The EU as a watchdog for responsibility in the field of arms control: a bridge too far?

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Conference on Export controls and the European defence market: Can effectiveness be combined with responsibility?”

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Necessary conditions for the European Union to act as watchdog:

- An EU policy relative to international instruments designed to regulate arms transfers

- An EU arms export control regime and not the compilation of Member State’s ones
Presently it is not the case

Due to

- Lack of EU legally binding power in that area?

  Exception established by article 346 of TFUE

- Lack of Member States \textit{willingness} to do so?

Attempt to answer

Do we face a similar situation for dual-use items where the EU \textbf{has the competence} to legislate and has adopted a set of legislation?
How the export control is presently ruled by the EU and its Member States?

- Up to 1994 ruled only by national legislation
- Establishment of the *internal market* (1992): *de facto* free movement of arms and dual-use items
- To counter the risk of diversion, necessity to coordinate Member States’ export control policies or *create* a EC export control regime

Different instruments have been adopted for arms and dual-use items due to the division of competencies between EC and its Member States established by the Treaty

- Adoption of *Common Criteria for arms* exports agreed by the European Council at the Luxembourg and Lisbon meeting in 1991 and 1992
- Commission proposal to adopt a EC Regulation establishing a *EC dual-use goods export control regime*
Progressive mutation of the dual-use export control regime as proposed by the Commission

Commission proposal rejected by Member States: dual-use items are considered as included in the Treaty exception.

Adoption of integrated system based on two instruments:
- A Regulation which contains essentially technical elements: the necessity of authorisation and territorial validity.
- A Joint Action for the so considered political elements (list, criteria).

- The Integrated system invalidated by the European Court of Justice: dual-use items export controls are included in the exception.

- New proposal of a Regulation establishing a Community regime for the control of exports of dual-use items and technology.

- Two years to convince several Member States to accept the ECJ’s interpretation of the distribution of competencies.
- Adoption of one Regulation (1334/2000) of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology
  Amended in 2009 (428/2009) to include essentially the control of brokering and transit
- Adoption of a Council Joint Action of 22 June 2000 concerning the control of technical assistance related to certain military end-uses (2000/401/CFSP)

Does the so called “Community regime for the control of exports, transfer, brokering and transit of dual-use items” is a …. Community Regime?
It is not a Community regime

Member States:
Hold decision making power to grant an authorisation
Have the right
- To extend the list of controlled items,
- To restrict the movement of dual-use goods within the EU,
- To establish new categories of authorisations,
- To extend the catch-all clause mechanism,
- To impose specific export control conditions.

A Community regime on the way to be

Elements of a single export control regime:
- A single list of items to control,
- A non-exhaustive list of criteria to be considered by national authorities,
- A community validity of authorisation,
- Several binding and non-binding consultation mechanisms,
- CGEA.
This Community regime is not fundamentally different from the Member States’ coordination established for arms….

EU arms export control coordination

- Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment
- Council Declaration of 13 June 2000, issued on the occasion of the adoption of the common list of military equipment covered by the European Union code of conduct on arms export
- Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering
Coordination of Member States which sounds like a dual-use Community Regime

Member States coordination includes
- A single list of items to control,
- A non-exhaustive list of criteria to be considered by national authorities,
- A politically binding consultation mechanism.

Member States hold the decision making power to grant an authorization and have the right to extend the list of controlled items, define conditions,…

Therefore
- If we don’t considere the legally binding aspect, both regimes are mostly equivalent
- Member States are still not ready to constraint their export policies further than to some forms of coordination
- The EU could not be considered as a watchdog in the field of arms export control because it does not seem to fit Member States’ expectations
Nevertheless

The situation might be considered differently if we sum up actions initiated by Member States acting not necessary within the framework of the EU:

- Council conclusion, declaration on Arms Trade Treaty, NPT, Code of Conduct against ballistic missile proliferation, CWC, SALW, Mine action, Iran, DPRK,…
- EU Strategy to combat illicit accumulation and trafficking of SALW and their ammunition (2005)