworld), Frank Slijper (Campagne tegen Wapenhandel), and Oliver Sprague (Amnesty-UK). Thanks go to Camilla Volcic (Saferworld) for providing research support.

The EU NGO network also wishes to acknowledge the constructive comments received from: Alun Howard (IANSA); Andrea Huber (Amnesty-Austria); Paul Ingram (BASIC); Thomas Reininger (IFOR); and An Vranckx (University of Gent).

This submission has been endorsed by the following NGOs:

- British American Security Information Council (BASIC), UK
- Campagne tegen Wapenhandel, the Netherlands
- ControllARMI: Rete Italiana per il Disarmo (Italian Network on Disarmament), Italy
- Groupe de recherche et d'information sur la paix et la sécurité (GRIP), Belgium
- International Fellowship of Reconciliation (IFOR), Austria
- KATU, Finland
- Swedish Peace and Arbitration Society, Sweden
- SweFOR, Sweden
- Saferworld, UK

1. Introduction

In July 2007, EU NGOs representing 20 Member States[1] published a report highlighting how the EU arms embargo on Myanmar was under threat due to the proposed re-export of EU components and technology incorporated by India into a military Advanced Light Helicopter (ALH). The report raised serious concerns about the extent, effectiveness and level of harmonisation across the EU of existing post-export controls employed by Member States. Re-export provisions were only applied on a sporadic basis, and their legal enforceability was frequently unclear. While interventions made by EU Member States may have had an influence on the Indian decision to prevent the proposed transfer taking place, EU-NGOs are nevertheless concerned that Member States are not facing challenges posed by the globalisation of the defence industry in an effective or systematic manner. More is required in terms of comprehensive and effective end-use and post-export controls to minimise the risk of EU equipment, components or technology being transferred to unlawful or undesirable end-users where such equipment will or is likely to be used to fuel conflict, poverty and serious violations of human rights and international humanitarian law.

While a rigorous assessment of any proposed export at the time of licence application is of fundamental importance in ensuring responsible international transfers of conventional weapons, an effective system of arms transfer controls cannot end at the moment the licence is awarded. There is always some risk that equipment or technology exported will subsequently be misused or diverted; there is therefore a need to develop meaningful post-licensing controls right across the EU.

In this context, it is also of concern that current end-use and post-export control measures may further be under threat from the proposed Directive by the European Commission to liberalise intra-community trade for defence material[2], which encourages Member States to ease end-use checks and restrictions on intra-EU transfers of controlled items.

This paper argues that post-licensing controls at the national level of the exporting state should be significantly strengthened. Post delivery and end-use controls are a fundamental part of the licensing process, and should not be overlooked in the EU transfer control regime. This paper sets out a number of steps that EU Member States could take to better regulate the post-licensing phase of the arms transfer cycle.

These draw in part upon the numerous examples of good practice in various EU Member States, and upon the options for "Licensing Practices" included in the User's Guide[3] to the EU Code. EU NGOs urge Member States to adopt, as obligations, these best practices into the User's Guide as well as into national export control regimes, and to transform the recommendations in the User's Guide into obligations. These include:

- standardised procedures for issuing and verifying end-use certificates (EUC);
- re-export controls as standard in all transfer licences;

[1] Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and United Kingdom.

[2] 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, <http://ec.europa.eu/enterprise/regulation/inst_sp/docs/consult_transfer/Defence_Directive_Proposal_EN.pdf>.

[3] *The User's guide to the EU Code of Conduct on Arms Exports* (27 February 2008), <http://register.consilium.europa.eu/pdf/en/07/st10/st10684-re01.en07.pdf>.

- delivery verification procedures for all transfers to non-EU destinations
- reservation of the right to conduct post-export end-use monitoring (and the development of mechanisms and procedures to exercise this right on a selective basis);
- inclusion of rigorous end-use controls on all EU licensed production overseas; and
- systematic information exchange among Member States on breaches of end-use certifications and other end-use undertakings and issues.

2. End-Use Certificates

End-use certification procedures are an important tool in combating diversion in any arms transfer control regime. However, as Member States are fully aware, a simple acceptance of End-Use Certificates (EUCs) at face value by an exporting government is, on its own, insufficient to prevent illicit and irresponsible transfers, as well as undesirable re-export of military equipment. In order to ensure that EUCs are not, in fact, false, governments need to take steps to verify their authenticity. Sophisticated security measures, enforcement mechanisms (such as sign-off procedures and signature verification) and sanctions for breaches of end-use undertakings need to be integrated into the EUC system in order to maximise its effectiveness.

There is substantial good practice within the EU around EUC procedures. As a rule, Member States always require some form of EUC. However, there are diverging practices among Member States as to the form and content of EUCs. For example, many governments have a standard format EUC that is applicable to the export of all strategic goods; others do not require any documentation for government-to-government transfers; while some governments will accept the EUC provided by the importing country.

Moreover, there is little complementarity across the 27 Member States relating to security provisions, authentication and enforcement procedures, re-export restrictions, follow-up practices and what happens in the event of a breach of end-user undertakings. Agreeing common minimum standards across the EU would not only help reduce the risk of diversion of arms originating from the EU, but would also provide a guide to other states that have made a formal commitment to align themselves to the principles of the EU Code of Conduct.

Governments have already taken steps internationally to harmonise procedures for dealing with “dangerous goods” (which include ammunition and munitions). For such items classification, packing, marking, labelling and, more specifically, documentation procedures, are identical in all countries regardless of the mode of transport. Special declarations need to be made in the accompanying documentation when shipping involves over-flight permissions, landings and Air Traffic Control requirements. As such, goods and their origin are identifiable throughout the world. With this global agreement in mind, it is surely feasible for the 27 states of the EU to harmonise documentation procedures for the transfer of strategic items.

Member States could usefully learn from the Swedish EUC system whereby the Swedish government implements a number of security, verification and enforcement procedures. For example, all EUCs are produced on bank-note-quality paper with an individual reference number for all transfers of Military Equipment for Combat (MEC) and of Other Military Equipment (OME) that is not destined for 'western industry states'. This helps ensure security by preventing the manipulation and counterfeiting of EUCs. The EUC is sent to the end-user for

signature and the provision of an official seal. Once it has been completed the end-user transmits it to the Swedish embassy in the country where the end-user is located. The embassy must verify that the request and the signature are legitimate before the transfer is authorised.[4] It should also be noted that all EUCs contain some kind of clause forbidding re-export without prior authorisation from the Swedish Government.[5]

Aside from the security features that Sweden employs, other Member States also seek to prevent falsification and misrepresentation of end-use commitments. For example, some states, such as Germany, specify that an official stamp or seal of the end-user must be provided along with an authorised signature and a reference number.

It is widespread across the EU that exporting companies are obliged to formally state the end-user/final destination if known. In the Netherlands, breach of this requirement could lead to a criminal offence. In addition, the exporting company should be able to present, if requested by the Dutch authorities, the foreign documentation that shows final destination of the goods and the binding agreement made between the exporter and the end-user.

The User's Guide sets out a series of "common core" and additional "discretionary" elements for end-use controls. While the common core elements, which are recommended (though not obligatory) as a minimum for Member States, go some way in harmonising the practice of EUCs, the additional discretionary elements, if made compulsory, would strengthen best practice in this area. These would include:

- A clause prohibiting the re-export of the goods covered in the EUC. Such a clause could contain a pure and simple ban on re-export, or provide that re-export will be subject to agreement in writing of the authorities of the original exporting country.
- A requirement to provide the full details of any intermediary.
- If the EUC comes from the government of the country of destination of the goods, the EUC should provide for authentication by the authorities of the exporting country in order to check the signature and the capacity of the signatory to make commitments on behalf of its government.

Taken together these elements can be seen as a summary of some of the best EU practice. It is unclear why these should not all be agreed as standard, and be included in the User's Guide as minimum standards for implementation into national systems.

Beyond this, there needs to be a clear commitment from the EU that Member States will take into account the end-use record of a recipient with regard to all Member States. This requires consistent and systematic information-sharing between Member States on breaches of EUC or known end-users that raise cause for concern. (For more on information-exchange see Section 8.)

[4] See Sweden's 2005 National Report to the UN ODA on the implementation of the UN Programme of Action, <http://disarmament.un.org/cab/salw-nationalreports.html>.
[5] *Ibid*

3. International Import Certificates

Transfers within the EU and to NATO and other friendly States[6] typically require the presentation of an International Import Certificate (IIC) by the government of the importing state prior to the transfer. IICs do not stipulate the end use(r) or final destination of the proposed export. An IIC is simply a tool to deliver the export licence between EU countries, and in most cases, will be the only documentation required. For example, Belgium allows IICs to be used for exports to all EU and NATO countries. In Germany, IICs are used from those countries with which Germany has bilateral governmental agreements on their mutual acceptance. This includes countries that share the same arms control commitments and have likewise stringent export control legislation.[7] In the Netherlands IICs are utilised, for example, for transfers of controlled goods to the US, e.g. components for incorporation into F-16 fighter aircrafts or Apache helicopters.

It is a fundamental weakness of the EU export control system that IICs are used as a matter of course among the EU and to NATO Member States. As IICs concern themselves only with the initial recipient of the items in question, rather than the ultimate end-user, it remains virtually impossible for the initial exporting Member State to carry out a pre-licence assessment that takes into consideration the final end-use(r). This undermines the credibility of the pre-licensing assessment process, and severely impacts upon Member States' ability to fulfil their Code of Conduct obligations. Furthermore, IICs do not make provision for end-use controls such as "no re-export without permission" clauses, so the maximum obligation set out in an IIC is often that future re-export is made under an export licence approved by the recipient authorities. In effect, this puts the issue of re-export completely in the hands of the importing state, with the original exporting state unable to investigate potential onward transfer to undesirable end-use(r)s.

An example of the problems relying on IICs can cause is demonstrated by the recent case of Belgium's transfer of Eland armoured vehicles to France in December 2006 on the strength of an IIC. The nature of this transfer—these were second-hand vehicles exported to SABIEX in France for refurbishment—was such that the possibility of re-export should have been obvious to the Belgian authorities. The vehicles were indeed subsequently re-exported, without Belgian permission, to Chad. Then in 2007 it was reported that Eland armoured vehicles were being deployed by the Chad Government along the Sudanese border and in the Darfur region.[8] As the IIC procedure does not allow for safeguards on re-export, Belgium was in effect powerless to prevent this onward export, regardless of any concerns about likely use.[9] By relying on an IIC, Belgium effectively put end-use safeguards into the hands of the French authorities, which, given the French decision to approve an export that would seem a straightforward breach of the EU Code, was clearly inadequate. The use of an IIC in this case represents in effect an abdication of responsibility on the part of Belgium. This example is of

---

[6] Usually Australia, Japan, New Zealand and Switzerland.

[7] Saferworld correspondence with German arms export control expert, January and April 2008.

[8] Mampaey L, C*ommerce d'armement triangulaire Belgique-France-Tchad : limites et lacunes de la réglementation belge et européenne*, (Groupe de recherche et d'information sur la paix et la sécurité (GRIP), 14 February 2008) <http://www.grip.org/bdg/pdf/g0951.pdf>, and Reports made by l'Agence Belga, 07 January 2008.

[9] The Idriss Déby administration in Chad has been notorious for its internal repression; several reports of systematic torture have been documented by Amnesty International (*Chad: Amnesty International Report 2007*, <http://thereport.amnesty.org/eng/Regions/Africa/Chad>; the Chad Government has been repeatedly accused of violating the UN arms embargo on Darfur by delivering arms to the Sudanese rebels (Final report of the Panel of Experts as requested by the Security Council in paragraph 2 of resolution 1713 (2006), 03 October 2007, S/2007/584).

particular relevance in light of the current European Commission initiative on simplifying intra-Community transfers of defence-related products (for more on this see section 7 below).

Therefore, EU NGOs recommend that Member States should discontinue the practice of accepting IICs in place of more rigorous EUCs. At a minimum, the use of IICs by Member States should be limited to transfers to States that agree to consult with the original exporting Member State in the event that a re-export is proposed and that they take the views of that Member fully into account in any eventual decision.

4. "No re-export without permission" clause

It is a major weakness of the EU export control regime that binding "no re-transfer without permission" provisions are not included as standard in all arms transfer contracts and licences from all Member States.

While unauthorised re-transfer can take place immediately after the shipment has been received, it can also occur years later, e.g. once the equipment comes to be regarded as surplus. Therefore, while re-export clauses may not always be seen as an immediate necessity, circumstances can change markedly over time. Mandatory clauses restricting rights on re-export would provide Member States with an additional tool in their transfer controls toolbox for retaining ongoing control over end-use.

As the recent report by EU NGOs *Indian helicopters for Myanmar*[10] demonstrated, the less-than-universal application of such restrictions risked undermining the EU embargo on Myanmar (which applies to indirect as well as direct transfers). Controls are clearly inadequate if Member States can only prevent indirect transfers to an embargoed country (Myanmar in this case) where the ultimate destination is known at the time of the licence application.

While such provisions will not be able to prevent re-transfer by a recipient state determined to carry out such an action, they do provide for extra leverage by creating a "legal" obligation on the recipient. This will be relevant when considering subsequent licensing applications, but it is also relevant in terms of information-sharing with international partners, thereby raising the stakes for those states that are considering ignoring their end-use commitments.

An analysis of the practice among the six EU Member States mentioned in the *Indian helicopters for Myanmar* report demonstrated wide disparities on this issue, and the pattern is repeated right across the EU. Belgium, Bulgaria, Finland, France, Germany, Italy, Poland, Romania, Spain and Sweden all use some form of re-export controls to differing degrees. In the case of Spain, for instance, EUCs include a commitment from the importing state not to re-export any military goods without the prior written consent of the Spanish authorities.[11] In Poland a detailed "no-re-export without permission" clause is required in almost all EUCs. This ensures that defence equipment exported from Polish territory cannot be re-exported to unauthorised or irresponsible end-users, for

[10] *Indian helicopters for Myanmar: making a mockery of embargoes* (Amnesty International & Saferworld, July 2007), <http://www.saferworld.org.uk/images/pubdocs/Myanmar_report_July07.pdf>.

[11] See section 5.12, Spain's 2007 National Report to the UN ODA on implementation of the UN Programme of Action, <http://disarmament.un.org/cab/salw-nationalreports.html>.

example to states subject to UN embargoes, EU restrictions or those accused of supporting acts of terrorism.[12]

EUCs accepted by Italy include a contractual obligation by the purchasing country not to re-export military goods without the prior authorisation of the Italian authorities. The criteria for issuing a re-export authorisation are identical to those applied to the direct export of material from Italy.[13] Should the Italian authorities be alerted to any unauthorised re-export, verbal and written representations would be made to the state in question, and any breaches would be factored into subsequent licence applications to that country.

France includes re-transfer restrictions in both its export licences and EUCs. Although certificates vary according to the nature of the buyer and of the operation, as a rule a re-export clause is included for all transfers of military list equipment.[14] For example, as detailed in the *Indian helicopters to Myanmar* report, France applied a re-export clause to the export of gun turrets which were incorporated into variants of the ALH.[15] Therefore, due to this clause, India would be in violation of its agreement if it were to retransfer this equipment to Myanmar without French permission.

Germany generally imposes re-export clauses within EUCs. By these clauses, the end-users certify that they will not re-export the imported goods to third countries without the approval of the German government. In case of exports of 'War Weapons' this is an indispensable requirement. Regarding re-exports of other military equipment, approval of the German government is not required if these re-exports concern EU or NATO Member States (or NATO-equated States[16]). These stipulations would apply in the case of exports to the Indian government or to Hindu Aeronautics Limited (the original importer) and potential re-exports[17]. Where end-use agreements are violated, further export licences are likely to be denied. [18]

One interesting variation on this issue is the approach taken by the German Government with regards to exports of small arms. Since 2003, wherever possible, controls are to stipulate that decommissioned, but still functioning small arms have to be destroyed when new small arms are supplied; the "New for Old" clause for exports to 'third' countries[19].

Some Member States also implement stringent provisions for enforcement of "no re-transfer without permission" clauses. For example, such provisions in the Belgian system are fairly robust with both the Flanders and Walloon regional

[12] Saferworld correspondence with Polish licensing official, May 2008.
[13] See section 3.K, Italy's 2002 National Report to the UN ODA on implementation of the UN Programme of Action, <http://disarmament.un.org/cab/salw-nationalreports.html>.
[14] See France's 2005 National Report to the UN ODA on the implementation of the UN Programme of Action, <http://disarmament.un.org/cab/salw-nationalreports.html>; and Saferworld correspondence with French arms export control official, dated December 2007 & January 2008, referring to the proposed transfer of ALHs by India to Myanmar
[15] Letter from the Director of Sensitive Technologies and Transfers of the General Secretariat of National Defence of the French Government to Amnesty International, dated 20 March 2007.
[16] States that benefit from equated status are: Australia, New Zealand, Switzerland and Japan.
[17] Letter from the Federal Office of Economics and Export Control of the German Government to Amnesty International, dated 16 March 2007, referring to the proposed transfer of ALHs by India to Myanmar.
[18] See section 1.6.3, Germany's 2007 National Report to the UN ODA on the implementation of the UN Programme of Action, <http://disarmament.un.org/cab/salw-nationalreports.html>.
[19] 'Third' countries are those that are not members of either the EU or NATO, and who do not benefit from NATO-equivalent status. The countries that benefit from NATO-equivalent status are Australia, Japan, New Zealand and Switzerland.

authorities stating that if end-user agreements are violated, then further export licences are likely to be denied.[20]

In Sweden, guidelines issued by the Swedish Inspectorate of Strategic Products state that sanctions could include the withdrawal of a licence, the reviewing of other export licences that have been granted and the denial of future licences; they may also consult with other EU Member States and, in the case of a serious breach, look into alternative sanctions.[21]

However, while there is an indication of good practice across a wide number of EU Member States, there are still a number of states who refuse to include "no re-export without permission" clauses which risks undermining both their export control regime and their non-proliferation aims. This was glaringly demonstrated to the UK Government by two separate incidents involving transfers from India to Myanmar in 2006. While EU representations may have had an influence on the Indian decision to prevent the proposed transfer of ALHs to Myanmar, it is impossible to know the extent to which India's re-transfer obligations impacted upon its decision. However, there is little doubt that the presence of re-export clauses in a number of the Member States involved in the design and manufacture of the ALH put the EU in a stronger position in their discussions with India.

By contrast, in February 2006, it was reported by *The Hindu* that the Indian Government was in negotiations to sell BN-2 'Defender' Islander maritime-patrol aircraft, originally supplied by the UK, to Myanmar. It is understood that the UK Government made representations to the Indian Government opposing the transfer, but according to *The Hindu*, the Indian Defence Ministry was unmoved in the absence of a resale clause in the contract. An unnamed senior naval officer was quoted as saying "we should tell [the UK] where to get off."[22] Two of the Islander maritime-patrol aircraft have been transferred by India to Myanmar, and India is reportedly still considering the transfer of two further aircraft, in addition to the pair it supplied in 2006.[23] In March 2007, when questioned by a parliamentary committee about this transfer, the then Foreign Secretary, Margaret Beckett, admitted "with the benefit of hindsight", an explicit ban on re-export "might have been desirable" and that "if a similar export took place today one would consider" putting such a clause in place. [24]

5. Post-export checks

While Member States should always apply a rigorous pre-licensing assessment in conformity with their obligations under the EU Code of Conduct and other international obligations, there is always some risk that equipment or technology exported will subsequently be misused or diverted.

Member States are therefore dealing with *levels* of risk; but wherever the line is drawn there will be cases where difficult decisions have to be made. With this in mind, delivery verification and end-use monitoring measures can be an important aid to evaluating whether the decisions being taken are the right ones. Indeed,

---

[20] See Article 4 §1.4°e, Belgian Law on Arms Transfer Control, 26 March 2003; and Saferworld correspondence with Flemish arms control experts, January 2008.
[21] Saferworld telephone interview with Swedish licensing officials, August 2007.
[22] C*urbs apply only to aircraft spares: UK*, Sandeep Dikshit, The Hindu, 04 February 2006, <http://www.hindu.com/2006/02/04/stories/2006020403311300.htm>.
[23] *India transfers more Defenders to Myanmar*, Rahul Bedi JDW Correspondent New Delhi, (16 May 2007).
[24] Quadripartite Select Committee oral evidence with Margaret Beckett (Q. 232, 15 March 2007) <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmquad/117/117.pdf>.

where specific concerns exist, delivery verification and end-use monitoring can be an invaluable tool in subsequent licensing decisions, thus helping to prevent future diversion and misuse. Note that such checks should not be an excuse for undertaking less stringent pre-licensing checks; they should be used as an additional safeguard. The two systems should complement each other, setting up a "virtuous loop", with post-export verifications feeding into subsequent pre-licensing risk assessments.

There are a number of different possibilities open to Member States, ranging from a requirement to request delivery verification from the importer; periodically requesting recipient states to confirm they still have the equipment and are using it for the stated end-use; confirming end-use verification through in-country embassies, defence attaches or other specialised persons; to implementing detailed and targeted on-site inspection. While some of these options are utilised by Member States on a regular basis, others are not, or are used infrequently, even though they provide an effective method for minimising the risk that arms will be misused or diverted.

Delivery verification:

Several states always require the recipient to provide a Delivery Verification Certificate (DVC) or a copy of Customs documentation from the importing country as proof that the shipment has reached its authorised destination and end-user. These states include, for instance, Belgium, Bulgaria and Italy. Belgium has relatively stringent requirements in that delivery verification is requested as soon as possible.[25] In addition, details of travel plans including transit and/or transhipment points and information on the transporters is also required before an export takes place.[26]

In Germany, DVCs are generally requested for all exports for which EUCs are required, unless they come under one of several pre-determined exemptions[27]. In general, while licences do not specify a particular time limit on presenting DVCs, when the German authorities request one, it is expected to be received "immediately after landing" of the items.[28]

Some states such as Sweden reserve the right to request delivery verification in specific cases, for example when transferring particularly sensitive types of equipment, such as Man-Portable Air Defense Systems (MANPADS).

While the practice of requesting DVCs does provide added legitimacy to an export and will alert Member States when items are diverted *en route*, it does not guard against recipients who use the imported goods for an un-stated or unauthorised purpose. Therefore, some form of targeted in-country verification procedures should be put in place to safeguard against arms being diverted or used for unauthorised purposes or by unauthorised end-users post-delivery.

Commercially, there are already organisations providing some kind of tracking or delivery verification service. For instance, the Société Générale de Surveillance, SGS, based in Geneva, has over 120 offices in countries throughout the world,

[25] Saferworld correspondence with Belgian arms export control expert, February 2008.
[26] Article 10 §1 and §2 of Belgian Royal Decree of 08 March 1993 (Arrêté Royal).
[27] Exemptions include: temporary exports, e.g. promotion on trade fairs (but re-transfer to Germany is required); re-exports of prior imported items; replacement of items supplied before on the basis of a formal export licence, provided the items and its total number as well as the end-user or consignee is identical; and where the value of the transaction is below a certain limit (€10.000 for ML items and €20.000 for dual-use items, exemptions to this values might apply in certain cases).
[28] Saferworld correspondence with German arms control official January 2008.

and provides inspection and verification services of quantity, weight and quality of traded goods, with inspection able to take place at the destination of delivery.[29] COTECNA Inspection S.A., also based in Geneva, provides supply-chain security for commercial goods, including, for example, steel, chemicals, petroleum and oil products, equipment and machinery as well as agricultural food and foodstuffs.[30] Governments should explore whether such organisations would be willing to extend their operations to include delivery verification of strategic items, or whether it would be better to establish other organisations or institutions for such a purpose. The costs incurred through the establishment of such agencies could be quickly absorbed. Exporters could pay using a percentage of the total value of the shipment (for example, in the case of SGS, they charge between 0.4 per cent and 1 percent), and could in certain cases be subject to an upper limit. If we consider the positive effect these controls would have on attenuating the negative impact of arms from being diverted towards the illegal market, such an approach should be advantageous.

At a minimum, targeted in-country verification procedures could be done through consular services or defence attaches, as done by Bulgaria[31] and Italy[32]. However, while these procedures could significantly assist in implementing end-use controls, in practice it is not clear that consular verification is undertaken in a consistent and systematic fashion. It is critical that in-country verification is prioritised and co-ordinated. Procedures for verification should be clearly set out and understood by all relevant staff, who must be properly trained in undertaking such tasks.

End-use monitoring:

A few countries include end-use monitoring as part of their export control system. The Swedish licensing authorities include a clause in all licences whereby the recipient commits to make facilities available to on-site inspections by Swedish authorities to allow for verification of compliance with end-use undertakings.[33] Although it is rare for checks to take place due to capacity of Swedish resources, Sweden has carried out post-delivery checks in the past, notably in Singapore and the Baltic states through the use of its in-country embassies.[34]

While all Member States should reserve the right to conduct end-use checks, such a right need only be exercised where there is particular cause for concern regarding diversion or misuse. This would require a targeted use of limited resources against a matrix of likely risk factors that would need to be developed at the national and/or regional level. Potential risk factors could include, *inter alia*: the type of equipment, unfamiliar end-users or brokers, unusual transit/transhipment routes, questionable transport agents, overseas destinations with a history of illicit activity or weak export/customs controls, commodities not known to be in the inventory of the recipient country's armed forces. While end-use monitoring should be applied across the spectrum of military and dual-use equipment, in order to ensure manageability of such a process it may be necessary to differentiate between 'critical' components and more everyday

[29] See <http://www.sgs.com/about_sgs/in_brief.htm>.
[30] *Marking and Tracing Small Arms and Light Weapons: physical inspections*, 16 June 2004, report produced by COTECNA in the framework of a research project initiated by the Groupe de Recherche et d'Information sur la Paix et la Sécurité (GRIP), <http://www.grip.org/bdg/g4545.htm>. See also <http://www.cotecna.com/COM/EN/home.aspx>.
[31] *Bulgaria's Arms Transfer Control System at EU Accession* (Saferworld, February 2007), p. 22.
[32] See section 3.I, Italy's 2007 National Report to the UN ODA on the implementation of the UN Programme of Action, <http://disarmament.un.org/cab/salw-nationalreports.html>.
[33] See Sweden's 2005 National Report to the UN ODA on the implementation of the UN Programme of Action, <http://disarmament.un.org/cab/salw-nationalreports.html>.
[34] Saferworld correspondence with Swedish arms export control expert, January 2008.

components such as nuts and washers, wiper blades and fan belts. This is not without its complications. However, Member States should consider developing ways to identify significance criteria for, for example, components for complete weapons systems. Ideas that could be explored include: percentage of components to the finished product by value/weight/volume; a 'criticality' assessment; non-replaceability of part etc.

The US uses end-use monitoring systems of this type: the State Department Blue Lantern programme and the Department of Defense Golden Sentry programme operate on the principle that where a particular transfer trips a number of 'red flags', checks are carried out. In practice, this means that physical and financial resources are only used for serious cases. For example, in 2006, only 613 Blue Lantern checks[35] were carried out by the US Department of State—which was less than 2 per cent of the 35,991 permanent export licence applications approved[36] during that year. A similar system operating across the EU would suggest similar level of checks.[37]

While the 'Blue Lantern' model has evolved over a number of years, and is designed to fit with US export control priorities, capacities and experience, Member States should consider if some discrete elements of this successful system could be adopted or modified by the EU and integrated into the regional export control regime to fit EU circumstances.

The Blue Lantern programme has an exceedingly high compliance level, with only two per cent of 'Unfavourable Checks' due to a refusal to co-operate.[38] It is frequently argued that this is due to the global power wielded by the US, which gives a leverage that an EU Member State cannot match. However, were it clear that failure to co-operate with end-use monitoring by one EU Member State would have implications for the supply of controlled items by all, the relatively limited leverage of individual Member States could be significantly enhanced. Therefore, EU Member States should work collaboratively through the pooling of information sources and in-country diplomatic resources.

It is recommended that COARM research ways to develop a common system of end-use monitoring by Member States, setting out procedures for information-exchange, pooling of resources and capacity, and guidelines for sanctions in event of end-use breaches. Research should be undertaken to look into the viability of using independent experts to carry out part of the end-use monitoring process, or to implement a system of assistance between EU Member States, especially for those States who do not have diplomatic missions in all the destinations to which they may export. In addition, were the EU to enter into an information-sharing arrangement with the US, the position of EU states would be further strengthened.

Finally, while it is essential that Member States commit time and resources to end-use monitoring, which requires the commitment of both licensing and

---

[35] *Registration & Compliance* presentation made by David Trimble, Director of Defense Trade Controls Compliance, 2007 Export Controls Symposium (23 May 2007), <http://thefdp.org/exp_controls_trimble_cook.ppt#346,17,Slide%2017>.

[36] Report by the US Department of State pursuant to section 655 of the Foreign Assistance Act of 1961, Direct Commercial Sales Authorizations for Fiscal Year 2006, <http://pmddtc.state.gov/docs/rpt655_FY06.pdf>.

[37] According to the *EU Ninth Annual Report according to Operative Provision 8 of the EU Code of Conduct on Arms Exports*, during 2006 Member States approved a total of 37,547 export licences, just over 1,500 more licenses than approved in the US for the same period.

[38] *End-Use Monitoring of Defense Articles and Defense Services Commercial Exports FY 2006*, <http://pmddtc.state.gov/docs/End_Use_FY2006.pdf.>

enforcement agencies, it is crucial that Member States demonstrate political will and where necessary expend political capital in support of the concept.

6. Licence production overseas

One of the likely consequences of the ongoing breakdown of national barriers within the defence industry is that the trend of EU defence companies establishing manufacturing facilities overseas will grow. This has far-reaching implications for EU Member States in their ability to control the re-export of controlled goods produced under licence elsewhere to countries or regimes to which EU Member States would not sell directly, as well as the threat of reverse engineering, and other downstream production risks. The acquisition of production technology allows the licensee state or its customers to manufacture potentially limitless numbers of weapons, as well as presenting the opportunity to develop new generations of technology further outside the control of the source country. Each new producer is a potential proliferator, and where production is transferred to countries with weaker export control regimes than the EU, these capacities could then spread exponentially, thereby increasing the risk of EU equipment and technology being used to fuel or sustain conflict or commit serious violations of human rights law or international humanitarian law. States to which EU Member States will not directly sell arms, such as Myanmar, may have alternative sources from which to choose.

The *Indian helicopters to Myanmar* report clearly demonstrated the way in which assisting the development of defence industries in third countries may create additional proliferation concerns, and undermine the efforts of EU Member States to wield effective arms transfer controls.

While these are challenging and complicated areas, if the purpose of the transfer control system is to prevent the supply of arms where there is a risk they will be misused, it is incumbent on the EU control system to attempt to meet these challenges. The current regional controls on licensing physical exports of military and dual-use goods (which cover many types of production equipment) do not adequately address the particular characteristics of licensed production or other methods of transferring production capacity. While maintaining control over licensed production is clearly more difficult than controlling direct sales, the potential implications for downstream proliferation in such circumstances make the maintenance of control even more critical.

The growing military co-operation between Turkey and Sudan highlights the dangers that transferring production capacity can generate. As a recognised candidate for EU accession, and as part of the *acquis communautaire*, Turkey is required to respect EU arms embargoes. This should naturally preclude entering into defence cooperation agreements with states that are under EU embargo. However it was reported in January 2008 that a Turkish military delegation visiting Khartoum held talks with the Sudanese army regarding future military cooperation between the two states[39], despite the fact that Sudan has been under an EU embargo since 1994.[40] The talks allegedly addressed cooperation between the two countries in areas of military industrialisation, transfer of military technology, training and the provision of military services. Given the relationship between some EU Member States and Turkey, in terms not only of arms transfers but also arms-production co-operation, these reports underscore

[39] *Sudan, Turkey to discuss ways to boost military cooperation*, Sudan Tribune, 11 January 2008.
[40] Council Common Position concerning the imposition of an embargo on arms, munitions and military equipment on Sudan, Council Decision 94/165/CFSP, 07 January 2004, <http://register.consilium.eu.int/pdf/en/03/st16/st16297.en03.pdf>.

the need to ensure that Member States do all they can to control the downstream supply of items produced elsewhere as a result of the transfer from the EU of production capacity.

On this issue Germany is an example of best practice within the EU. In 2000, Germany tightened its controls on exports of 'war weapons' and related production capacities.[41] In principle, such exports are only granted to governmental end-users in EU or NATO States, or to 'NATO-equated' countries. It should be noted that the guidelines specify that the ability of the recipient country to exercise effective export controls on the technology or production equipment, as well as of derived goods, will be considered according to strict standards.

Furthermore, Germany requires as part of this process an end-use certificate identifying the end-user and end-use of derived finished goods. Signatories of these declarations must commit to neither pass on to another company transferred production capacities nor to make related production knowledge available to third parties. Signatories must further commit to neither re-export imported production capacities nor to export derived goods without written approval of the German authorities.[42]

In order to prevent the diversion of arms produced with EU components, technology or capacity, the setting-up of LPO facilities should be subject to strict procedures. Member States should consider following the German model with regard to limiting the type and location of end-users to which production capacity is transferred.

In addition, licensing approval by Member States should be sought at the level of the licensed production agreement itself, rather than in terms of only the transfer of individual components or machine tools etc. used in production. The criteria for issuing a LPO authorisation should be applied at least as rigorously as for the export of material from Member States. Furthermore, Member States should go beyond this and take into consideration the long-term proliferation risks to the recipient country.

In particular, licensed production agreements should:

- contain specific re-export clauses to prevent the export of goods produced under licence to countries of concern. If the licensee then wished to export to a destination not specified in the original licensed production deal, it would have to seek prior approval from the original Member State;
- contain specific clauses relating to the duration of the agreement and what happens when the agreement reaches the end of the agreed time period; and
- place clear and binding contractual obligations on production ceilings, with any production or export over and above terms specified in the original licensed production agreement requiring an additional licence from the Member State.

If there is a concern that the recipient government may licence the export of the resulting equipment to countries to which the Member State would not licence such an export directly, the licensed production agreement should be denied. In addition, governments should take into account:

- whether the recipient state can demonstrate sufficient accountability in terms of export and end-use control;

[41] *Politische Grundsätze der Bundesregierung für den Export von Kriegswaffen und sonstigen Rüstungsgütern*, Berlin, 19 January 2000.
[42] *Bundesamt für Wirtschaft und Ausfuhrkontrolle* (2002) Formularmuster zu Endverbleibserklärungen.

- whether the end-user has a record of honouring UN, EU or OSCE arms embargoes; or
- whether the end-user has a record for honouring other relevant international or regional commitments, including the non-use of force, respect for international humanitarian law and human rights law, and a commitment to non-proliferation and disarmament agreements.

While EU-based defence companies would be required to obtain specific end-use undertakings from the overseas producer and/or to insert a clause in their contracts providing for restrictions on re-export, it is not envisaged that governments would pursue the EU licensor in the event that the terms of the licensed production agreement were broken by the licensee (unless of course there is criminal negligence or culpability). But by licensing the licensed production agreement, and thereby setting out clearly the legal obligations that flow from it, EU governments would have solid grounds for insisting that the items produced under licence are only for mutually-agreed uses and destinations, and for applying sanctions where obligations are not met.

Sanctions could take the form of revoking the licensing agreement and refusing to provide any subsequent parts, training, advice etc related to the agreement. Furthermore, the Member State in question could refuse to license any additional direct exports or transfers of production capacity until such time as it is satisfied that the recipient state will honour all future contractual obligations. Governments could 'blacklist' any foreign company in breach of the terms of a licence production agreement and share that information with EU partners, thus increasing the costs of refusing to abide by production deals.

It has been argued that putting in place stricter regulation of LPO could damage the competitiveness of the European defence industry on the grounds that other governments do not place such controls upon their producers. However, there are examples of governments that have successfully placed controls on LPO agreements without damaging national industry, including a number of EU Member States eg Sweden and Germany. Beyond Europe, Russia has begun to introduce stringent post-production controls on goods produced under licence[43] and the US imposes and enforces stringent controls on LPO. In recent years, Russia and the US authorised over half of all arms deliveries world wide[44]; controls on LPO do not appear to have damaged the competitiveness of the Russian and US defence industry. The US is able to apply unique leverage in its efforts to enforce these types of agreements. Many of the Member States on their own may find it difficult to reproduce this level of success, working collectively would improve their chances of success. Moreover, were the EU to follow the procedures recommended above, when added to the US and Russia this would result in far more than half of the global arms trade being subject to this type of control. Licensees would thus fall under increasing pressure to honour their contractual obligations.

[43] For example, in May 2005, Venezuelan officials announced the signing of a US$54 million deal for 100,000 Izhmash-produced AK-103 assault rifles, along with ammunition and other unspecified light weaponry with the Venezuelan company Cavim. One of the conditions of the contract stipulated that Venezuela will not be able to export these weapons without Russia's consent. See *Venezuela formalizes Russian arms deal*, ISN Security Watch (20 May 2005) <http://www.isn.ethz.ch>.

[44] In 2005, according to the CRS Report *Conventional Arms Transfers to Developing Nations 1998-2005*, the US accounted for almost 46 percent, and Russia 11 percent, of all arms deliveries worldwide. See Richard F. Grimmett, Specialist in National Defense, Foreign Affairs, Defense, and Trade Division, *Conventional Arms Transfers to Developing Nations 1998-2005*, Congressional Research Service Report for Congress, figure 2, tables 9A, 9B and 9D (23 October 2006), Congressional Library, <http://www.fas.org/sgp/crs/weapons/RL33696.pdf>.

7. Implications of the proposed Directive of the European Parliament and of the European Council on simplifying terms and conditions of transfers of defence-related products within the Community

The proposed Directive[45] to simplify intra-Community transfers of defence-related products may have negative implications for effective end-use controls. The Directive allows Member States to determine the terms and conditions of the transfer licence, including re-export limitations, but its general thrust is that Member States should keep this to a minimum. Paragraph 16 of the Explanatory Memorandum states that "[a]s regards sub-systems and components, Member States should refrain from export limitations as far as possible by accepting recipients' declaration of use." Like the use of International Import Certificates (IICs) as discussed in section 3 above, the proposed intra-Community Directive shifts responsibility of re-export away from the original exporting State and leaves end-use risk assessments to the final exporting Member State.

This approach should not be contemplated until such time as EU Member States have properly harmonised their export control regimes. In many areas, including end-use control, Member States are still a long way from having attained sufficient harmonisation (not to mention the neighbouring states that may be granted EU status over the next few years). This proposal runs the risk of reducing the current controls to the lowest common denominator, and it raises the prospect of unscrupulous actors transferring defence-related products within the Community to those Member States with the least stringent controls, or those states with differing political affinities or policies. It would also create a business case for companies to arrange their production within the EU to take the same advantage.

One such example of a blurring of the lines between intra-community trade can be demonstrated by the recent debate in the Flemish Parliament regarding an export licence granted by the current Minister for Economics, Patricia Ceysens, for military vehicles and parts to BAE Systems in the UK. Due to the UK's status as a "befriended country", the ultimate end-user was not a consideration in the licence assessment, and responsibility for further export was delegated to the UK.[46] The ultimate end-user in this case was the Saudi Arabian National Guard. The decision came under fire as Flemish Parliamentarians were concerned that Ceysens was effectively relaxing strict export control policies. This case came in sharp contrast to a decision taken by the previous Minister, Fientje Moerman, who had refused the same export licence in October 2006 on the grounds that it contravened criterion 2 of the EU Code on the basis of Saudi Arabia's poor human rights record.

This case highlights the threat that relaxing intra-Community trade of defence-related products can pose to the national prerogative of enforcing strict transfer control policies, including controlling the re-export of goods and technology to end-users the original transferring state regards as undesirable.

Rather than prioritising the relaxation of controls on intra-Community trade, more should be done to ensure that Member States are applying harmonised, rigorous standards at the national level. This should apply to components as well as complete weapons systems, taking into account the ultimate destination and end-user of the final product, even if that product is being routed through another EU

[45] European Commission 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, 2007, http://ec.europa.eu/enterprise/defence/defence_docs/Defence_Directive_EN.pdf

[46] Persbericht: Jaarrapport "Vlaamse Buitenlandse Wapenhandel 2006" (Flemish Peace Institute, 15 March 2007) <http://www.vlaamsvredesinstituut.eu/get_pdf.php?ID=167&lang=NL>.

Member State. This should be the priority for all Member States as well as the Commission.

8. Information exchange

A further key element to mitigating risk is to learn from past experience. If unauthorised diversion or re-export has taken place, then special caution is necessary if the same actors or potentially transport routes are involved in future transfers. The benefits of this can be maximised through institutionalised sharing of information among Member States on known or suspected diverters, or states that breach re-export or other end-use provisions.

It is therefore recommended that COARM commission research into developing and integrating systematic information exchange among Member States. A secure database accessible to licensing officials should be specifically tailored to deal with this issue. Information should include:

- breaches of EUCs or other breaches of end-use undertakings;
- breaches of re-export clauses;
- known actors (individuals, companies or governments) who are re-exporting or re-transferring equipment to illicit or unauthorised end-users (either within or outside the recipient state);
- known brokers, intermediaries, transporters, financers and other providers of ancillary services that may be involved in the illicit or unauthorised transfer of arms;
- problematic transport routes and intermediate destinations from where there is a high risk of diversion;
- verified end-users ;
- any implications of corruption in the recipient state (both across the economy as a whole, but also more specifically with regard to the defence sector, and actors involved);
- the results of any on-site verification of exports; and
- information on stockpile security procedures, as well as surplus/disposal policy and practice in recipient countries.

9. Conclusion and Recommendations

While a stringent and rigorous approach to pre-licensing assessments in accordance with regional and international commitments is the backbone of any export control regime, EU Member States sometimes place too much confidence in the ability of pre-licensing assessments to deal with the risk that controlled goods and technology sourced or brokered from EU territory could be diverted or misused. There is always some risk that equipment or technology will be misused or diverted to an unauthorised end-use(r). Without compromising the current procedures of pre-licensing, governments can mitigate possible risks of misuse or diversion by acknowledging that post delivery and end-use controls are a fundamental part of the licensing process, and should therefore be elaborated and harmonised within the EU transfer control regime as a whole.

There are many examples of good practice in EU Member States in terms of end-use controls, and much would be done to improve the general practice within the EU if all would simply adopt these best practices as common. These include:

- All transfers requiring an end-use certificate (EUC).
- Security provisions for EUCs including the use of banknote-quality paper with an individual reference number, and requiring the end-user to provide a verifiable signature and an official seal.

- In-country verification checks of end-use undertakings carried out by consular services before a transfer is authorised.
- The inclusion of a “no re-export without permission” clause in EUCs.
- Where authorities are alerted to any possible unauthorised re-export, the use of verbal and/or written representations by the original exporter (or collectively through the EU) to the state in question, in order to pre-empt unauthorised re-export.
- Request of Delivery Verification Certificates (DVCs), which include details of transit and/or transhipment points.
- Post-export on-site verification procedures
- Implementing stringent enforcement procedures for breaches of end-use undertakings. Any end-use problems should be factored into subsequent licence applications to that recipient state, with options for sanctions to include:
    - revocation or review of other export licences that may have been granted; or
    - denial of future export licences.

The adoption of these measures by all Member States will help guard against diversion or irresponsible transfer of equipment or technology to an unauthorised end-use(r). Further steps that Member States should consider include:

- Reserving the right to conduct targeted on-site inspections of exports of military and dual-use goods and technologies carried out in a co-ordinated manner utilising a matrix of pre-developed risk assessment criteria.
- Requiring the licence applicant to provide full details, where appropriate, of any intermediaries involved in a transfer.
- Commissioning research into whether commercial organisations, such as SGS or COTECNA, could extend their operations to include delivery verification.
- Commissioning research into developing a common system of end-use monitoring by Member States, setting out procedures for information-exchange, pooling of resources and capacity, and guidelines for sanctions in event of end-use breaches. Research should be undertaken to look into the viability of using independent experts to carry out part of the end-use monitoring process.
- A clear commitment that Member States will take into account the end-use record of a recipient.
- The development of formalised systematic sharing of information on breaches of EUCs or known end-users, intermediaries, transporters etc that raise cause for concern.
- The setting-up of licensed production facilities overseas should be subject to prior licensing approval by Member States at the level of the licensed production agreement itself, rather than in terms of only the transfer of individual components or machine tools etc. used in production. The criteria for issuing a LPO authorisation should be applied at least as rigorously as for the export of material from Member States.
- A reassessment by the European Council of the value of a Directive simplifying transfers of defence-related products in light of its potential to erode the EU’s commitment to end-use and post-export controls on intra-community transfers of controlled items.

Until such steps are taken, the EU will continue to run unnecessary risks in this area. Fully comprehensive export control procedures require effective end-use control as well as a thorough pre-licensing process. Indeed, a more robust end-use control system would help Member States by improving the quality of information that can then inform subsequent pre-delivery/licensing assessments, thus helping to prevent future diversion and misuse.

If the EU is to do all it can to prevent and combat the illicit and irresponsible trade in military goods, then certain minimum standards need to be adopted by all Member States. The lack of harmonisation on end-use and post-export controls across the EU is a serious cause for concern, and risks undermining the EU's regional transfer controls policy and its counter-proliferation aims.

Saferworld works to prevent and reduce violent conflict and promote co-operative approaches to security. We work with governments, international organisations and civil society to encourage and support effective policies and practices through advocacy, research and policy development and through supporting the actions of others.

For further information, please contact:

Sonia Rai, Advocacy and Communications Co-ordinator, Saferworld
Tel: +44 (0)207 324 4646 / srai@saferworld.org.uk

Jacqueline Macalesher, Project Officer, Small Arms and Transfer Controls
Tel: +44 (0)207 324 4646 / jmacalesher@saferworld.org.uk

Saferworld – 28 Charles Square, London N1 6HT, UK | Registered Charity no 1043843 | Company limited by guarantee no 3015948 | **Tel:** +44 (0)20 7324 4646 | **Fax:** +44 (0)20 73244647 | **Email:** general@saferworld.org.uk | **Web:** www.saferworld.org.uk