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Kehne, Charlotte

Veröffentlichungsversion / Published Version

Stellungnahme / comment

Empfohlene Zitierung / Suggested Citation:

Kehne, C. (2019). *Taking the initiative: the European Parliament and EU arms export controls*. (BICC Policy Brief, 10/2019). Bonn: Bonn International Center for Conversion (BICC). <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-68122-7>

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Taking the initiative

The European parliament and EU arms export controls

Charlotte Kehne \ Research associate, University of Tübingen

Policy recommendations

\ The European parliament should take the initiative and develop a concept of restrictive EU arms export controls

The Council of the European Union and the member states have failed to counter the substantial weaknesses of EU arms export controls. It is now the European parliament's turn to take the debate forward by developing its own concept of restrictive EU arms export controls.

\ No competence for arms export controls for the Commission

A communitisation of arms export controls under the authority of the European Commission is unrealistic and undesirable. While it would offer the possibility of formal sanctions, it might lead to an even less restrictive control system than the existing one. Instead, the European parliament should build on the regulatory potential of social sanctions and naming and shaming-effects within the current division of competencies.

\ Stimulate the debate on a 'presumption of denial', 'White List' and justification mechanism

Arms exports to non-EU countries should not be permitted on principle. An exemption to this exclusion would have to be specifically justified. Therefore, member states should agree on a 'White List' of recipient countries for European arms, which are assessed unanimously as acceptable. If member states nevertheless grant licences to non-EU countries that are not listed on the White List, they would be obliged to justify these decisions on COARM or Council level. To stimulate the debate on these instruments, the European parliament itself should work on a 'White List' and assess the member states' export practices against this background.

\ Establish a subcommittee on arms export controls

The European parliament should create a subcommittee on arms export controls to discuss improvements of EU arms export controls and to act as a supervisory body. The subcommittee would publish an annual report assessing member states' export practices. An advisory body that ensures exchange between members of the European parliament, national parliamentarians and societal actors should assist this subcommittee.

Taking the initiative: The European parliament and EU arms export controls

The current system of arms export controls in the European Union (EU) is characterised by a tension between liberalisation and fragmentation of control. On the one hand, the Europeanisation of the arms industry is pushed ahead by liberalising arms transfers within the European Union and promoting cooperation. One example in this regard is the European Defence Action Plan, which aims to strengthen the European defence industry. On the other hand, EU governments have failed to set up an effective system of restrictive arms export controls on the EU level. EU member states have agreed on a legally binding Common Position governing control of exports of military technology and equipment. This Common Position sets out eight criteria for the assessment of arms export licences by member states including, for example, criterion two 'Respect for human rights and international humanitarian law' by the recipient country or criterion three 'Internal situation in the recipient country'. Yet, the actual implementation of export controls takes place at the national level. This leads to an incoherent and contradictory application of the eight criteria, which cannot be sanctioned by the European Union. Recently, the most striking example of such incoherent and inconsistent implementation are arms exports from EU countries to the Saudi-led Yemen war coalition. While the European parliament believes that arms exports to countries of the war coalition violate at least criterion two of the Common Position, and multiple EU countries have imposed arms export restrictions on parts of the war coalition, other member states, such as France and Spain, continue to supply arms to those states, in particular to Saudi Arabia.

Against this background, the European parliament called for a change in EU arms export controls. In its Resolution on arms export and the implementation of the Common Position (2018), it criticises the member states' systematic failure to apply the eight criteria and takes the view that greater convergence in their application should be promoted. The review of the Common Position that began in 2015 would have

provided a good opportunity for the member states to respond to these weaknesses of the system and to take concrete steps towards a restrictive EU arms export controls. But the recent Council's decision amending the Common Position remains highly unsatisfactory. The introduction of a reporting deadline and the provision of the EU annual report as a narrative report and searchable online database are examples of the few notable developments member states agreed on. However, criteria were neither tightened nor were institutional arrangements to promote the coherent application of existing criteria proposed. The Council and member states are thus not countering the substantial weaknesses of EU arms export controls. On the contrary, diverging export practices are mainly interpreted as obstacles to cooperation projects and, as the recent French-German agreement shows, national governments misrepresent harmonisation as an adaptation and concession to less restrictive export practices of other member states.

By undermining their own rules and not applying them coherently, member states gamble with the credibility of the European Union, which advocates human rights and a rule-based international order. But the Council and the member states will not review the Common Position for another five years. Therefore, it is the European parliament's turn to stand up for its expressed critique in its resolution (2018) and to take the debate forward. Until the next review, the European parliament must develop a concept of a restrictive EU arms export control system. This concept must include tightened criteria as well as procedures that promote compliance, coherent application of existing rules and democratic scrutiny. In addition to already existing proposals on how to tighten the European criteria, the following recommendations shall stimulate this debate by discussing the question of competencies within the EU-multi-level system, presenting mechanisms that could promote the coherent application of existing criteria and by exploring the European parliament's scope of action.

A communitisation of arms exports controls?

At first sight, the highest degree of coherence in EU arms export controls could be assured if the competence for arms export controls were in one and not 28 (or 27) ‘hands’. Competence could, therefore, be shifted from the national to the supranational level. The most radical step in this regard would be to dissolve Article 346 (1)(b) TFEU, which grants member states extensive rights to act independently in the field of arms production and trade. Such a step could transform the Common Position into an EU regulation or directive and fully integrate arms export controls into the competence of the Commission. This would, for example, open up the possibility of the Commission establishing an own European licensing authority and Directorate-General on Arms Export Controls. Another possibility would be that the Commission transfers this task to the national licensing authorities of the member states but sanctions violations of EU law, for example, by initiating infringement proceedings. Consequences of such a procedure could range from a letter of formal notice to referring the matter to the Court of Justice, potentially resulting in financial penalties. Hence, the centralisation of competence and the related, so far non-existent, formal possibility of sanctions could enhance compliance and coherence of EU arms export controls. However, there are several concerns about this option. First, it is highly unlikely that member states will agree to transfer their competencies for arms production and trade to the Commission. Second, and even more significant, without a substantial change of the political priorities of the Commission, such centralisation would not be desirable from a restrictive arms export controls perspective. The Commission looks at the European arms industry and arms export policy primarily from a competitive perspective, as became clear in the discussions on the European Defence Fund (EDF) and the establishment of the new Directorate-General for Defence Industry and Space. It does not seem likely that the Commission would be willing to place arms export restrictions or sanction

licencing decisions of the member states to the detriment of the competitiveness of the European arms industry on the global market. Hence, the transfer of competence to the Commission might lead to an even less restrictive system than the current one. Additionally, due to the complexity of the EU-system, it would be more difficult for the public to identify direct political responsibility for decisions on arms exports than on the national level. This would hamper democratic scrutiny.

Another option to promote compliance and coherence in arms export controls within the European Union could be shifting competencies for arms export controls to the Commission and transferring the Common Position into an EU directive—but maintaining Article 346 (1)(b) TFEU. This option might be politically more realistic but also not sufficiently convincing. It would offer the possibility of a formal sanction for suspected non-compliance with European criteria by the Commission launching an infringement procedure. This could enhance compliance and coherence of existing rules but goes along with the concerns already mentioned. On top, recourse to Article 346(1)(b) TFEU would constitute a valid justification for the infringement of EU law as the article states that “any member state may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material”. Although the states would have to make it plausible that the application of Article 346 (1)(b) TFEU is based on an essential security interest and not on economic interest, the Commission or the Court of Justice will hardly second guess a member states’ political assessment of its essential national security interests. Accordingly, a review of arms export decisions would probably be limited to a plausibility check.

In sum, at first sight, a communitisation might improve the coherence of European arms export licensing, but even if this could be realised, it would probably come at the cost of a less restrictive system than the

current one and an even weaker political accountability. This begs the question, how compliance and coherence can be improved in the current system, that is within the framework of Article 346 (1)(b) TFEU and the Common Position that falls within the competence of the Council and the member states. In light of the poor performance of the Council in reviewing the Common Position, it is now up to the European parliament to advance the conceptualisation of restrictive EU arms export controls. As the current system does not offer a formal sanction mechanism, parliament should look at the regulatory potential of social sanctions to achieve greater compliance and coherence with existing rules and to promote democratic scrutiny. This can be achieved by mechanisms that enhance ‘naming and shaming’-effects towards the member states by enhanced information exchange and requirements to justify arms export decisions.

Promoting compliance, coherence and democratic scrutiny in EU arms export controls

Despite the European parliament’s political demand to promote compliance with and the coherent application of existing rules, suggestions on how this can be achieved and institutionalised within the EU’s multi-level system are still underdeveloped. Therefore, the European parliament should confront the Council and the member states with concrete proposals. To draw the Council’s and the member states’ attention to these proposals, the European parliament should model the behaviour that it expects from the Council and the member states to take themselves.

Presumption of denial, ‘White List’ and justification mechanism

Weapons are no ordinary economic goods but means of violence. Hence, arms exports must be judged according to the same ethical criteria as the threat or use of force. Article 2(4) of the UN Charter states that all members shall refrain from the use of force. Decisions on the use of force and thus on arms exports must, therefore, be explicitly justified by those in favour.

This logic can be implemented in EU arms export controls by starting from a presumption of denial for arms exports to non-EU countries. On principle, arms exports to countries outside the European Union should not be permitted. An exemption to this exclusion would have to be specifically justified. To reinforce this recommendation vis-à-vis the Council and the member states, the European parliament itself should assess the member states’ export practices against the background of this presumption. Due to Article 346 (1) (b) TFEU, the presumption of denial would leave room for exemptions. To manage the process of granting exemptions in the sense of restrictive controls, the following mechanisms would be helpful instruments:

- 1\ Creation of a so-called White List to ensure coherent compliance with the European criteria in the case of exemptions. The main arms exporting countries within the European Union are already familiar with such an instrument through Article 13 of the Framework Agreement concerning Measures to Facilitate the Restructuring and Operation of the European Defence Industry. The White List should include non-EU countries that nevertheless qualify as recipient countries because they satisfy the criteria of the Common Position. Proposals for countries to be put on the White List ought to be prepared by the existing Working Party on Conventional Arms Export (COARM). In the next step, each proposed country would have to be adopted unanimously by the Council. It should also be possible to update the White List annually to make decisions on the inclusion or removal of non-EU countries from the list. The use of this instrument does not mean that arms exports to countries on the White List must be granted automatically. It is rather an instrument that enhances coherent compliance with an agreed standard that the member states can apply more restrictively. This corresponds with the Common Position’s aim to set high common standards which shall be regarded as the minimum by all member states.

2\ Establishment of a ‘justification mechanism’.

Due to Article 346 (1)(b) TFEU, member states would retain the right to grant licences for arms exports to countries outside the White List. Although the final decision lies in the member states’ hands, they would have to justify such a decision at the EU level. This justification mechanism is intended to increase pressure on and among EU member states to comply with their own criteria. This can be achieved by extending the already existing information exchange between member states. Each one of the member states should be obliged to justify positive arms export decisions to countries not listed on the White List by explaining their decision in light of each criterion of the Common Position. Once this explanation has been shared with all member states via the existing online system, it should be presented by the member state’s representative at a regular COARM meeting. To further increase the pressure on member states, the next step could be to discuss the case at Council level. Such an approach would follow the logic of Article 9 of the Common Position which states that “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”. Possibilities to identify cases that ought to be discussed at Council level are the following: Either a member state calls for a discussion of the case at Council level, or it is a case in which the existing denial notification mechanism shows that another member state has already rejected a similar export to a non-White List country.

To stimulate the debate on such an approach, the European parliament itself should draw up such a White List and assess member states’ export practices against this background.

Promoting democratic scrutiny

All the mechanisms presented so far aim to support coherent compliance with the European criteria by promoting a common interpretation of these criteria and exerting pressure on member states to comply with them. But it is not enough that the member states have to justify their decisions among themselves. Their decisions must also be subject to democratic scrutiny at the European level.

Democratic scrutiny is characterised by transparency and parliamentarisation. Transparency is the most important prerequisite for the public as well as parliamentarians to exert control over member states’ decisions. Under the current system, the Council informs on member states’ arms exports by publishing an annual report. However, this report needs to be improved in several ways. In light of the proposals presented, the most striking improvements of the EU annual report would be the following: The report should include case studies that show how governments have assessed export decisions against the criteria. The United Kingdom, for example, already included such case studies in its national report. The report should also make clear the scope of arms exports to non-White List countries. The number of cases discussed under the justification mechanism at COARM or Council level must be outlined per country, including the number of cases where member states have decided to export despite the discussion. These adaptations would further a genuine public political debate on arms exports controls and could enhance a coherent interpretation of the criteria through public pressure. In this sense, and similar to the White List discussed above, the European parliament should seize the initiative and present a blueprint for the EU annual report containing all the information parliamentarians need to exert control.

In addition to strengthening transparency, parliamentarisation must also be promoted. The European parliament can exert its control function within the framework of EU arms export controls primarily by assessing the member states' compliance with the European criteria. Based on this assessment, the European parliament can then put pressure on the member states by publicly criticising their export practices where necessary. To institutionalise this function, parliament could establish a subcommittee on arms export controls located under the Committee on Foreign Affairs. The main task of this subcommittee would be to act as a supervisory body, evaluating member states' export practices against the criteria of the Common Position and publishing its assessments in a public report. The subcommittee would also be in charge to work on concrete proposals of how to improve EU arms export controls.

It would be necessary to implement a regular exchange between such a subcommittee and COARM so that the subcommittee can fulfil its function as a supervisory body. One option would be that the proposed justifications for arms exports to non-White List countries to be discussed at Council level are shared with the subcommittee. The subcommittee can agree on a statement which will then be shared with all member states via the online system. In this context, it is important to note that the subcommittee should not be too restricted by confidentiality obligations. Hence, some of the subcommittee's statements should be published in its annual report—in addition to the general assessment of member states' arms export practices and suggestions for improvement within the EU arms export control system. In contrast to the already existing resolutions of the European parliament, this report should be out of quota of the limited number of own-initiative reports that each parliamentary committee can submit per legislature. Such a report ought to be compiled on an annual basis. This could provide an incentive for the member states to comply with the existing criteria and not to

be shamed in the report. To strengthen this possible effect, member states should be required to agree within COARM on a response to the subcommittee's report.

Given that, under the current system, political accountability is highest at the national level, the connection between the European parliament and national parliaments should be strengthened. Furthermore, in terms of democratic control, it seems constructive to include exchanges with different societal stakeholders. One way of putting this into practice is to establish a forum to promote exchange between members of the European parliament, national parliamentarians and societal actors. The already existing Parliamentary Forum on Small Arms and Light Weapons could give an insight into how such a forum could be structured. The forum should act as an advisory body to the proposed subcommittee. The expertise of national parliamentarians and civil society actors could help to prepare the subcommittee's public report on the implementation of the Common Position and to develop further suggestions for improving arms export controls in the European Union.

Conclusion

The Council and the member states seem to have no common vision for developing a restrictive EU arms export control system. Likewise, the Commission focusses mainly on competition and industrial policy. The result of the recent Common Position's review is far from tackling the substantive weaknesses of the current practice. Therefore, it is the parliamentarians' turn to intensify their engagement on the design of a restrictive EU arms export control system, which promotes compliance, coherence and democratic scrutiny. The European parliament should remember its own criticism and not allow itself to be sidelined. It should actively shape the debate and increase its scope of action. Parliamentarians can work on concrete proposals and confront the Council and the

member states with their suggestions, for example via resolutions and during the biannual discussion with the High Representative. At the same time, the European parliament should enforce its proposals by modelling the behaviour that it expects from the member states and the Council to take themselves.

Accordingly, parliamentarians could

- \ establish a new parliamentary subcommittee on arms export controls to institutionalise its function as a supervisory body;
- \ let its assessment of the Common Position's implementation be guided by a presumption of denial;
- \ draw up a White List and assess the member states' export practices against this background;
- \ present a blueprint for the EU annual report.

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bicc \
Internationales Konversionszentrum Bonn
Bonn International Center for Conversion GmbH

Pfarrer-Byns-Straße 1, 53121 Bonn, Germany
+49 (0)228 911 96-0, Fax -22, bicc@bicc.de

www.bicc.de
www.facebook.com/bicc.de



Director for Research
Professor Dr Conrad Schetter

Director for Administration
Michael Dedek

AUTHOR

Charlotte Kehne \ Research associate, University of Tübingen;
Expert on arms export controls at "Ohne Rüstung Leben"

COPYEDITOR

Heike Webb

EDITORIAL DESIGN

Diesseits - Kommunikationsdesign, Düsseldorf

DATE OF PUBLICATION

14 December 2019

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