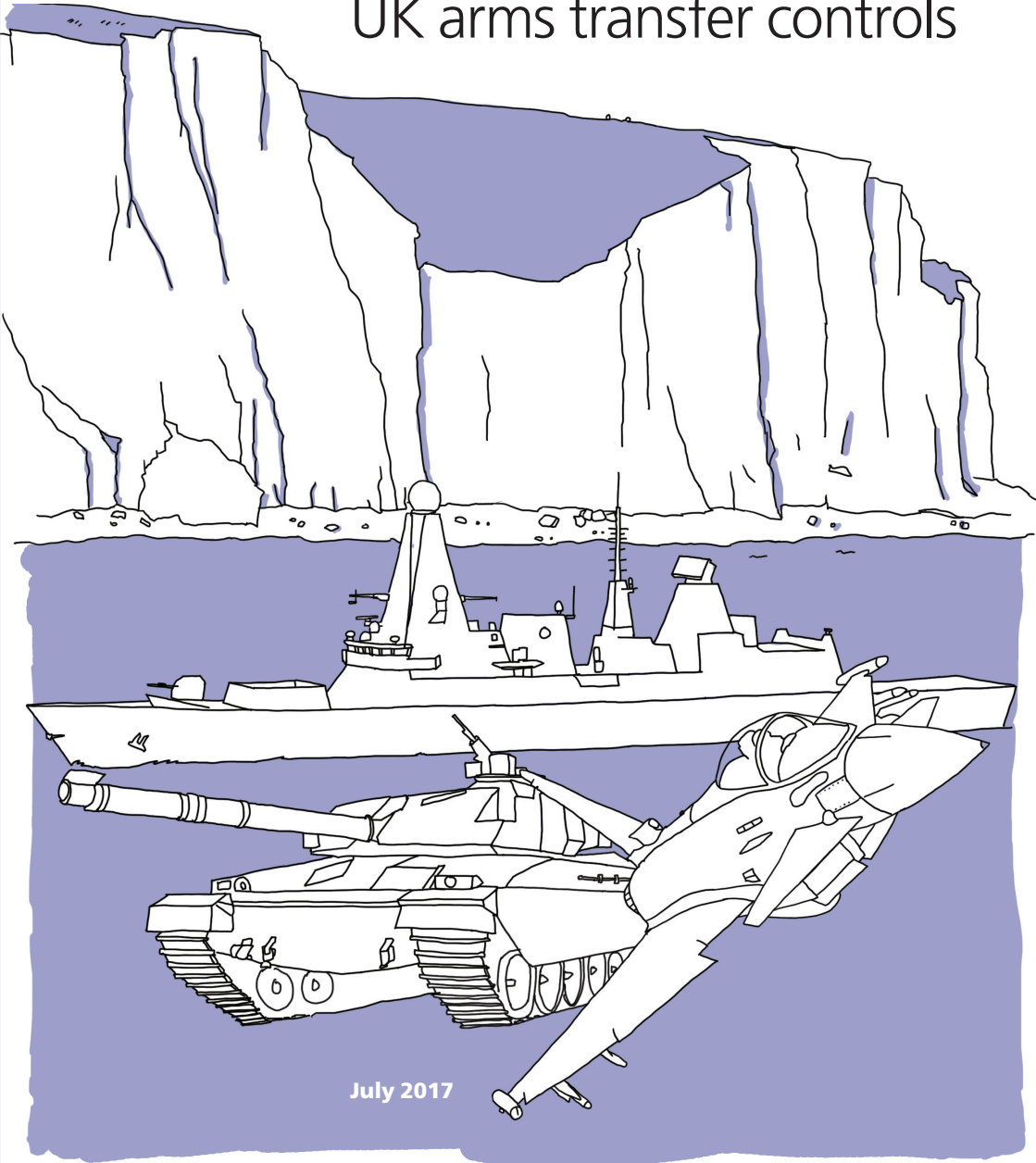


Brexit and the future of UK arms transfer controls



July 2017

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Contents

1. Introduction	1
2. Background	3
3. UK implementation of key EU agreements on arms and dual-use transfer controls	6
i. Restrictive measures	7
ii. EU Dual-Use Regulation	8
iii. Eight criteria and the EU Code of Conduct/EU Common Position on arms exports	9
iv. EU Common Position on arms brokering	9
v. EU Torture Regulation	10
vi. The EU Dual-Use List, the EU Common Military List and the EU Human Rights List	11
vii. The ICT Directive	12
viii. The EU Firearms Directive	12
4. Implications of Brexit for UK arms and dual-use transfer controls	14
i. Export Control Act 2002	15
ii. Restrictive measures	16
iii. EU Dual-Use Regulation	16
iv. EU Common Position on arms exports	17
v. EU Common Position on arms brokering	18
vi. EU Torture Regulation	18
vii. The EU Dual-Use List, the EU Common Military List and the EU Human Rights List	19
viii. The ICT Directive	20
ix. The EU Firearms Directive	20
5. Issues and priorities for arms and dual-use controls in the UK post-Brexit	21
6. Conclusion	24

1

Introduction

On 23 June 2016 the UK voted by a narrow margin to leave the EU. Since then the UK Government's triggering of Article 50 of the Treaty on European Union (TEU) on 29 March 2017 has set in motion the UK's exit from the EU. This is likely to yield significant changes to the social, legal, economic, and political fabric of the country.

Among the myriad changes that are likely to follow its departure from the EU, the UK will assume exclusive formal authority over the transfer of all military, security and dual-use items¹ within its jurisdiction. The significance of this should not be underestimated: the current legal, regulatory and administrative system and, to a significant extent, the normative basis for arms transfer control, while rooted in UK political and legislative tradition, has over the past 25 years been shaped and moulded by the country's membership of and interaction with the EU.

The purpose of this paper is to consider the potential implications of the UK's exit from the EU for arms and dual-use transfer control and to explore the steps that the UK Government may need to take in order to fill the legal and regulatory gaps that arise once the UK is no longer bound by EU obligations and agreements. Given that it is not yet clear what shape Brexit will ultimately take (and it may still be some time before the nature of the UK's future relationship with the EU²⁷ is clear) it is not possible to say definitively what the precise legislative and regulatory consequences of Brexit will be for the UK in the area of arms and dual-use transfer controls. Nevertheless, it is an inescapable reality that the UK's legal entwinement with the EU – even in this relatively narrow

¹ Dual-use goods and technologies are comprised of items that can be used for civilian purposes or in the manufacture, deployment or use of conventional weapons and/or weapons of mass destruction (nuclear, chemical and biological).

sphere – is complex and extensive. Accordingly, as the UK moves towards the exit it is important to consider the likely priorities for the UK and its future relationship with the EU in this field. It will also be desirable to consider how the UK and the EU27 may continue to support and build on the normative, rules-based approach they have jointly helped to create in this area. This paper seeks to unpack the main issues and the potential implications of this changing relationship; it is not, however, an exhaustive review, and there may be further, related matters that also merit consideration.

2

Background

The UK reviewed and overhauled its arms and dual-use transfer controls during the mid-1990s primarily as a consequence of the ‘Arms to Iraq’ scandal and the subsequent Scott Inquiry and Report.² This resulted in the creation of an entirely new legal framework for UK arms transfer controls – the Export Control Act (2002)³. During this period the UK also became a driving force behind the strengthening and moves towards harmonisation of EU arms transfer controls including the development of a criteria-based control system ultimately elaborated in the 1998 EU Code of Conduct on Arms Exports (EU Code)⁴.

While the EU Code (now an EU Common Position⁵) might be seen as the centrepiece of EU efforts to develop a shared approach to arms transfer control it is only one of a number of related EU instruments which together form a comprehensive framework encompassing arms and dual-use transfer control. The intertwining of EU and UK policy and practice has been facilitated by an overarching like-minded approach, a general convergence that has arisen from day-to-day participation in a variety of operational mechanisms, and the development of shared positions with regard to relevant multilateral discussions – including the Arms Trade Treaty (ATT),⁶ the UN Small Arms

² For more information on the Scott Inquiry and Report see http://news.bbc.co.uk/1/hi/programmes/bbc_parliament/3631539.stm

³ Export Control Act (2002) entered into force 1 May 2004, www.legislation.gov.uk/ukpga/2002/28/contents

⁴ EU Code of Conduct on arms exports, www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf

⁵ Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015XG0327\(05\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015XG0327(05)&from=EN)

⁶ The text of the Arms Trade Treaty can be found at <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

Programme of Action⁷ and the Wassenaar Arrangement⁸. The UK has typically played a lead role throughout: accordingly, the current EU system of arms and dual-use transfer control bears a substantial UK imprint.

Before moving to consider the likely impact of Brexit on UK arms and dual-use transfer controls it is worth revisiting the motives underpinning the progress that has been made towards harmonisation of EU Member States' approaches and therefore why it is in the UK's – and the EU27's interests – to maintain, as far as possible, the pre-Brexit arrangements in the post-Brexit world.

At the beginning of the 1990s it became clear that EU Member States' arms and dual-use export policies *vis-à-vis* states in unstable regions and in human rights crisis zones were sometimes widely divergent. For example, some Member States were known to have authorised the transfer of lethal arms to countries in the Middle East or in sub-Saharan Africa; whereas others operated a *de facto* embargo. These differences raised concerns of a growing attitude of “if we don't sell, someone else will” and of a consequent pressure on Member States to set their arms and dual-use transfer controls at the level of the lowest common denominator. It also opened up the possibility that manufacturers of arms and dual-use goods could seek to engage in ‘licence shopping’ by locating their operations in Member States with weaker controls in order to access the widest possible overseas market for their goods. In addition, the first Gulf War of 1991 exposed practices which caused great concern among Member States' parliaments and electorates, in particular when the armed forces of some EU Member States and their allies were found to be facing their own weapons. This called into question the practice of exporting arms to states in unstable regions and where human rights were considered to be at risk and pushed arms transfer controls higher up the EU agenda. Finally there was the growing understanding that, as major development donors, the EU and its Member States should seek to avoid contributing to conflict and instability and undermining development objectives through irresponsible arms transfers.

While progress towards harmonisation of EU Member States' arms and dual-use transfer policies over the past 25 years has clearly not eliminated these risks, there is little doubt that increased co-operation in this field has reduced the negative consequences for human rights, peace and stability around the

7 Information on the UN Small Arms Programme of Action can be found at <https://www.un.org/disarmament/convarms/salw/programme-of-action/>

8 Information on the Wassenaar Arrangement can be found at www.wassenaar.org/

world that would otherwise have flowed from an unmoderated approach to arms transfers by EU Member States.

The UK's scheduled departure from the EU at the end of March 2019 presents a number of risks to the consensus around the need for effective arms and dual-use transfer controls. In the first instance, leaving the EU could result in a concomitant drift in the UK's strategic trade controls away from the shared principles and practices that have underpinned the progressive development of controls across the EU for the past 25 years. Secondly, there is a risk that Brexit may lead to a deterioration in the UK economy presenting a further risk of a more permissive UK approach to sales of arms and dual-use items in order to raise foreign currency revenue. A worst case scenario could see a 'race to the bottom' with other major exporters – including those within the EU27 – potentially undermining long-standing efforts to safeguard human rights and to prevent and mitigate violent conflict around the world.

This paper now sets out the nature and extent of the obligations and commitments that have arisen from the UK's membership of the EU in the area of arms and dual-use transfer control. It examines the likely impact of Brexit upon the fate of these various obligations and commitments in the UK before outlining what steps may be necessary to ensure their continued application. The briefing concludes by exploring priorities for UK arms and dual-use controls post Brexit.

3

UK implementation of key EU agreements on arms and dual-use transfer controls

The UK's membership of the EU created a number of obligations in the field of arms and dual-use goods export controls through a variety of types of agreement (see Table 1).

Table 1

Regulations	Directly applicable in the Member States and require no implementing legislation
Directives	Require Member States to draft legislation to give effect in national law
Decisions (of the European Council/Parliament/Commission)	Legally binding, and potentially obliging Member States to take national implementing measures
Common Positions	A legally-binding expression of the EU's position on a particular issue, adopted under the EU Common Foreign and Security Policy and to which Member States are obliged to conform ⁹
Council Declarations	Politically binding only

The legal basis for the adoption of EU legislation into UK law is situated in the European Communities Act of 1972;¹⁰ this gives legal force to directly applicable

⁹ Under the Treaty of Lisbon which entered into force on 1 December 2009, the EU Common Foreign and Security Policy is expressed through Guidelines and Decisions, the latter of which replaces the previous Common Strategies, Common Positions and Joint Actions. See www.europarl.europa.eu/document/activities/cont/200805/20080513ATT28796/20080513ATT28796EN.pdf

¹⁰ European Communities Act 1972, www.legislation.gov.uk/ukpga/1972/68/contents

EU Regulations and other legal instruments in the UK. In addition, the Export Control Act makes a number of references to the existence of directly applicable EU Regulations; it also provides the basis for secondary legislation (including the Export Control Order 2008,¹¹ as amended) which enables EU Directives and Decisions relating to arms and dual-use transfer control to be implemented through UK legislation. The following is a summary of the key EU agreements relating to arms and dual-use transfer control in effect in the UK prior to Brexit.

i. Restrictive measures

For over three decades EU Member States have sought to coordinate approaches and adopt restrictive measures in relation to other states in response to events of particular concern. The most common type of restrictive measure has been the arms embargo which restricts the transfer of items on the EU Common Military List (see below) to a specified entity; since 1986, almost 40 have been implemented by the EU against states and/or non-government groups in 33 countries. Other restrictive measures have also been implemented by the EU in respect of countries of concern, such as Iran, Russia, Syria and North Korea and include measures to freeze the assets of designated companies or individuals, to impose visa restrictions or travel bans on certain individuals, and/or to restrict trade in certain technologies or commodities.¹² Many – though not all – of the restrictive measures imposed by the EU have originated from binding UN Security Council resolutions. Arms embargoes adopted by the EU are agreed in the form of Common Foreign and Security Council Decisions which bind the Member States to undertake direct national-level implementation measures. Other restrictive measures are adopted in the form of binding Council Regulations which are directly applicable in the EU Member States. In the UK all binding restrictive measures of UN and EU origin have been implemented as EU law through the powers conferred by the European Communities Act; insufficient UK domestic powers currently exist for these purposes.¹³

¹¹ Export Control Order 2008, www.legislation.gov.uk/ukxi/2008/3231/contents/made

¹² See, for example, *Syria: EU extends sanctions against the regime by one year*, European Council Press Release 299/17, 29 May 2017, www.consilium.europa.eu/en/press/press-releases/2017/05/29-syria-sanctions/

¹³ *Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions*, p7, Foreign and Commonwealth Office, HM Treasury and Department of International Trade, 21 April 2017, <https://www.gov.uk/government/consultations/public-consultation-on-the-united-kingdoms-future-legal-framework-for-imposing-and-implementing-sanctions>

ii. EU Dual-Use Regulation

In 1994 the EU Council adopted Regulation 3381/94¹⁴ (the Dual-Use Regulation) setting up a community regime enabling the free movement of all but the most sensitive dual-use goods throughout the EU and the control of subsequent exports (to territories outside the EU). In May 2009 it was recast and adopted as Council Regulation 428/2009¹⁵. This was further amended in 2011¹⁶ and is currently subject to another recast.¹⁷ The Dual-Use Regulation establishes that exports of dual-use goods from the territory of the EU are to be authorised by the Member States and that this can take the form of individual,¹⁸ general¹⁹ or global authorisations²⁰ issued by competent national authorities; alternatively one or more of six EU General Export Authorisations may be used.²¹ An export authorisation granted in one Member State is valid throughout the EU. The regulation applies to a Common EU List of Dual-Use Items (see below); relevant brokering services are also covered. In addition, the regulation provides for consultations between Member States concerned in respect of cases where an application is made for an individual export authorisation in one Member State with the goods located in another and if the goods and/or ultimate destination are considered sensitive.²² The Dual-Use Regulation is directly applicable in all EU Member States although they are required to institute certain national measures, for example in the area of enforcement, in order to ensure its implementation. The regulation is central to the optimal functioning of the internal EU market in dual-use goods and technologies.

- 14 EC Council Regulation 3381/94, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31994R3381&from=EN>. This was replaced in 2000 by Council Regulation 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000R1334&from=EN>
- 15 Council Regulation 428/2009, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:134:0001:0269:en:PDF>
- 16 Council Regulation 1232/2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:326:0026:044:EN:PDF>
- 17 See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1548>
- 18 Council Regulation 428/2009 (as amended) defines an individual export authorisation as ‘an authorisation granted to one specific exporter for one end user or consignee in a third country and covering one or more dual-use items’.
- 19 Council Regulation 428/2009 (as amended) stipulates that national general export authorisations must be issued in accordance with Article 9(2) and defined by national legislation in conformity with Article 9 and Annex III; such authorisations enable the transfer of less sensitive dual-use goods to a range of approved destinations.
- 20 Council Regulation 428/2009 (as amended) defines a global export authorisation as ‘an authorisation granted to one specific exporter in respect of a type or category of dual-use item which may be valid for exports to one or more specified end users and/or in one or more specified third countries.’
- 21 Until 2011 only one ‘Community General Export Licence’ existed; the additional five ‘Union General Export Licences’ were introduced by amending Council Regulation 1232/2011.
- 22 That is if the destination is not listed in Annex IIa or alternatively if the goods are listed in Annex IV to the Regulation.

iii. Eight criteria and the EU Code of Conduct/EU Common Position on arms exports

In 1991 the Lisbon summit of the European Council identified seven common criteria for regulating arms exports addressing issues including: respect for human rights, regional peace, security and stability and the risk of diversion or re-export. An eighth criterion – concerning socio-economic development – was added in 1992. Despite Member States committing to taking these criteria into account in their assessment of arms export licence applications, by the mid-1990s it had become clear that arms export policies were continuing to diverge. Calls for the EU to agree a detailed Code of Conduct were heeded by the Member States and, in a landmark agreement, the EU Code of Conduct on Arms Exports was adopted on 5 June 1998 – the final month of the UK Presidency. Ten years later this politically-binding code was transformed into a legally-binding EU Common Position. Member States are now legally obliged to assess export, brokering, and transit/transshipment licence applications for items on the EU Common Military List (see below) against the elaborated eight criteria. Information on export licences denied must be circulated (via a secure ICT system), and any Member State considering issuing a licence for an ‘essentially identical transaction’²³ that has been denied by another Member State within the last three years must first consult with the Member State that first issued the denial. The UK implements the Common Position through its national arms transfer control system and through the Consolidated EU and National Arms Export Licensing Criteria²⁴.

iv. EU Common Position on arms brokering

In 2003, in response to growing international concern over the role of unscrupulous arms brokers in fuelling the illicit and irresponsible trade in arms, EU Member States agreed a legally-binding Common Position on

²³ While Member States have declared that they use a broad interpretation of the term ‘essentially identical transaction’ (EIT), they have so far not formally agreed a definition *per se*. It would seem, however, that the system is working to at least some extent, in that there are typically around 100 to 150 EIT consultations a year among Member States (though the outcomes of these consultations are not made public, either in detail or in aggregate) – see the EU Annual Reports on Arms Exports, available at <https://eeas.europa.eu/headquarters/headquarters-homepage/8472/annual-reports-on-arms-exports-.en>. Saferworld sees an EIT as where the same actor is attempting to acquire the same capacity, in whole or in substantial part, or where the consequences of the transfers would be largely similar.

²⁴ Consolidated EU and National Arms Export Licensing Criteria, <https://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140325/wmstext/140325m0001.htm#14032566000018>

arms brokering²⁵. This requires Member States to take all necessary measures to control brokering of arms on the Common EU Military List within their territory. They are also encouraged to consider adopting controls with an extra-territorial dimension which apply to citizens or residents operating abroad. Controls are required to take the form of prior written authorisation in advance of each individual transaction; brokers may also be required to register with national authorities. Member States are required to implement the Common Position on arms brokering through their national legislation, which the UK has done by way of the Export Control Act and the Export Control Order.

v. EU Torture Regulation

In 1997 the UK Foreign Secretary announced a ban on the export of certain electro-shock equipment and other devices designed for use in torture and announced the government's intention "to prevent British companies from manufacturing, selling or procuring equipment designed primarily for torture".²⁶ Subsequently, the UK adopted a national prohibition on facilitating the transfer of certain goods that could be used for torture or capital punishment.²⁷ In 2005 controls in this area were established at EU level by way of Council Regulation 1236/2005²⁸ (the EU Torture Regulation) concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. An implementing regulation was issued in 2014²⁹ and there was a comprehensive revision of the regulation in 2016.³⁰ Adding to the existing prohibition on the export, import and provision of technical assistance in respect of goods that are solely used for torture or capital punishment, the 2016 review introduced prohibitions on transit and brokering and on the provision of associated promotion, advertising and technical assistance services relating to such goods. It also

²⁵ Council Common Position on arms brokering 2003/468/CFSP, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003E0468&from=EN>

²⁶ UK parliament Foreign Affairs Select Committee First Report: *Foreign Policy and Human Rights*, 21 December 1998, <https://www.publications.parliament.uk/pa/cm/199899/cmselect/cmcaff/100/10003.htm#n8>

²⁷ See Export Control Order 2008, *ibid.*, Part 4, Section 21 and Schedule 1.

²⁸ EU Council Regulation 1236/2005, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:200:0001:0019:EN:PDF>. Subsequent to this, Regulation (EU) 2016/2134 was adopted on 23 November 2016 including measures to strengthen the 2005 text, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2134&from=EN>

²⁹ Commission Implementing Regulation (EU) No 775/2014, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0775>. This expanded the scope of the Torture Regulation in terms of the types of goods to be controlled.

³⁰ Regulation (EU) 2016/2134, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2134>

imposed a requirement for prior authorisation of export, import, related technical assistance and brokering services in respect of goods that *could* be used for torture or capital punishment; transit authorisation is also now required for goods if it is known they are intended for the purposes of torture or capital punishment. In addition the 2016 review established an expedited process for updating the lists of goods set out in Annexes II and III to the Regulation – known as the EU Human Rights List (see below). It also established a denial notification and consultation mechanism similar to that operating under the EU Common Position on arms exports along with an Anti-Torture Co-ordination Group to examine questions concerning the application of the Regulation. The EU Torture Regulation is directly applicable in all EU Member States.

vi. The EU Dual-Use List, the EU Common Military List and the EU Human Rights List³¹

EU Member States must apply the provisions of the Dual-Use Regulation to a defined EU Dual-Use List of controlled items; they must also apply the Torture Regulation to a defined list of equipment found in Annexes II and III to the Regulation (referred to in UK legislation as the ‘EU Human Rights List’). The UK has implemented these obligations through secondary legislation (specifically via the UK Export Control Order); it has also adopted controls on additional items through the UK Dual-Use List and the UK Security and Human Rights List.

The EU Common Positions on arms exports and on arms brokering both require that Member States apply their provisions to an EU Common Military List. The control of transfers of military equipment remains within the competence of the Member States and so the UK has adopted its own Military List. However, both the UK and EU Military Lists are based on the Wassenaar Arrangement Munitions List and so are almost identical in scope and content, with the exception of a few additional items that have been included in the UK Military List.

³¹ See The UK Strategic Export Control Lists, February 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/593228/controllist20170222.pdf

vii. The ICT Directive

The 2009 Directive on intra-EU transfers of defence-related products (the Intra Community Transfers or ICT Directive³²) was established to create a simplified and unified regime for transfers of defence-related products within the EU. It seeks to encourage Member States to publish general licences³³ for the intra-EU transfer of defence products to certified recipient companies.³⁴ Companies may receive ‘certification’ from their national authorities if they have proven to be a reliable adherent to relevant national and EU transfer controls. EU Member States are required to implement the provisions laid down in the Directive via their national laws; in the UK this is covered by the Export Control Order. At time of writing no enterprises in the UK had received certification pursuant to the ICT Directive; one general licence – the ‘Open general export licence (certified companies)’³⁵ – has been issued by the UK Government.

viii. The EU Firearms Directive

The establishment of the EU internal market and the abolition of border controls between Member States by 1992 prompted the development of common rules for the acquisition and possession of civilian (non-military) firearms and their movement between EU countries. Under the 1991 ‘Directive on control of the acquisition and possession of weapons’ or EU Firearms Directive (amended 2008³⁶) any person intending to transfer a firearm from

32 Directive on intra-EU transfers of defence related products, Directive of the European Parliament and European Council 2009/43/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02009L0043-20120413&from=EN>

33 General licences issued pursuant to the ICT Directive allow EU Member States to transfer unlimited quantities of specified (low-risk) goods to certified companies based elsewhere in the EU.

34 The certification of companies is conducted at national level and is meant to testify to the record of defence undertakings as a reliable recipient of defence-related products and of their positive track record in respecting any conditions attached. Information on certified recipients of defence-related products and on available General licences in EU countries is collated by the EU Commission and published online. See CERTIDER, <http://ec.europa.eu/growth/tools-databases/certider/index.cfm>. As of March 2017, 50 enterprises across 14 EU/EFTA countries had received certification; none of these were in the UK.

35 See <https://www.gov.uk/government/publications/open-general-export-licence-certified-companies>

36 EU Firearms Directive 91/477/EEC, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31991L0477&from=EN>. This was amended in 2008 by Directive 2008/51/CE of the European Parliament and of the Council, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0051&from=EN>. In November 2015, the European Commission proposed a revision of the Firearms Directive which sought to address a number of weaknesses and loopholes in the existing arrangements and to respond to the issues raised by a number of terrorist attacks in the EU involving firearms. Revisions have been agreed by the Member States and are now subject to approval by the European Parliament.

one Member State to another must notify the authorities where the firearm is located. Owners of a European Firearms Pass may, however, travel with their firearms through two or more Member States without prior authorisation. EU Member States are required to share information on transfers with affected Member States in a timely manner; a contact group has been established to facilitate information exchange. Member States are required to implement the provisions laid down in the Directive via their national laws; in the UK this is covered by the Firearms Act 1968³⁷, the Firearms (Amendment) Act 1997³⁸ and the Firearms Regulations 2015³⁹.

³⁷ UK Firearms Act 1968, www.legislation.gov.uk/ukpga/1968/27

³⁸ UK Firearms (Amendment) Act 1997, www.legislation.gov.uk/ukpga/1997/5/contents

³⁹ UK Firearms Regulations 2015, www.legislation.gov.uk/uksi/2015/860/contents/made

4

Implications of Brexit for UK arms and dual-use transfer controls

At time of writing the precise nature and implications of the UK's withdrawal from the EU are unclear. On the one hand it may involve the UK's departure from the EU single market, the customs union and all related obligations (a so-called 'hard Brexit'); however it could conceivably involve the UK retaining involvement in certain of these aspects in the short, medium or longer term, or indefinitely, depending on what is negotiated. Regardless of which scenario unfolds, the UK's exit from the EU will see the European Communities Act repealed. This will mean that extant directly applicable EU Regulations will cease to apply in the UK.

In order to prevent the emergence of a large legislative and regulatory void, the UK Government set out plans in the Queen's Speech⁴⁰ on 21 June 2017 for the introduction of a so-called 'Repeal Bill'⁴¹ which in addition to repealing the ECA will convert directly applicable EU laws into UK law. While the adoption of existing applicable EU Regulations in UK law would appear to be a sensible and necessary course of action, concerns have nevertheless been raised regarding the potentially sweeping powers that such a 'Repeal Bill' would confer upon government. The power to amend or institute large quantities

⁴⁰ See www.bbc.co.uk/news/uk-politics-40339564

⁴¹ The idea of a Repeal Bill was first raised in March 2017. See *Legislating for the United Kingdom's withdrawal from the European Union*, March 2019, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf. See also *Legislating for Brexit: the Great Repeal Bill*, House of Commons Library, 24 February 2017, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7793>

of legislation⁴² without any requirement to consult or inform parliament represents extremely bad practice in its own right and could set a very unfortunate precedent for UK law-making more broadly. It is vital therefore that the Repeal Bill is used only to transpose all the relevant EU law into secondary legislation with the minimum of necessary changes and that any requirement to amend or introduce primary legislation is agreed by the UK Parliament and devolved institutions as per usual. Measures should also be taken to ensure full transparency and parliamentary accountability in respect of any changes that are made during transposition in order to build confidence in the process and to safeguard against any temptation to roll-back on existing provisions and commitments that currently flow from EU Regulations.

In the field of strategic trade controls, repealing the European Communities Act will necessitate the adoption of new primary legislation; this process has already begun in the field of international sanctions (see Restrictive measures, below); it may also require the amendment or replacement of existing statutes (for example, the Export Control Act). Moreover, some regulations that incorporate or rely upon cooperative structures (such as the EU Firearms Pass under the EU Firearms Regulation) will require significant amendment and/or agreement between the UK and the EU²⁷ if they are to continue to apply in their entirety. In other areas, the UK's participation in a variety of practical and administrative arrangements, for example those relating to information exchange will not be easily legislated; the UK's continued involvement in these structures will require agreement on all sides. Much is therefore dependent on the nature and extent of the agreement concluded between the UK and the EU²⁷ and on the existence of a positive ongoing relationship generally, and more specifically in the sphere of arms and dual-use transfer controls.

i. Export Control Act 2002

As the legal basis for UK export, transfer, trade (brokering) and technical assistance controls this act makes several references to 'directly applicable EU Regulations' as well as 'EU provisions' (meaning any Directive or Regulation) and to 'decisions taken by the Council under Title V of the Treaty on European Union' (i.e. under the aegis of the Common Foreign and Security Policy).⁴³

⁴² The UK Government has estimated that over 12,000 EU regulations are currently in force in the UK. See *Legislating for the United Kingdom's withdrawal from the European Union*, March 2019, *ibid*.

⁴³ See Export Control Act 2002, Sections 1–5 and 11, www.legislation.gov.uk/ukpga/2002/28/contents

On exiting the EU, at a minimum these references will need to be removed and replaced with references to UK legal instruments addressing relevant issues.

ii. Restrictive measures

As noted above, existing UK primary legislation is insufficient for the implementation of the full range of restrictive measures that the UK currently employs in pursuit of its international obligations and foreign policy objectives. In a positive move, in April 2017 the UK Government set in motion a consultation process which is anticipated to lead to the development of new primary legislation that will take effect immediately upon Brexit. Most EU restrictive measures (sanctions and arms embargoes) are agreed by the UN Security Council in the first instance. In such cases, UK and EU policies will almost certainly continue to align post-Brexit. However, the EU has on occasion adopted its own restrictive measures, for example in relation to China, Crimea, Russia, Syria, Myanmar and Zimbabwe. Whether the UK will adopt new restrictive measures of EU origin in the future remains an open question; however it is worth noting that the UK has in the past played an active role in the promotion and adoption of sanctions by the EU. Future cooperation and coordination on restrictive measures will depend on the UK's and EU's respective foreign policy priorities and the UK's ongoing relationship with the EU²⁷. Nonetheless, given that the impact of particular sanctions is largely dependent upon the number of state adherents this is undoubtedly an area where a common approach would be mutually beneficial.

iii. EU Dual-Use Regulation

The EU Dual-Use Regulation is directly applicable in the Member States. Accordingly, when the UK leaves the EU, the provisions of the Dual-Use Regulation will cease to apply in the UK. Unless there is some specific agreement between the UK and the EU²⁷, prospective transfers of dual-use goods to the EU²⁷ will require export authorisation from the UK Government. In addition UK-based companies will not be able to use the EU General Export Authorisations (which allow the export of dual-use items from any EU Member State), nor will UK-issued export authorisations be valid throughout the EU.

The UK Government can, if it chooses, continue to authorise exports of less-sensitive dual-use goods to the EU27 using UK-issued Open General Licences. However, if the UK wishes to have some measure of control over whether and where these goods are subsequently exported, the government may need to consider Standard or Open Individual Export Licences whereby specified goods can be exported by a company to a named consignee but with re-export restrictions attached. While this would represent an increased level of control over dual-use trade with the EU27, such a step may be necessary if there is a divergence in EU and UK dual-use export policy post-Brexit and if the UK is no longer able to continue to participate in the existing consultation mechanism associated with the Dual-Use Regulation which allows different national perspectives to be discussed and reconciled. As regards the export of dual-use goods from the EU27 to the UK, it would seem likely that efforts will be made to agree a special arrangement, for example to include the UK as an approved destination under EU General Export Authorisation 001 (similar to existing arrangements for Australia, Canada, Japan and some others), given that this would be in the interests of the dual-use industry located within the EU27 as well as in the UK.

iv. EU Common Position on arms exports

The UK has a well-developed and sophisticated arms transfer licensing system and implements the EU Common Position through the Export Control Act, the Export Control Order, and the application of the Consolidated EU and National Arms Export Licensing Criteria. It is to be expected that this system and the associated licensing criteria will, at least at first, continue to provide the basis for UK arms transfer decisions post-Brexit. However, as discussed in more detail below, there is no guarantee that UK and EU criteria, or indeed any other of the elements contained in the Common Position, will remain in concert into the future. Indeed the same possibility of a drift apart over time applies to all of the instruments listed in this section.

At the operational level, the UK will no longer have the right to participate in the EU Council of Ministers Conventional Arms Working Group (COARM) where information-sharing on and further development of arms export policy and practice take place. Continued participation in the Common Position denial-notification and consultation mechanism is also very uncertain. Norway – which pays into the EU budget, is a member of the European Free Trade Association (EFTA) and has aligned itself with the EU Common

Position – has from January 2017 begun to share real-time denial notifications with the EU and has access to the associated ICT system for this purpose. Nevertheless, the UK’s continuing participation in the Common Position denial-notification system is not a foregone conclusion and will depend upon negotiations between the UK and the EU27, and the perceptions of costs and benefits on both sides. The UK’s alignment with the EU Common Position on arms exports is likely to be a prerequisite for any future agreement in this area.⁴⁴ If the UK cannot continue to participate in this mechanism, other specific transfer control information-sharing mechanisms should be considered, for example, regular (annual or possibly biannual) UK-EU27 dialogue, akin to that which takes place between the EU and Canada and between the EU and the US. Nevertheless, this will not provide the same level and detail of information as can be accessed through EU membership or through continued real-time involvement in the denial-notification system.

v. EU Common Position on arms brokering

The UK is fully compliant with the mandatory provisions of the EU Common Position on arms brokering via the Export Control Act and Export Control Order. As such the UK controls on arms brokering are not dependent on its membership of the EU and their full implementation will be expected to continue post-Brexit. However, as noted above, if the UK does not continue to enjoy access to the denial-notification and consultation mechanism that operates under the Common Position on arms exports, there will be a reduced inflow of potentially relevant information available to the UK Government on arms transfer issues that would be potentially useful for the ongoing implementation of UK trade (brokering) controls.

vi. EU Torture Regulation

The EU Torture Regulation is directly applicable in the UK. Accordingly when the UK leaves the EU the provisions of the Torture Regulation will cease to apply. Although the UK has established its own national legislation prohibiting

⁴⁴ The following countries have officially aligned themselves with the criteria and principles of Common Position 2008/944/CFSP: Albania, Bosnia and Herzegovina, Canada, the Former Yugoslav Republic of Macedonia, Georgia, Iceland, Montenegro and Norway.

the supply or delivery of specific goods designed for capital punishment or for use in torture, or any act calculated to promote such, this is much narrower in scope than the EU Torture Regulation. Accordingly, it will be vital that the UK Government ensures the transposition of the Torture Regulation into UK law immediately upon exit to prevent any gaps in controls. Given that the UK first introduced controls on torture equipment in 1997 it is very much to be hoped that the government will remain demonstrably committed to preventing entities under UK jurisdiction from participating in the supply, promotion and use of goods or equipment that could be used in capital punishment, torture or other cruel, inhuman or degrading treatment. In addition, it will be important for the UK and the EU²⁷ to keep in step in terms of the future development of controls in this field, however this will be difficult to achieve if the UK is no longer able to participate in the denial-notification and consultation mechanism and the Anti-Torture Co-ordination Group and if information is no longer exchanged in a timely manner, for example in relation to updating of lists.

vii. The EU Dual-Use List, the EU Common Military List and the EU Human Rights List

In respect of the EU Dual-Use List, the UK Government will need to incorporate the full List of items into the UK Dual-Use List on quitting the EU. However, this should not be problematic, given that the EU Dual-Use List is based on lists developed by the main non-proliferation regimes⁴⁵, of which the UK is a member. Indeed, the UK has a particular depth of expertise in the field of dual-use technologies and has been the lead Member State in preparing the amendments to the EU Dual-Use List pursuant to the changes made within the non-proliferation regimes. Thus, unless some arrangement can be agreed upon, another EU Member State will need to take on this role when the UK leaves.

The items controlled under the EU Torture Regulation should be incorporated into the UK Security and Human Rights List. This will ensure that, in the immediate post-Brexit era, successor UK legislation will apply to all relevant items of concern. However, in the medium and longer term efforts will be

⁴⁵ The EU Dual-Use List is derived from lists associated with: the Australia Group (chemical and biological technologies), the Chemical Weapons Convention, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement (conventional arms and related technologies).

required to coordinate updates to the respective EU and UK lists in order to prevent the emergence of lacunae which could be exploited by unscrupulous actors.

The EU Common Military List is already subsumed in its entirety into the UK Military List; as such there should be no gaps in the coverage of military items immediately post Brexit. Again, continued cooperation and coordination will be required between the UK and the EU27 in order to ensure a common approach to future development of their respective Military Lists.

viii. The ICT Directive

EU Member States are required to implement the provisions of the ICT Directive in their national law. In the UK this is covered by the Export Control Order. To date, however, in respect of the key provisions, the UK has no ‘certified enterprises’ and has adopted only one specific general licence pursuant to the ICT Directive. Accordingly, the lapsing of this particular EU agreement is likely to have minimal impact on arms and related transfers between the UK and the EU27.

ix. The EU Firearms Directive

The implications of Brexit for regulating the movement of firearms between the UK and the EU27 relate primarily to the notification system for transfer of firearms, the operation of the European Firearms Pass, and the continued involvement of the UK in information sharing on relevant issues. If there were to be a breakdown in cooperation and information exchange on the movement of firearms between the UK and the EU27 this could have significant security implications for all concerned. It could also increase the administrative burden on relevant government departments including customs and law enforcement agencies responsible for preventing the unauthorised movement of firearms between the UK and the continent of Europe. Once again, a constructive, cooperative approach to these issues in the post-Brexit era will be of benefit to all parties.

5

Issues and priorities for arms and dual-use controls in the UK post-Brexit

The post-Brexit world will be full of new uncertainties for the UK's diplomatic, trade and security relationships. It is therefore in the interest of the UK to maintain stable, predictable and cooperative partnerships in all of these areas with the remaining EU27 – both individually and as a collective. Much will depend on how the exit negotiations between the UK and the EU27 proceed; the need to avoid the development of entrenched, oppositional views and agendas, and a willingness to negotiate in good faith, will be central to achieving a positive outcome.

Continued cooperation and coordination between the UK and the EU27 in the field of arms and dual-use export controls will be key to ensuring that both parties uphold their international obligations to safeguard human rights and combat proliferation. In particular, the UK's continued involvement in information-exchange and denial-notification mechanisms, ongoing regular information sharing with the EU27 via the relevant EU Working Groups, and continued cooperation among security and intelligence agencies would benefit all 28 states. Indeed the benefits from such cooperation are likely to be felt both at home and abroad, by reinforcing collective efforts to tackle human rights violations, prevent and mitigate conflict and address international terrorism while helping to promote a continued commonality in ensuring responsibility and restraint in arms and dual-use export controls. Ongoing shared approaches to firearms regulation including sharing of information

will also be vital in order to combat armed crime and the threat of terrorist attacks across Europe.

The need to continue cooperation on intelligence and enforcement activities is equally important. However, should the UK quit the EU single market and customs union this could become more difficult to achieve. For example, if routine customs checks and revenue collection once again become a part of the trade relationship between the UK and EU²⁷ this will place a significant additional burden on customs resources in the UK and also in the EU²⁷. Unless the UK Government provides significant extra capacity there is a risk that a greater focus on revenue-gathering activities could reduce the capacity of customs and other enforcement agencies to effectively identify, interdict and prosecute cases of illicit trafficking, including of arms and dual-use goods.

Brexit could also bring about unwelcome changes in the UK's trade in arms and dual-use exports with non-EU states, and in particular those in regions of conflict and human rights crisis. Under pressure to build new relationships and maximise revenue, there is a very real risk that the UK Government may subordinate rigorous arms transfer controls in favour of export promotion.⁴⁶ Without the potential mitigating effects of information exchange with EU partners and the 'peer pressure' associated with the denial notification process of the EU Common Position on arms exports and the consultation and review processes associated with the EU Dual-Use Regulation, the EU Torture Regulation and the EU Firearms Regulation, over time the UK could conceivably drift away from the established EU consensus around responsibility and restraint in arms and dual-use exports; it is also possible that the commitment of the EU²⁷ to established norms may weaken.

It will therefore be vital to the UK's international interests and reputation that any desire to engage in free trade with other countries does not lead to a weakening of UK commitments to core non-proliferation objectives and obligations to safeguard human rights. Indeed, given that the UK is a major arms exporter its trade activities can have a tangible impact on such objectives and obligations around the world. Whereas the UK and the EU both have a reputation globally as leaders on arms transfer controls, a worst-case post-Brexit scenario would be one whereby weaker UK controls encourages the EU to follow suit, or vice versa. There is also a risk that any future rolling back from existing commitments on the part of the UK or the EU²⁷ may be reflected more widely.

⁴⁶ 'Arms company that sold missiles to Gaddafi is a 'role model' for post-Brexit trade, Fallon says', 21 April 2017, *The Independent*, www.independent.co.uk/news/uk/politics/brexit-michael-fallon-mdba-arms-company-sold-gaddafi-missiles-saudi-arabia-sales-a7695296.html

This is not to say that changes to UK rules, policy or practice will inevitably be mirrored in the EU. Arguably the greatest risk is that without concerted efforts to sustain cooperation over time and across the whole range of instruments and areas discussed above, there will be a growing divergence between UK and EU laws and regulations. Even without significant shifts in approach or policy, changes are inevitable. Post-Brexit the UK will be free to change its laws, regulations and guidance as it chooses, subject to its other obligations under international law, and will be under no compulsion to mirror any future changes to the relevant EU instruments as and when such occur. Significantly, the UK will lose much of its ability to influence the future direction of EU arms and related transfer controls, an influence which the UK, as a member of the EU, has used to considerable effect for the last 25 years.

Finally, and most worryingly, since 2015, while a full member of the EU, the UK has supplied munitions, aircraft spares and other military goods to Saudi Arabia despite the clear risk that such equipment will be used in violations of international humanitarian law in the Yemen conflict.⁴⁷ There are very real fears of ‘more of the same’ as further downward pressure builds upon UK arms export controls post-Brexit, particularly if the UK economy is significantly negatively affected following exit from the EU.

⁴⁷ See *The lawfulness of the authorisation by the UK of weapons and related items for export to Saudi Arabia in the context of Saudi Arabia's military intervention in Yemen*, www.saferworld.org.uk/resources/view-resource/1023-the-lawfulness-of-the-authorisation-by-the-united-kingdom-of-weapons-and-related-items-for-export-to-saudi-arabia-in-the-context-of-saudi-arabias-military-intervention-in-yemen

6

Conclusion

The UK's split with the EU will bring about significant changes to many aspects of UK life while also impacting across the continent. If the UK and the EU27 are to continue to uphold their common values of a rules-based international system and the primacy of international human rights and humanitarian law, continued cooperation and joint action in the field of arms and dual-use export controls will be a necessity.

For their part, the UK Government should ensure that wherever possible existing EU obligations relating to arms and dual-use export controls are manifestly incorporated into UK domestic legislation and that it plays a full part in working to ensure that UK and EU rules continue to reflect best practice as much as possible into the future. Having played a key part in the development of progressive EU policy and practice in this area it would be a huge mistake for the UK to turn its back on a legacy of its own creation. Formally aligning to the EU Common Position on arms exports post-Brexit would be a useful way for the UK to demonstrate its ongoing commitment.

At the same time the EU27 should sustain their commitment to comprehensive and responsible regulation of the trade in arms and dual-use technologies and accept the UK as a key partner in efforts to prevent the proliferation and misuse of these items around the world. The EU27 should continue to allow the UK to participate in EU denial-notification and information-exchange systems and consult with the UK on any changes to EU instruments, lists and practices of common concern. Cooperation among intelligence and enforcement agencies will also be vital to ensuring the optimal functioning of respective arms and dual-use export controls; while continued collaboration on export control outreach activities, particularly in the near abroad, will be vital to promoting peace and security across the wider Continent of Europe.

Above all, there is a need for sustained political will on all sides to ensure cooperation, coordination and continuing effectiveness of UK and EU arms and dual-use transfer controls and to avoid ‘race to the bottom’ opportunism that would only undermine the well-established yet fragile international norms that underpin peace, security and stability within Europe and internationally.

Saferworld is an independent international organisation working to prevent violent conflict and build safer lives. We work with local people affected by conflict to improve their safety and sense of security, and conduct wider research and analysis. We use this evidence and learning to improve local, national and international policies and practices that can help build lasting peace. Our priority is people – we believe in a world where everyone can lead peaceful, fulfilling lives, free from fear and insecurity.

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