

THE LIFTING OF THE EU ARMS EMBARGO ON CHINA

STATEMENT OF

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General Background on European Union Embargoes

Arms embargoes fall within the sanctions or restrictive measures imposed by the European Union against third countries. In general, EU embargoes are either adopted to implement UN Security Council resolutions acting under Chapter VII, or are “autonomous.” In the latter case, embargoes are legally founded in a specific provision of the treaties establishing the European Union. EU members have full jurisdiction to decide on imposing arms trade restrictions.¹ Prior to 1992, decisions on embargoes were made by the member states through an informal political process, the so-called European Political Cooperation.² In several instances, member states convened as a body, the European Council, adopted declarations to impose embargoes.³ Within such a context, the embargo on China was imposed in 1989, by the then twelve members of the European Community, the EU’s precursor. The objective was to introduce arms trade restrictions against the regime in China in reaction to the killing of demonstrators in Tiananmen Square.

The introduction of the Common Foreign and Security Policy (CFSP) by the Treaty on European Union (Maastricht Treaty), effective in November 1993, altered the procedural basis for EU embargoes. Decisions to impose an embargo still require unanimity among EU member states, but such decisions are now based on Common Positions, rather than declarations.⁴ Often, implementing regulations are also adopted. Members are required to conform with the provisions or regulations and Common Positions. Both instruments contain a detailed description of the type of material covered as well as the terms and conditions of implementation by the member states. Arms embargoes are also subject to EU standards on arms exports, such as the

¹Article 296 of the Treaty Establishing the European Community. Available at [<http://europa.eu.int/eurlex/lex/en/treaties/index.htm>]

²It refers to the informal network of communication and cooperation on foreign policy issues among the governments of the EC Member states, between the period of 1970-1992.

³External Relations, Common Foreign & Security Policy (CFSP), Sanctions. Available at:[http://europa.eu.int/comm/external_relations/sfcp/sanctions].

⁴Decisions are made based on articles 12 and 15 of the Treaty on European Union. Available at [<http://europa.eu.int/eurlex/lex/en/treaties/index.htm>]

1998 Code of Conduct on Arms Exports (hereafter the EU Code). Consequently, in the implementation of the arms embargo on China, EU members are expected not only to abide by the restrictions on arms trade on China but also with the EU requirements on arms exports. Ultimately, what a given embargo entails may be viewed differently by different member states. And, as a political statement by the European Union, the EU Code on Arms Exports is not legally binding on the EU member states.

European Union's Arms Embargo on China

On June 27, 1989 the European Council, convened in Madrid, agreed to impose an arms embargo on China. The entire text of the embargo, which is in the form of a political declaration, is rather brief. In the first two paragraphs, it condemns the repression in China and requests that the Chinese authorities cease executions and respect human rights. The fourth paragraph contains the measures agreed by the members states. These include the suspension of military cooperation and high-level contacts, reduction of cultural, scientific and technical cooperation programs and prolongation of visas to Chinese students. The specific wording of the arms restrictions on China calls for: "...interruption by the Member States of the Community of military cooperation and an embargo on trade in arms with China."⁵

The declaration does not clarify the meaning of the term "military cooperation" nor does it contain a list of arms that come within the scope of the phrase "trade in arms." Neither does it contain exceptions or review clauses. By contrast, other EU embargoes imposed later in the CFSP context are more elaborate and specific in their scope and coverage. For instance, the Burma/Myanmar embargo, which was first adopted in 1991, has been updated and revised a number of times due to the lack of progress in democratization and continuous violation of human rights, and appears as a Common Position, which is binding. It contains, *inter alia*, a ban on technical assistance related to military activities and the provision, maintenance and use of weapons and

⁵Conclusions of the European Council, adopted in Madrid on June 27, 1989, available at [<http://www.eurunion.org/legislat/Sanctions.htm#China>]. See text in Appendix 3.

ammunition, paramilitary equipment and spare parts.⁶

The arms embargo against China has not been interpreted uniformly by the EU members since it was imposed. This has been attributed to several factors, including lack of specificity in the political declaration, absence of a legally binding document, such as a Common Position, as is the case with subsequent embargoes imposed on other countries and, more importantly, the existing loopholes and weak points in the EU arms control system. For instance, the UK interpreted the embargo in a narrow manner, to include the following items: lethal weapons such as machine guns, large-caliber weapons, bombs, torpedoes and missiles; specially designed components of the above, and ammunition; military aircraft and helicopters, vessels of war, armored fighting vehicles and other weapons platforms; and equipment which might be used for internal repression.⁷ The French have interpreted the embargo similarly.⁸

U.S. Arms Export Control System

The United States, for its part, has a long established legal framework for reviewing and determining which nations will be permitted to obtain defense articles, defense services, and related military technology from it. The principal U.S. statute that governs the sale and transfer of defense articles is the Arms Export Control Act (AECA), P.L. 90-629 (22 USC 2751 et.seq.).⁹ Under the structure of the AECA, the United States government reviews

⁶Common Position 2004/423/CFSP and Council Regulation (EC) No. 798/2004 Renewing the Restrictive Measures in Respect of Burma/Myanmar and repealing Regulation No. 1081/2000.

⁷Robin Niblett, The United States, the European Union, and Lifting the Arms Embargo on China, 10 EURO-FOCUS no. 3 (Sept 30, 2004). Center for Strategic and International Studies. See also: Amnesty International. *Undermining Global Security: The European Union Exports*, at [<http://web.amnesty.org/library/index/engact300032004>]

⁸EU arms embargo on China. [<http://projects.sipri.se/expcon/euframe/euchiemb.htm>]

⁹The key regulations promulgated pursuant to the authorities granted by the Arms Export Control Act which set out the totality of items covered by the (AECA) and all of the pertinent procedures regulating all aspects of U.S. arms export control and rules are the International Traffic in Arms Regulations (ITAR) found at 22 CFR Subchapter M 120-130. The United States Munitions List is found at 22 CFR 121.

applications for possible arms sales. These sales can be made through the government-to-government Foreign Military Sales (FMS) program or through the direct commercial sales (DCS) process. The DCS process is administered by the Directorate of Defense Trade Controls (DDTC) in the State Department's Bureau of Politico-Military Affairs which reviews and grants or denies licences for arms exports to companies who seek to sell their defense products directly to the foreign clients. Once the President has determined that an arms sale or transfer should be made to a foreign recipient through either of the two processes noted above, he submits detailed information about a prospective sale in a formal report and notification to the Congress for its review, when the dollar values of the proposed sale exceed a specific reporting threshold. Should Congress disagree with such a Presidential arm sale proposal, it can nullify it by passing and obtaining enactment of a joint resolution of disapproval.¹⁰

EU Arms Export Control System

In the case of European Union (EU) member states, their arms exports licensing process is based on the pertinent laws of each member state. They are also regulated by the following instruments: (1) the 1998 European Code of Conduct on Arms Exports, a non-binding instrument, which lays down minimum standards to be applied on export licenses¹¹; (2) Regulation (EC) No 1334/2000 setting up a Community Regime for the Control of Exports of dual-use items and technology;¹² and (3) Common Position 2003/468/CFSP on the Control of Arms Brokering.¹³ The EU Code of Conduct, analyzed in detail below, establishes eight criteria to be applied by EU members on the exports

¹⁰Current reporting thresholds for FMS and DCS sales that carry the potential for Congressional rejection by joint resolution are: \$14 million for sales of major defense equipment; 50 million for defense articles or services; and \$200 million for any design and construction services. Section 36 (b) and (c), AECA (22 USC 2776 (b) and 22 USC 2776(c). The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services was delegated to the Secretary of State by Executive Order 11958, as amended. The International Traffic in Arms Regulations (ITAR) implements that authority. Title 22 CFR, section 120.1

¹¹Adopted by the Council of the European Union on June 8, 1998.

¹²2000 O.J. (L159) 1

¹³2003 O.J. (L156) 79

of conventional arms, including software and technology.¹⁴ A Common List of Military Equipment was agreed upon in 2000 and updated recently.¹⁵ In general, arms embargoes, unless specific guidance is otherwise provided, cover at least all the items included in the Common List.¹⁶ Regulation No 1334/2000 as amended (whose scope extends to any items that could be used for civilian and military purposes) is directly applicable to the member states. Under its provisions, member states grant authorizations for exports, called Community general export authorization (CGE) of dual-use items.

Such authorizations are valid throughout the Community, subject to certain specific cases for which consultation is needed among EU members prior to granting or denying an authorization. The items and technology listed in Annexes I, II and IV of the Regulation are based on the lists prepared by the international export control regimes. The Regulation includes a “catch-all” clause which allows controls on goods not included in the Annex of the Regulation. Under this clause, EU members have the discretion to impose or not to impose controls on exports and technology not listed in the Regulation. The objective of Common Position, 2003/468/CFSP, is to control arms brokering¹⁷ in order to prevent circumvention of UN, EU, or Organization for Security and Co-Operation in Europe (OSCE) embargoes on arms exports and the criteria established in the EU Code. Under its provisions, Member states are urged to put in place legal norms for lawful brokering activities, including obtaining a written authorization prior to engaging in arms brokering and to

¹⁴Article XXI of GATT allows the imposition of trade restrictions on arms exports and imports and military equipment and those imposed by the UN Charter VII resolutions.

¹⁵List included in the Council Declaration of June 13, 2000. It was issued on the occasion of the adoption of the common list of military equipment covered by the EU Code of Conduct on Arms Exports, 2000 O.J. (C 191).

¹⁶See Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, at 17, available at EU Council Website, CFSP Section.

¹⁷Regarding arms brokering, the Wassenaar Arrangement should be noted. In December 2003, a group of conventional arms exporting Member states agreed to establish national legislation to control the activities of those engaged in the brokering of conventional arms. [<http://www.wassenaar.org/docs/>]; See EU Common Position 2003/468/CFSP, adopted June 8, 1998 by the Council of the European Union.

keep records for at least 10 years.¹⁸

European Union Code of Conduct on Arms Exports

The European Union (EU) Code of Conduct on Arms Exports was adopted on June 8, 1998, during the Presidency of the United Kingdom.¹⁹ The EU Code sets up eight criteria for the export of conventional arms and a denial notification procedure obligating EU member states to consult on possible undercutting arms sales one EU state might make even though another EU state has chosen not to make a comparable arms export. Under this procedure, member states are required to transmit through diplomatic channels information on licenses refused and reasons for the denial. Thus, before a member state authorizes a license which has been refused by another member state for the same transaction, it is necessary to consult the state that rejected the license in the first place. If the member state decides to issue the license, it must inform the state that refused to grant authorization.²⁰

The EU Code's eight criteria, which are to be utilized by EU members when reviewing license requests and making decisions whether or not to make an arms export, can be briefly summarized as follows:

- (1) Consistency of export with the exporter's international commitments arising from UN, EU, or OSCE arms embargoes;
- (2) Risk that export would be used for internal repression or where the recipient country has engaged in serious violations of human rights;
- (3) Risk that export would provoke or prolong armed conflicts;
- (4) Risk of recipient using export to undermine regional peace and security;
- (5) Effect of export on defense and national security interests of friends and allies;
- (6) Commitment of purchaser to fight terrorism and uphold international law;
- (7) Risk of diversion to third parties or to a terrorist organization;
- (8) Risk that export would undermine the sustainable development of the recipient country.

¹⁸2003 O.J. (L156) 79

¹⁹The full text of the European Union Code of Conduct on Arms Exports is in Appendix 1.

²⁰See Fourth Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, 2002 O.J. (C319) 1.

It is important to emphasize that these eight criteria, and the EU Code on Arms Exports in its entirety, are political statements by the European Union, and *not legally binding* on the member states of the EU, although the Code is supposed to represent a moral imperative that EU member states are expected to uphold and enforce. Nevertheless, no matter how strong the language of purpose and intent contained in the Code's eight Criteria is, the 12 Operative Provisions of the EU Code—the sections of the Code which set out the manner in which the Code is to be carried out—contain significant loopholes which militate against it being a strong regime, in its current form, for the control of conventional arms exports from EU member states. This circumstance is illustrated by the following examples:

1. While each EU member state is to review export license applications made to it on a “case-by-case basis” against the eight specific criteria in the EU Code, Operative Provision 3 of the Code expressly states that “The decision to transfer or deny the transfer of any item of military equipment will remain at the national discretion of each Member State.” Thus, each EU member state is free to make an arms sale based on its own determination regarding whether it is appropriate or not under the Code.²¹

2. Operative Provision 10 provides additional guidance to member states in application of the EU Code. It states: “It is recognized that Member States, where appropriate, may also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, but that these factors will not affect the application of the above criteria.” A literal reading of that sentence could mean that those who adopted the EU Code recognized that national economic or commercial interests would weigh importantly in the decision-making process regarding any given arms sale, and may even trump the larger stated EU-wide interest in restricting problematic arms exports. Yet in the same sentence the provision effectively states that while national economic self-interest may compel a member state to sell, that state is expected not to do so to remain true to the principles of the EU Code.

²¹Operative provision 6 of the EU Code states that the criteria in the Code and the consultation procedure provided for in the Code shall apply to “dual-use goods as specified in Annex 1 of Council Decision 94/942/CFSP as amended, where there are grounds for believing that the end-user of such goods will be the armed forces or internal security forces or similar entities in the recipient country.” As with sales of military equipment, the decision to grant or not grant a license for the sale of “dual-use” equipment is left to each EU nation to decide on its own.

3. A major oversight mechanism within the EU Code is Operative Provision 8, which requires that a *confidential* annual report is to be circulated by each EU member state to the other EU states dealing with its defense exports and its own implementation of the Code. These reports are to be discussed at an annual meeting of the member states where the operation of the EU Code is reviewed, and any “improvements” to it can be recommended to the EU Council. Subsequently, a public report is produced based on the submissions of individual EU members. However, the complete details of *actual arms exports* made by EU states are not set out in this public document, although the published annual reports made pursuant to Operative Provision 8 of the Code do provide *values of arms export licenses* issued, and values of deliveries made, if available, by the exporting country. A supplier list is also provided, giving a total of sales denials made, but not what *specific* weapon sale was denied, nor to whom. Individual states are free to give as much or as little detail in their national reports as they choose. Most have taken a minimalist approach. Furthermore, individual states have different arms trade licensing, data collecting and reporting practices, thus calling into question the accuracy of some of the data provided in the annual public report. In the most recent EU annual report on the Code, the Sixth, covering calendar year 2003, categories of military systems are indicated in the data tables. Yet this standardized reporting is still not universal among member states, given the varied export licensing systems and practices individual countries currently employ.²²

Arms Exports Authorized for China by European Union Members

The European Union has published official documents which provide general data regarding the total values of EU member states’ arms exports licenses to China. Some countries provide the total values of actual exports. There is no uniformity in this reporting across the membership of the EU. As noted above, these annual reports are made pursuant to Operative Provision 8 of the EU Code. The most recent two reports provide data for calendar years 2002 and 2003 (the Fifth and Sixth reports respectively). What follows

²²For details of individual EU member state arms data reporting practices see generally: Sibylle Bauer and Mark Bromley. The European Union Code of Conduct on Arms Exports: Improving the Annual Report. SIPRI Policy Paper No. 8. November, 2004. Stockholm International Peace Research Institute, found at [<http://www.sipri.org/contents/armstrad/PP8>]

are the data from those reports for *arms export licenses* for China as approved by named EU countries in rank order of their license values, together with the total license values of the European Union as a whole. These data show that despite an embargo on arms trade with China since 1989, because each EU member state can, and has, interpreted the mandate of the embargo differently, some sales of military articles and services have, nonetheless, been made.²³

CY2002: Total value of *export licenses approved* for China (expressed in Euros):

France—105,431,246

United Kingdom—79,500,000

Italy—22,836,976

Austria—2,025,925

All European Union countries—209,794,157

CY2003: Total value of *export licenses approved* for China (expressed in Euros):

France—171,530,641

Italy—127,128,192

United Kingdom—112,455,000

Czech Republic—3,610,819

Germany—1,096,261

All European Union countries—415,820,913

In the Sixth annual report, made in accordance with Operative Provision 8, the EU for the first time breaks down the export data by EU Common Military List category.²⁴ So, for those states whose licensing systems categorize their arms export licenses in detail, it is possible to get a sense of what general types of military equipment are being licensed. These data do not provide information on EU members' transactions involving dual-use equipment and items—and there is no publicly available official source that provides details on such transactions. This EU report does cover the broad

²³2003 O.J. December 31, 2003 (C320) 9, 14, 30, 42. The Sixth report is found at Official Journal C 316, December 21, 2004 pp. 001-215.

²⁴Ibid.

spectrum of military equipment licensed for export by the European Union of EU Common Military List categories. (See Appendix 2 for a detailed descriptive summary of these EU Military List categories). This descriptive list uses an abbreviation scheme whereby a number is attached to a specific category of military equipment, and this number/category is given in the license data table to indicate the value of licenses granted for sales of that specific category. For example, ML10 is: “Aircraft,” unmanned airborne vehicles, aero-engines and “aircraft” equipment, related equipment and components, specially designed or modified for military use.”

The United Kingdom provides no detailed breakdown of its licenses in the Sixth report since the way its standard export licenses are valued in its licensing system currently preclude this. The same is true for Italy, and the Czech Republic. However, France and Germany are able to break down the categories of their licenses for purposes of the EU report. The data in the report indicate that the largest share of French license approvals for China in 2003 were in categories ML11– electronic military equipment (98.5 million Euros), ML10–aircraft and related equipment (45.4 million Euros), and ML15–imaging or countermeasure military equipment (24.1 million Euros). In the case of Germany, its largest share of license approvals for China in 2003 were in categories ML14–specialized military training equipment or simulators (528 thousand Euros), ML11–electronic military equipment (433.1 thousand Euros), and ML21–software for items controlled in the EU Common Military List (134.4 million Euros).

Thus, most of the arms exports authorized for China by EU members have been made by France, the United Kingdom and Italy. The Czech Republic, Austria, and Germany granted substantially smaller valued licence approvals.

U.S. Arms Export Control Act retransfer authorities and obligations

The Arms Export Control Act (AECA) sets out a number of conditions and obligations that foreign purchasers of U.S. defense articles, services, and military technology must agree to prior to being permitted to purchase such items from the United States. Among these obligations is the signing of an agreement that prohibits, among other things, the subsequent re-transfer of such items to another nation without first receiving the consent of the United

States government to do so, by obtaining the express approval of the President of the United States. These re-transfer authorities and obligations are discussed in detail below.

Section 3(a) of the U.S. Arms Export Control Act (AECA) contains an express obligation that for any country to be eligible to purchase U.S. defense articles and services or to enter into a cooperative project as defined in the AECA, that country first: “shall have agreed not to transfer title to, or possession of, any defense article or related training or other defense service so furnished to it, or produced in a cooperative project (as defined in section 27 of this Act), to anyone not an officer, employee, or agent of that country or international organization (or the North Atlantic Treaty Organization or the specified member countries (other than the United States) in the case of a cooperative project) and not to use or permit the use of such article or related training or other defense service for purposes other than those for which furnished unless the consent of the President has first been obtained.” Section 3(a) further states that: “ In considering a request for approval of any transfer of any weapon, weapons system, munitions, aircraft, military boat, military vessel, or other implement of war to another country, the President shall not give his consent under paragraph (2) to the transfer unless the United States itself would transfer the defense article under consideration to that country.”²⁵

Should any nation violate their agreement with the United States, signed at the time U.S. munitions list items are sold, by not obtaining the prior consent of the President before retransferring them, the penalties can be severe. If the country is receiving credits or loan guarantees from the United States in connection with financing a weapons purchase, those credits or loan guarantees can be terminated. Should a non-financed cash purchase be involved, the nation deemed to have violated its agreement with the United States can be made ineligible for future purchases from the U.S. Regardless of whether a sale has been financed or not, any deliveries to the foreign buyer pursuant to previous sales can be terminated.²⁶ Under this provision of the Arms Export Control Act, the President has the authority to determine that a

²⁵22 USC 2753(a)(2). This obligation is also contained in the International Traffic in Arms Regulations (ITAR). 22CFR Section 123.10.

²⁶22 USC 2753(c)(1).

violation has occurred and impose a penalty provided for by the AECA as he deems appropriate to the given situation. Any such determination of a violation by the President must be reported to the Congress to take effect. The President is also required to report to Congress “promptly upon the receipt of information” that a section 3 violation “may have occurred.” Congress, can, on its own initiative, determine that a section 3 violation has occurred and impose a penalty it deems appropriate by passing and obtaining enactment of a joint resolution to that end.

The authorities in the Arms Export Control Act noted above are especially pertinent to the question of ensuring that U.S. defense articles and services and the technical information associated with them are not re-transferred to China by EU member states who have purchased or may purchase such items from the United States in the future. Should any EU member state transfer any U.S.--supplied defense articles, services or the technical information associated with them to China, without first obtaining the consent to do so from the President, they would be subjecting themselves to the possible imposition of the penalties discussed above. In this context, the United States has strong, existing, authority to discourage re-transfer of U.S. defense articles, services and technology to China within the existing AECA framework.

The AECA framework, however, does not apply to arms sales to China of indigenously developed and produced military equipment of EU member states. Controls of sales or transfers of that military equipment must be achieved through application of the national arms export control statutes of the individual EU nations, the EU Code of Conduct on Arms Exports, or EU regulations regarding arms exports. As matters currently stand a formal EU decision is not expected until May or June 2005. Since the European Council has already stated its “political will to continue to work towards lifting the arms embargo,” the prospects of it doing so when the issue is formally addressed are high.²⁷ What remains to be set out in detail, should the EU lift the Chinese arms embargo, is what will be the nature and scope of the revised EU Code of Conduct on Arms Exports, and the new instrument establishing measures to address EU arms exports to post-embargo countries—what the EU refers to

²⁷Council of the European Union, 16/17 December 2004. Presidency Conclusions. 16238/1/04 REV 1, p. 19. Published February 1, 2005.

as the “Toolbox.” The details of any such changes to the Code of Conduct or the central elements of the “Toolbox” will not be known until the EU chooses to announce them. Private consultations among EU members on these matters are continuing, but are likely to be completed before final EU action on lifting the arms embargo on China takes place. Should the European Union strengthen the EU Code of Conduct on Arms Exports, and utilize effective instruments to prevent worrisome arms exports to China in a post-embargo period, prospects for reaching a successful accommodation in US-EU relations over this issue could be notably enhanced.

Appendix 1
European Union Code Of Conduct On Arms Exports
(adopted on June 8, 1998)
by
COUNCIL OF THE EUROPEAN UNION²⁸

BUILDING on the Common Criteria agreed at the Luxembourg and Lisbon European Councils in 1991 and 1992,

RECOGNIZING the special responsibility of arms exporting states,

DETERMINED to set high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers by all Member States, and to strengthen the exchange of relevant information with a view to achieving greater transparency,

DETERMINED to prevent the export of equipment which might be used for internal repression or international aggression or contribute to regional instability,

WISHING within the framework of the Common Foreign and Security Policy (CFSP) to reinforce cooperation and to promote convergence in the field of conventional arms exports,

NOTING complementary measures taken against illicit transfers, in the form of the EU Programme for Preventing and Combating Illicit Trafficking in Conventional Arms,

ACKNOWLEDGING the wish of Member States to maintain a defence industry as part of their industrial base as well as their defence effort,

RECOGNIZING that States have a right to transfer the means of self-defence, consistent with the right of self-defence recognized by the UN Charter,

²⁸Source: Council of the European Union, European Union Code of Conduct on Arms Exports, document 8675/2/98 Rev 2, Brussels, 5 June 1998.

HAS DRAWN UP the following Code of Conduct together with Operative Provisions:

CRITERION ONE

Respect for the international commitments of Member States, in particular the sanctions decreed by the UN Security Council and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations.

An export licence should be refused if approval would be inconsistent with, inter alia:

(a) the international obligations of Member States and their commitments to enforce UN, OSCE and EU 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 commitments of Member States in the framework of the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement;

(d) the commitment of Member States not to export any form of anti-personnel landmine.

CRITERION TWO

The respect of human rights in the country of final destination.

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

(a) not issue an export licence if there is a clear risk that the proposed export 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 equipment, to countries where serious violations of human rights have been established by the

competent bodies of the UN, the Council of Europe or by the EU;

For these purposes, equipment which might be used for internal repression will include, inter alia, equipment where there is evidence of the use of this or similar equipment for internal repression by the proposed end-user, or where there is reason to believe that the equipment will be diverted from its stated end-use or end-user and used for internal repression. In line with paragraph 1 of the Operative Provisions of this Code, the nature of the 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.

CRITERION THREE

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

Member States will not allow exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

CRITERION FOUR

Preservation of regional peace, security and stability.

Member States will not issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim.

When considering these risks, Member States will 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 neighboring country which the recipient has in the past tried or threatened to pursue by means of force;

(c) whether the equipment would be likely to be 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.

CRITERION FIVE

The 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 will take into account:

(a) the potential effect of the proposed export on their defence and security interests and those of friends, allies and other Member States, while recognizing 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 goods concerned against their forces or those of friends, allies or other Member States;

(c) the risk of reverse engineering or unintended technology transfer.

CRITERION SIX

The behavior 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 will take into account inter alia the record of the buyer country with regard to:

(a) its support or encouragement of terrorism and international organized crime;

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

(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.

CRITERION SEVEN

The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions.

In assessing the impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user, the following will be considered:

- (a) the legitimate defence and domestic security interests of the recipient country, including any involvement in UN or other peace-keeping activity;
- (b) the technical capability of the recipient country to use the equipment;
- (c) the capability of the recipient country to exert effective export controls;
- (d) the risk of the arms being re-exported or diverted to terrorist organizations (anti-terrorist equipment would need particularly careful consideration in this context).

CRITERION EIGHT

The compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources.

Member States will take into account, in the light of information from relevant sources such as UDP, World Bank, IMF and OECD reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They will consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid.

OPERATIVE PROVISIONS

1. Each Member State will assess export licence applications for military equipment made to it on a case-by-case basis against the provisions of the Code of Conduct.

2. The Code of Conduct will not infringe on the right of Member States to operate more restrictive national policies.

3. Member States will circulate through diplomatic channels details of licences refused in accordance with the Code of Conduct for military equipment together with an explanation of why the licence has been refused. The details to be notified are set out in the form of a draft pro-forma set out in the Annex hereto. 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 will 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 will notify the Member State or States issuing the denial(s), giving a detailed explanation of its reasoning. The decision to transfer or deny the transfer of any item of military equipment will 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 authorize the actual sale or physical export of the item of military 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.

4. Member States will keep such denials and consultations confidential and not use them for commercial advantage.

5. Member States will work for the early adoption of a common list of military equipment covered by the Code of Conduct, based on similar national and international lists. Until then, the Code of Conduct will operate on the basis of national control lists incorporating where appropriate elements from relevant international lists.

6. The criteria in the Code of Conduct and the consultation procedure

provided for by paragraph 3 of these Operative Provisions will also apply to dual-use goods as specified in Annex 1 to Council Decision 94/942/CFSP ⁽²⁹⁾, where there are grounds for believing that the end-user of such goods will be the armed forces or internal security forces or similar entities in the recipient country.

7. In order to maximize the efficiency of the Code of Conduct, Member States will work within the framework of the CFSP to reinforce their cooperation and to promote their convergence in the field of conventional arms exports.

8. Each Member State will circulate to other Member States in confidence an annual report on its defence exports and on its implementation of the Code of Conduct. These reports will be discussed at an annual meeting held within the framework of the CFSP. The meeting will also review the operation of the Code of Conduct, identify any improvements which need to be made and submit to the Council a consolidated report, based on contributions from Member States.

9. Member States will, as appropriate, assess jointly through the CFSP framework the situation of potential or actual recipients of arms exports from Member States, in the light of the principles and criteria of the Code of Conduct.

10. It is recognized that Member States, where appropriate, may also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, but that these factors will not affect the application of the above criteria.

11. Member States will use their best endeavors to encourage other arms exporting states to subscribe to the principles of the Code of Conduct.

12. The Code of Conduct and Operative Provisions will replace any previous elaboration of the 1991 and 1992 Common Criteria.

²⁹(1)OF L 367, 31.12.1994, p. 8. Decision as last amended by Decision 98/232/CFSP (OJ L 92, 25.3.1998, p. 1).

ANNEX

Details to be notified

..... [name of Member State] has the honor to inform partners of the following denial under the EU Code of Conduct:

Destination country:

Short description of equipment, including quantity and where appropriate, technical specifications:

Proposed consignee:

Proposed end-user (if different):

Reason for refusal:

Date of denial:

Appendix 2

Brief descriptions of EU Common Military List Categories³⁰

ML1 Smooth-bore weapons with a caliber of less than 20 mm, other arms and automatic weapons with a caliber of 12,7 mm (caliber 0,50 inches) or less and accessories, and specially designed components therefor.

ML2 Smooth-bore weapons with a caliber of 20 mm or more, other weapons or armament with a caliber greater than 12,7 mm (caliber 0,50 inches), projectors and accessories, and specially designed components therefor.

ML3 Ammunition and fuze setting devices, and specially designed components therefor.

ML4 Bombs, torpedoes, rockets, missiles, other explosive devices and charges and related equipment and accessories, specially designed for military use, and specially designed components therefor.

ML5 Fire control, and related alerting and warning equipment, and related systems, test and alignment and countermeasure equipment, specially designed for military use, and specially designed components and accessories therefor.

ML6 Ground vehicles and components.

ML7 Chemical or biological toxic agents, “tear gases”, radioactive materials, related equipment, components, materials and “technology”

ML8 “Energetic materials”, and related substances.

ML9 Vessels of war, special naval equipment and accessories, and components therefor, specially designed for military use.

³⁰ See OJ C 314 of December 23, 2003 for the full EU Common Military List. Sixth Annual report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports. Official Journal C 316, December 21, 2004 pp. 1-215.

ML10 “Aircraft”, unmanned airborne vehicles, aero-engines and “aircraft” equipment, related equipment and components, specially designed or modified for military use.

ML11 Electronic equipment, not controlled elsewhere on the EU Common Military List, specially designed for military use and specially designed components therefor.

ML12 High velocity kinetic energy weapon systems and related equipment, and specially designed components therefor.

ML13 Armored or protective equipment and constructions and components.

ML14 Specialized equipment for military training or for simulating military scenarios, simulators specially designed for training in the use of any firearm or weapon controlled by ML1 or ML2, and specially designed components and accessories therefor.

ML15 Imaging or countermeasure equipment, specially designed for military use, and specially designed components and accessories therefor.

ML16 Forgings, castings and other unfinished products the use of which in a controlled product is identifiable by material composition, geometry or function, and which are specially designed for any products controlled by ML1 to ML4, ML6, ML9, ML10, ML12 or ML19.

ML17 Miscellaneous equipment, materials and libraries, and specially designed components therefor.

ML18 Equipment for the production of products referred to in the EU Common Military List.

ML19 Directed energy weapon systems (DEW), related or countermeasure equipment and test models, and specially designed components therefor.

ML20 Cryogenic and “superconductive” equipment, and specially designed components and accessories therefor.

ML21 “Software” specially designed or modified for the “development”, “production” “use” of equipment or materials controlled by the EU Common Military List.

ML22 “Technology” for the “development”, “production” or “use” of items controlled in the EU Common Military List, other than that “technology” controlled in ML7.

Appendix 3

Declaration of European Council, Madrid, June 27, 1989

The European Council, recalling the declaration of the Twelve of 6 June, strongly condemns the brutal repression taking place in China. It expresses its dismay at the pursuit of executions in spite of all the appeals of the international community. It solemnly requests the Chinese authorities to stop the executions and to put an end to the repressive actions against those who legitimately claim their democratic rights.

The European Council requests the Chinese authorities to respect human rights and to take into account the hopes for freedom and democracy deeply felt by the population. It underlines that this is an essential element for the pursuit of the policy of reforms and openness that has been supported by the European Community and its Member States. (...)

In the present circumstances, the European Council thinks it necessary to adopt the following measures:

- raising the issue of human rights in China in the appropriate international fora; asking for the admittance of independent observers to attend the trials and to visit the prisons;
- **interruption by the Member States of the Community of military cooperation and an embargo on trade in arms with China [emphasis added];**
- suspension of bilateral ministerial and high-level contacts;
- postponement by the Community and its Member States of new cooperation projects;
- reduction of programmes of cultural, scientific and technical cooperation to only those activities that might maintain a meaning in the present circumstances;
- prolongation by the Member States of visas to the Chinese students who wish it.

Taking into account the climate of uncertainty created in the economic field by the present policy of the Chinese authorities, the European Council advocates the postponement of the examination of new requests for credit insurance and the postponement of the examination of new credits of the World Bank.