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from: Secretariat

to: Delegations

Subject: User's Guide to the EU Code of Conduct on Arms Exports

Delegations will find attached the updated version of the User's Guide to the EU Code of Conduct on Arms Exports, as agreed by the Working Party on Conventional Arms Exports at its meeting on 1 December 2006.

USER'S GUIDE TO THE EUROPEAN UNION CODE OF CONDUCT ON ARMS

EXPORTS

Introductory note

All Member States have agreed to apply the EU Code of Conduct on Arms Exports when assessing applications to export items listed in the agreed EU Common Military List. The Code of Conduct also aims to improve the sharing of information between Member States and to increase mutual understanding of their export control policies.

The User's Guide is intended to help Member States apply the Code of Conduct. It does not replace the Code in any way, but summarises agreed guidance for the interpretation of its criteria and implementation of its operative provisions. It is intended for use primarily by export licensing officials.

This User's Guide will be regularly updated. The most recent version will be available on the Security-related export controls web-page of the Council internet site.

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Introduction

Operative Provision 3 of the Code of Conduct states that Member States are to circulate details of licences refused together with an explanation of why the licence has been refused.

Sharing information on denials is one of the most important means through which the aims of Member States' export control policies, and the convergence of these policies, can be achieved. This chapter is intended to clarify Member States' responsibilities in this area. It also takes into consideration the fact that, on 23 June 2003, Member States agreed to assess applications for licences to carry out specific brokering transactions against the provisions of the Code.

Section 1: The definition of a denial

1.1.1 Operative Provision 3 of the Code of Conduct states that *“a denial of a licence is understood to take place when the Member State has refused to authorise the actual sale or ... export of the item of military equipment concerned, where a sale would otherwise have come about, or the conclusion of the relevant contract. ...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.”*

1.1.2 Practices currently differ between Member States as to when their companies approach their government authorities to get export permissions. Some Member States will consider a request from business only when the formal export licence is applied for. Others deal with industry more informally, giving early and non-binding indications as to whether or not a proposed transaction would be permitted.

1.1.3 Whether the company's request concerning a possible export is made at an early stage in the marketing process or just prior to an export order being received, the request has meet certain formal requirements before a formal response can be given and, if negative, notified as a denial by the government authority. In the absence of certain factual information, a request could only be discussed on the basis of assumptions rather than handled as an application by the competent authority. A request over the telephone or a brief e-mail with general information or questions would therefore not constitute a situation in which the authority could approve or deny a specific business opportunity.

1.1.4 A denial should be notified when the government authority has refused an application for export approval made in writing (email, fax, or letter) with a certain degree of precision giving the competent authority enough information on which to make a decision. The minimum level of information that the written request has to contain is:

- country of destination;
- full description of the goods concerned, including quantity and where appropriate technical specifications;
- buyer (specifying whether the buyer is a government agency, branch of the armed forces, paramilitary force or a private natural or legal person);
- proposed end-user.

1.1.5 A denial notification (DN) should also be issued when:

- a Member State revokes an extant export licence;
- a Member State denies an export licence that is relevant to the scope of the Code, and has already circulated a DN relating to this denial in other international export control regimes;
- a Member State has refused an export transaction deemed essentially identical to a transaction previously refused by another Member State and notified as a denial. Among the points to be assessed more particularly in order to determine whether a transaction is “essentially identical” are the technical specifications, the quantities and volumes, and the customers and end-users of the goods concerned.

1.1.6 By contrast, in the following situation, a denial notification (DN) should not be issued:

- an application for approval has either not been made in writing or has not provided all the information required in section 1.4 above.

1.1.7 In the case of a licence being refused on the basis of a national policy that is stricter than that required under the Code, a DN could be issued "for information only". Such DN would be added to the central database by the Secretariat, but it would remain de-activated.

Section 2: The denial information to be notified

1.2.1 It is vital for the successful operation of the DN system that all relevant information is provided when notifying a denial, so that this information can be taken into account by other Member States in developing their export control policies. This section therefore sets out harmonised notification forms for DNs for export and brokering licences (model Form 1, in the Annex) and for modifications and revocations of DNs (model Form 2 in the Annex).

1.2.2 Descriptions of these information elements are set out below:

Identification number

Standard registry number assigned by the issuing Member State, in the following format:

Standard acronym to identify regime (EUARMS)/two-letter acronym for issuing country/year (4 numbers)/serial number (3 numbers). For example, EUARMS/PT/2005/007, EUARMS/ES/2003/168.

Country of final destination

Country where (according to the exporting country's information) the end-user is located.

Date of notification

Date of the message that informs EU partners of the decision to deny, or to amend or revoke the denial.

Contact details for more information

Name, phone number, fax number and email address of a person who can provide further information.

Short description of the goods

Technical specification, permitting a comparable assessment. If necessary for this purpose, technical parameters should be indicated. The French/English glossary of technical terms (to be developed) should be used where appropriate. In addition to this description, the following voluntary information may be provided:

- Quantity
- Value
- Manufacturer of the goods

Control List reference

Identification of the item number of the notified goods on the most recently agreed version of the EU Common Military List (with sub-item number where applicable) or on the dual-use goods list (give official reference) for goods on which DN information is shared pursuant to Operative Provision 6 of the Code of Conduct.

Stated end-use

Information on the intended use of the notified commodity (e. g. spare part for..., incorporation in ..., use as...). If it is a supply to a project, the name of the project should be indicated.

Consignee and end-user

This information should be as detailed as possible in order to permit a comparable assessment. Name/address/country/telephone number/fax number/e-mail address should be given in separate fields.

Reason for notification of denial/amendment/revocation

In case of a denial, the applicable criteria of the EU Code of Conduct for arms exports are given here. Where the relevant criteria consist of numerous “sections” (e.g. 7 (a), (b), (c) and (d)), they shall specify which one(s) were relevant. In case of amendment or revocation of a notification, a short explanation should be added, e.g. following lifting of an embargo, replacement by notification X, etc.

Additional remarks

Any additional information that could be helpful to other Member States in their assessment. Voluntary.

Origin country of the goods

Country from which the brokered goods are being exported. This category should only be filled in for brokering DNs.

Broker's name and details

Name(s), business address(es), country, telephone number(s), fax number(s) and e-mail address(es) of the brokers whose application for a licence has been refused. This category should only be filled in for brokering DNs.

Information element(s) to be amended

Specify which item of the original notification is to be changed.

New information element(s)

New content of the modified item.

Effective date of amendment or revocation

The date on which the decision to amend or revoke the denial takes effect.

1.2.3 As agreed in article 5 in Council Common Position 2003/468/CFSP on the control of arms brokering, Member States will exchange information, inter alia, in the area of "denials of registering applications (if applicable)". The attached Form 3 is a harmonized notification form for DNs on applications for brokering registration.

Section 3: Revocation of Denial Notifications

1.3.1 The purpose of a denial notification is that it provides information on a Member State's export control policy that other Member States should then be able to take into account in their own export licensing decisions. Whilst it would not be possible for a Member State's stock of DNs to perfectly reflect its export control policy at all times, Member States can keep information up to date by revoking denial notifications where appropriate.

1.3.2 Revocations shall be carried out by COREU message as soon as possible after the decision to revoke has been made, and in any event within 3 weeks of this decision. The Member State shall use Form 2 (see Annex) for this purpose.

1.3.3 Member States shall annually review their extant denial notifications and revoke a notification if a change in national thinking means it is no longer relevant (updating), and suppress multiple notifications relating to essentially identical transactions (tidying) in order to retain only the ones which are most relevant to national export control policy.

1.3.4 Revocations shall also take place in the following circumstances:

- A Member State grants an export licence for a transaction that is “essentially identical” to a transaction it has denied in the past. In this case, the DNs that it issued previously shall be revoked.
- After an arms embargo has been lifted. In this case, Member States shall revoke the denials that were solely based on the embargo, within one month of the lifting of the embargo.
- A Member State decides that a licence which it previously revoked should be reinstated (see Section 1.1.5, first bullet)

1.3.5 It is not necessary for Member States to revoke DNs that were issued more than three years previously. These DNs will be automatically de-activated on the central data base by the Council Secretariat (see Section 1.4 8 below). Though de-activated, they will remain on the data base.

Section 4: Notifying denials and carrying out consultations

Export licences

Denial notifications: circulation

1.4.1 When an arms export or brokering licence is denied, the Member State must circulate the denial notification no more than one month after the licence has been refused.

1.4.2 Member States will circulate denials to all other Member States using Form 1. All fields must be filled in, or an explanation should be given of why a field is not relevant. Incomplete notifications will not be entered on the database by the Council Secretariat.

1.4.3 All denial notifications, revocations and modifications must be written in either English or French. They are to be circulated by COREU to all Member States (the message will automatically be copied to the Council Secretariat). The classification should be “Restricted”. The priority setting should be “urgent”.

Denial notifications: handling and storage

1.4.4 The Council Secretariat will operate a central DN database for export licence DNs. This will not prevent Member States from operating their own databases. The central DN database is a resource for all Member States to use. The database will allow Member States to search on any of the denial notification fields (country issuing the DN; country of destination of the equipment; criteria for refusal; description of goods,...), or combinations of fields. The database will allow statistics based on these fields to be compiled.

1.4.5 The information on the database is classified ‘Restricted’ and will be treated as such by all Member States and the Council Secretariat. It will be in the English language. Where the information provided is in French it will be translated into English by the Council Secretariat. For this purpose, the Member States will compile a glossary of technical terms.

1.4.6 The Council Secretariat will check each Form 1 DN to ensure that it contains all the essential information. If complete, it will be entered in the central database. If essential information has been omitted, the Secretariat will request this information from the Member State that has issued the denial. Denial notifications will not be entered in the database until at least the following information has been received:

- identification number;
- country of destination;
- short description of the goods (with their matching control list number);
- stated end-use;
- name and country of consignee, or end-user if different (specifying whether the buyer is a government agency, the police, army, navy or air force, a paramilitary force, or a private natural or legal person and, if denial is based on criterion 7, the name of the natural or legal person);
- reasons for denial (these should include not only the number(s) of the criteria, but also the elements on which the assessment is based);
- date of the denial (or information on the date when it takes effect, unless it is already in force).

1.4.7 When the Council Secretariat receives a Form 2 message revoking a DN, it will remove this DN from the central DN database. When the Council Secretariat receives a Form 2 message to change the details in a DN, it will amend them as requested so long as the new information conforms to the agreed format.

1.4.8 The Council Secretariat will regularly check each month that none of the active DNs on the central DN data base are more than 3 years old. All DNs of more than 3 years old shall be deactivated, though the information will remain on the database.

1.4.9 Until remote access to a secure database is possible, the Council Secretariat will, around the first working day of each month, send to Member States, via nominated persons in their Permanent Representations in Brussels, a disc containing the latest version of the database. Appropriate security procedures will be followed.

Consultation Procedures

1.4.10 When Member States are considering granting an export licence, they should consult the database to see if another Member State has denied an essentially similar transaction, and if so, consult the Member State(s) which issued the denial(s).

1.4.11 If a Member State is not sure whether or not a DN on the central database constitutes an ‘essentially identical transaction’; it should initiate a consultation in order to clarify the situation.

1.4.12 Consultations shall be sent via COREU in English or French, addressed to the Member State who has issued the DN, and copied to all other Member States. The message will be in the following format:

“[Member State X] would be grateful for further information from [Member State Y] on EU Code of Conduct denial notification [identification number and destination concerned], as we are considering a relevantly similar licence application. Under the Users’ Guide of the Code of Conduct, we hereby request a response on or before [deadline date]. It will be considered that there has been no response unless we receive a reply by this date. For further information please contact [name, telephone number, e-mail address].”

1.4.13 The deadline is 3 weeks from the date of transmission of the consultation request, unless otherwise agreed between the parties concerned. If the consulted Member State has not responded within this time, it is presumed to have no objection to the licence application.

1.4.14 If a Member State’s refusal was based on intelligence information, it may choose to state that *“The refusal was based on information from sensitive sources”*. The consulting Member State would then usually refrain from asking for further details about the source of this information.

1.4.15 The consulted Member State may, within the 3 week period, request an additional extension of one week. This should be requested as soon as practicable.

1.4.16 Whilst the initial consultation must be made in the manner set out above, Member States may continue the consultation through any jointly agreed format. However, the consulted Member State should provide a full explanation of this grounds for its refusal.

1.4.17 EU Member States will keep such denials and consultations confidential. They will treat them in the appropriate manner and not use them for commercial advantage.

After the consultation has ended

1.4.18 The consulting Member State shall inform all Member States, by COREU, of its decision on the licence application, including a brief statement of its reasoning. The consulting Member State should send this notification within 3 weeks of reaching a decision.

Licences for brokering, transit or transshipment, and intangible transfers of technology

1.4.19 All of the above procedures for the circulation, handling and storage of DNs, consultations and post-consultation actions (paragraphs 1.4.1 – 1.4.18), should also be followed in the case of DNs for brokering, transit and transshipment licences and licences for intangible transfers of technology.

1.4.20 All Member States which have laws on brokering and operate a licensing system for brokering transactions should notify denials in the same way as for export licence denials in accordance with and to the extent permitted by their national legislation and practice. Brokering DNs should be recorded on a separate database by the Council Secretariat, which will circulate it, together with the export licence DN database, on a monthly basis.

CHAPTER 2 - LICENSING PRACTICES

Section 1: Best practices in the area of end-user certificates

2.1.1 There is a common core of elements that should be in an end-user certificate when one is required by a Member State in relation to an export of items on the EU Common Military List. There are also some elements which might be required by a Member State, at its discretion.

2.1.2 The end-user certificate should at a minimum set out the following details:

- exporter's details (at least name, address and business name);
- end-user's details (at least name, address and business name). In the case of an export to a firm which resells the goods on the local market, the firm will be regarded as the end-user;
- country of final destination;
- a description of the goods being exported (type, characteristics), or reference to the contract concluded with the authorities of the country of final destination;
- quantity and/or value of the exported goods;
- signature, name and position of the end-user;
- the date of the end-user certificate;
- end-use and/or non re-export clause, where appropriate;
- indication of the end-use of the goods;

- an undertaking, where appropriate, that the goods being exported will not be used for purposes other than the declared use;
- an undertaking, where appropriate, that the goods will not be used in the development, production or use of chemical, biological or nuclear weapons or for missiles capable of delivering such weapons.

2.1.3 The elements which *might* be required by a Member State, at their discretion, are *inter alia*:

- a clause prohibiting re-export of the goods covered in the end-user certificate. Such a clause could, among other things:
 - contain a pure and simple ban on re-export;
 - provide that re-export will be subject to agreement in writing of the authorities of the original exporting country;
 - allow for re-export without the prior authorisation of the authorities of the exporting country to certain countries identified in the end-user certificate;
- full details, where appropriate, of the intermediary;
- if the end-user certificate comes from the government of the country of destination of the goods, the certificate will be authenticated by the authorities of the exporting country in order to check the authenticity of the signature and the capacity of the signatory to make commitments on behalf of its government;
- a commitment by the final consignee to provide the exporting State with a Delivery Verification certificate upon request.

Section 2: Assessment of applications for incorporation and re-export

2.2.1 As with all licence applications, Member States shall fully apply the Code of Conduct to licence applications for goods where it is understood that the goods are to be incorporated into products for re-export. However, in assessing such applications, Member States will also have regard inter alia to:

- (i) the export control policies and effectiveness of the export control system of the incorporating country;
- (ii) the importance of their defence and security relationship with that country;
- (iii) the materiality and significance of the goods in relation to the goods into which they are to be incorporated, and in relation to any end-use of the finished products which might give rise to concern;
- (iv) the ease with which the goods, or significant parts of them, could be removed from the goods into which they are to be incorporated;
- (v) the standing entity to which the goods are to be exported.

Section 3: The export of controlled equipment for humanitarian purposes

2.3.1 There are occasions on which Member States consider permitting the export of items on the Common Military List for humanitarian purposes in circumstances that might otherwise lead to a denial on the basis of the criteria in the Code of Conduct. In post-conflict areas, certain items can make important contributions to the safety of the civilian population and to economic reconstruction. Such exports are not necessarily inconsistent with the criteria. These exports, like all others, will be considered on a case-by-case basis. Member States will require adequate safeguards against misuse of such exports and, where appropriate, provisions for repatriation of the equipment.

Section 4: Definitions

2.4.1 The following definitions apply for the purposes of the Code of Conduct and Operative Provisions:

2.4.2 - 'Transit': movements in which the goods (military equipment) merely pass through the territory of a Member State

- Transshipment: transit involving the physical operation of unloading goods from the importing means of transport followed by a reloading (generally) onto another exporting means of transport

2.4.3 As defined in Article 2 of Council Common Position 2003/468/CFSP,

- 'Brokering activities' are activities of persons and entities:
 - negotiating or arranging transactions that may involve the transfer of items on the EU Common Military List from a third country to any other third country; or
 - who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country.

2.4.4 - 'Export licence' is a formal authorisation issued by the national licensing authority to export or transfer military equipment on a temporary or definitive basis. Export licences include:

- licences for physical exports, including where these are for the purpose of licensed production of military equipment;
- brokering licences;
- transit or transshipment licences;
- licences for any intangible transfers of software and technology by means such as electronic media, fax or telephone.

Given the wide divergence in procedures for the processing of applications by the national licensing authorities of Member States, information exchange obligations (e.g. denial notifications) should, where appropriate, be fulfilled at the pre-licence stage, e.g. for preliminary licences and licences to conduct marketing activities or contract negotiations.

Member States' legislation will indicate in which case an export licence is required."

CHAPTER 3 - CRITERIA GUIDANCE

Introduction to all criteria best practices

The purpose of these best practices is to achieve greater consistency among Member States in the application of the criteria of the EU Code of Conduct on Arms Exports by identifying factors to be considered when assessing export licence applications. They are intended to share best practice in the interpretation of the criteria rather than to constitute a set of instructions; individual judgement is still an essential part of the process, and Member States are fully entitled to apply their own interpretations. The best practices are for the use of export licensing officials and other officials in government departments and agencies whose expertise inter alia in regional, legal (e.g. human rights law, public international law), technical, development as well as security and military related questions should inform the decision-making process.

These best practices will be reviewed regularly, or at the request of one or more Member States, or as a result of any future changes to the wording of the Code of Conduct

Section 1: Best practices for the interpretation of Criterion 2

How to apply Criterion 2

3.1.1 The EU Code of Conduct applies to ALL arms exports by Member States. Thus a priori Criterion 2 applies to exports to all recipient countries without any distinction. However, because Criterion 2 establishes a link with the respect for human rights by the recipient country, special attention should be given to arms exports to countries where there are indications of human rights violations.

3.1.2 **Information sources:** A common EU base of information sources available to all Member States consists of EU HOMs reports, EU human rights fact sheets and in certain cases EU Council statements/conclusions on the respective recipient countries. These documents normally already take into account information available from other international bodies and information sources. However, because of the essential case-by-case analysis and the specificity of each licence application, additional information might be obtained as appropriate from:

- Member States diplomatic missions and other governmental institutions,
- Documentation from the United Nations, the ICRC and other international and regional bodies,
- Reports from international NGOs,
- Reports from local human rights NGOs and other reliable local sources,
- Information from civil society.

Furthermore the EU has designed and adopted specific guidelines to serve as a framework for protecting and promoting human rights in third countries, such as the Guidelines on the death penalty, torture, children and armed conflict and human rights defenders. A non-exhaustive list of relevant internet websites is contained in Annex I.

Elements to consider when forming a judgement

3.1.3 **Key concepts:** Examination of Criterion 2 reveals several key concepts which should be taken into account in any assessment, and which are highlighted in the following text.

“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.”

In assessing whether there is a clear risk that a proposed export might be used for internal repression Member States should consider the current and past record of the proposed end- user with regard to respect for human rights and that of the recipient country in general. The latter includes the policy line of recipient country’s government; recent significant developments, including inter alia impact of "fight against terrorism”; effective protection of human rights in constitution; human rights training among key actors (e.g. law enforcement agencies); impunity for human rights violations; independent monitoring bodies and national institutions for promotion or protection of human rights.

3.1.4. ***International human rights instruments:*** A non-exhaustive list of the main international and regional instruments is contained in Annex II.

These instruments and their respective additional protocols represent the main international norms and standards in the areas of human rights and fundamental freedoms. They guarantee civil and political rights (such as inter alia right to life; prohibition of slavery and forced labour; liberty and security of person; equality before the law; fair trial and effective remedy; freedom of expression and information; freedom of assembly; freedom of movement; freedom of thought, conscience and religion; right to seek and enjoy asylum); women’s rights; children’s rights; non-discrimination; rights of minorities and indigenous peoples; economic, social and cultural rights.

3.1.5 ***The recipient country's attitude:*** The following indicators should, as appropriate, be taken into account when assessing a country's respect for, and observance of all human rights and fundamental freedoms:

- the commitment of the recipient country's Government to respect and improve human rights and to bring human rights violators to justice
- the implementation record of relevant international and regional human rights instruments through national policy and practice
- the ratification record of the country in question with regard to relevant international and regional human rights instruments
- the degree of cooperation with international and regional human rights mechanisms (eg UN treaty bodies and special procedures)
- the political will to discuss domestic human rights issues in a transparent manner, for instance in the form of bilateral or multilateral dialogues, with the EU or with other partners including civil society

3.1.6 ***Serious violations of human rights:*** In the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in Vienna in June 1993, the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law was reaffirmed. Equally reaffirmed were the principles of universality, indivisibility, interdependence and interrelatedness of all human rights.

Regarding the qualification of a human rights violation as "serious", each situation has to be assessed on its own merits and on a case-by-case basis, taking into account all relevant aspects. Relevant factor in the assessment is the character/nature and consequences of the actual violation in question. Systematic and/or widespread violations of human rights underline the seriousness of the human rights situation. However, violations do not have to be systematic or widespread in order to be considered as "serious" for the criterion 2 analysis. According to Criterion 2, a major factor in the analysis is whether the competent bodies of the UN, the EU or the Council of Europe (as listed in Annex III) have established that serious violations of human rights have taken place in the recipient country. In this respect it is not a prerequisite that these competent bodies explicitly use the term "serious" themselves; it is sufficient that they establish that violations have occurred. The final assessment whether these violations are considered to be serious in this context must be done by Member States. Likewise, the absence of a decision by these bodies should not preclude Member States from the possibility of making an independent assessment as to whether such serious violations have occurred.

3.1.7 *Internal repression, clear risk, "might", case by case:* The text of the Criterion gives an ample set of examples of what constitutes internal repression. But assessing whether or not there is a clear risk that the proposed export might be used to commit or facilitate such acts requires detailed analysis. The combination of “clear risk” and “might” in the text should be noted. This requires a lower burden of evidence than a clear risk that equipment will be used for internal repression.

An analysis of clear risk must be based upon a case-by-case consideration of available evidence of the history and current prevailing circumstances in the recipient state/regarding the proposed end-user, as well as any identifiable trends and/or future events that might reasonably be expected to precipitate conditions that might lead to repressive actions (e.g. forthcoming elections). Some initial questions that might be asked are:

- Has the behaviour of the recipient state/ the proposed end-user been highlighted negatively in EU Council statements/conclusions?
- Have concerns been raised in recent reports from EU Heads of Mission in the recipient state/regarding the proposed end-user?
- Have other international or regional bodies (e.g. UN, Council of Europe or OSCE) raised concerns?
- Are there consistent reports of concern from local or international NGOs and the media?

It will be important to give particular weight to the current situation in the recipient state before confirming any analysis. It may be the case that abuses have occurred in the past but that the recipient state has taken steps to change practices in response to domestic or international pressure, or an internal change in government. It might be asked:

- Has the recipient state agreed to external or other independent monitoring and/or investigations of alleged repressive acts?
- If so, how has it reacted to/implemented any findings?
- Has the government of the recipient state changed in manner that gives confidence of a change in policy/practice?
- Are there any EU or other multilateral or bilateral programmes in place aimed at bringing about change/reform?

Mitigating factors such as improved openness and an on-going process of dialogue to address human rights concerns in the recipient state may lead to the possibility of a more positive assessment. However, it is important to recognise that a lengthy passage of time since any highly publicised instances of repression in a recipient state is not on its own a reliable measure of the absence of clear risk. There is no substitute for up-to-date information from reliable data sources if a proper case-by-case assessment is to be made.

3.1.8 ***The nature of the equipment*** is an important consideration in any application. It is vital that any assessment of equipment under Criterion 2 be realistic (i.e. are the items in question really useable as a tool of repression?). But it is also important to recognise that a wide variety of equipment has a track record of use to commit or facilitate repressive acts. Items such as Armoured Personnel Carriers (APCs), body armour and communications/surveillance equipment can have a strong role in facilitating repression.

3.1.9 ***The end-user*** is also a strongly linked consideration. If intended for the police or security forces, it is important to establish to exactly which branch of these forces in a recipient state the items are to be delivered. It should also be noted that there is no strict rule as to which branches of the security apparatus may have a role in repression. For example, the army may have a role in many states, while in others it may have no record of such a role.

Some initial questions might include:

- Is there a record of this equipment being used for repression in the recipient state or elsewhere?
- If not, what is the possibility of it being used in the future?
- Who is the end-user?
- What is the end-user's role in the recipient state?
- Has the end-user been involved in repression?
- Are there any relevant reports on such involvement?

3.1.10 ***Diversion***. The question of internal diversion also needs consideration. There may be clues to this in the nature of the equipment and the end-user. It might be asked:

- Does the stated end-user have a legitimate need for this equipment? Or are the items in question more appropriate to another branch of the security apparatus?
- Would we issue a licence if the end-user were another part of the security apparatus of the recipient state?
- Do the different branches of the security forces have separate procurement channels? Is there a possibility that equipment might be redirected to a different branch?

3.1.11 *Arriving at a judgement.* Based on information and assessment of elements suggested in paragraphs 3.1.4 - 3.1.10 above Member States will reach a judgement on whether the proposed export should be denied on the basis of Criterion 2.

INTERNET WEBSITES OF RELEVANT INFORMATION SOURCES INCLUDE:

Office of the United Nations High Commissioner for Human Rights (www.ohchr.org)

United Nations (www.un.org; <http://untreaty.un.org>)

International Committee of the Red Cross (www.icrc.org)

Council of Europe (www.coe.int)

European Union (<http://europa.eu>)

Organization for Security and Co-operation in Europe (www.osce.org)

Organization of American States (www.oas.org)

African Union (www.africa-union.org)

Amnesty International (www.amnesty.org)

Human Rights Watch (www.hrw.org)

Fédération internationale des ligues des droits de l'homme (www.fidh.org)

Organisation mondiale contre la torture (www.omct.org)

Association for the Prevention of Torture (www.appt.ch)

International Commission of Jurists (www.icj.org)

OTHER INFORMATION SOURCES INCLUDE:

International Criminal Court and ad hoc tribunals

International agencies operating in the recipient state

International Crisis Group

Coalition to Stop the Use of Child Soldiers

Small Arms Survey

SIPRI and other research institutes

Military manuals (instructions to armed forces)

CORE INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

UNITED NATIONS:

International Covenant on Economic, Social and Cultural Rights
(CESCR);

International Covenant on Civil and Political Rights (CPPR);

Optional Protocol to the International Covenant on Civil and Political Rights (CPPR-OP1);

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition
of the death penalty (CPPR-OP2-DP);

International Convention on the Elimination of All Forms of Racial Discrimination (CERD);

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women
(CEDAW-OP);

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);

Optional Protocol to the Convention Against Torture (CAT-OP);

Convention on the Rights of the Child (CRC);

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed
conflict (CRC-OP-AC);

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and
child pornography (CRC-OP-SC);

1951 Convention on the Status of Refugees;

1967 Protocol relating to the status of refugees;

Rome Statute of the International Criminal Court

REGIONAL INSTRUMENTS:

WITH RESPECT TO MEMBER STATES OF THE COUNCIL OF EUROPE:

European Convention on Human Rights, including protocols 6 and 13 concerning the abolition of the death
penalty;

European Convention for the Prevention of Torture;

WITH RESPECT TO MEMBER STATES OF THE ORGANIZATION OF AMERICAN STATES:

Inter-American Convention on Human Rights;

Additional Protocol to the American Convention of Human Rights in the area of Economic, Social and Cultural Rights, Protocol of San Salvador;

Protocol to the American Convention on Human Rights to abolish the death penalty;

Inter-American Convention on Forced Disappearance of Persons;

Inter-American Convention to Prevent and Punish Torture;

WITH RESPECT TO MEMBER STATES OF THE AFRICAN UNION:

African Charter on Human and People's Rights;

Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights;

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa;

African Charter on Rights and Welfare of the Child;

WITH RESPECT TO MEMBER STATES OF THE ARAB LEAGUE:

Arab Charter on Human Rights

COMPETENT BODIES OF THE UN, THE COUNCIL OF EUROPE OR THE EU TO ESTABLISH
SERIOUS VIOLATIONS OF HUMAN RIGHTS ARE:

UNITED NATIONS:

The General Assembly (including country-specific resolutions)

The Security Council

Human Rights Council and the Economic and Social Council

The Office of the United Nations High Commissioner for Human Rights

Special procedures and other mandate-holders

The treaty bodies

COUNCIL OF EUROPE:

The Ministerial Committee of the Council of Europe

Parliamentary Assembly

European Court of Human Rights

The Council of Europe Commissioner for Human Rights

European Commission against Racism and Intolerance (ECRI)

European Committee for the Prevention of Torture (CPT)

EUROPEAN UNION:

The European Council

Statements by CFSP bodies

Country-specific common positions and declarations of the EU

EU Annual human rights report

EU HOMs human rights reports and EU human rights fact sheets

Resolutions and declarations by the European Parliament

Section 2: Best practices for the interpretation of Criterion 3

How to apply Criterion 3

3.2.1 The EU Code of Conduct applies to all exports, by Member States, of military equipment and technology included in the Common Military List, and dual use items as specified in operative paragraph 6 of the Code of Conduct. Criterion 3 applies to all recipient countries without distinction. However, these best practices follow the principle that if there is an armed conflict or if there are internal tensions in the country of destination, a careful analysis should be carried out of the risk of this proposed export provoking or prolonging the conflict or aggravating the existing tensions and escalating them into a wider conflict. If the analysis shows a risk of this happening, a restrictive approach should be adopted towards the export licence under consideration. Particular attention should be given to the role of the end-user in this conflict. All export licences should be assessed on a case-by-case basis and consideration should be given to criterion 3 where there are concerns over the existence of tensions or armed conflicts.

3.2.2 **Information sources:** Information on whether there is a risk the equipment would provoke or prolong armed conflicts, or aggravate existing tensions or conflicts in the country of final destination, should be sought from a Members States' mission in the country concerned, as well as from the Foreign Ministry country desk.

A common EU base of information sources available to all Member States consists of EU HOMs reports, EU reports, and in some cases, EU Council statements/conclusions on the respective recipient country. The EU Watchlist contains destinations that may deserve particular attention with respect to Criterion 3. When consulting other Member States on their denials to an area of concern, Member States are encouraged to share their analysis and interpretation of the internal situation in the country of final destination.

Wider Internet and intelligence reports – from national intelligence services - are also helpful, especially when assessing the possible increase in capabilities.

Additional information can be obtained from:

- Local UN/EU/OSCE missions
- Documentation from the UN (UNGA, UNSC), International Criminal Court and/or other international and regional bodies;
- Research institutes (e.g. SIPRI)
- Reports from international NGOs;
- Information from local and regional NGOs / civil society.

A non-exhaustive list of relevant internet websites is contained as Annex I.

Elements to consider when forming a judgement

3.2.3 **Key concepts:** Examination of Criterion 3 reveals several key concepts which should be taken into account in any assessment, and which are highlighted below.

Internal situation

“Internal situation” refers to the economic, social and political developments and stability within the borders of the country of final destination. The EU Code of Conduct elsewhere also refers to the “country of final destination” as the “recipient country”.

Function of the existence of tensions or armed conflicts

“Tensions” refers to unfriendly or hateful relations between different groups, or groups of individuals, of the society based either on race, colour, sex, language, religion, political or other opinion, national or social origin, interpretation of historic events, differences in economic wellbeing or ownership of property, sexual orientation, or other factors. Tensions could be at the origin of tumult or violent actions, or a cause for the creation of private militia not controlled by the State.

“Armed conflicts” refers to the escalation of the tensions between above mentioned groups to the level in which any of the groups uses arms against others.

In considering an export licence application the competent authority must assess the internal situation of the country of destination; possible participation and role of the end-user in the internal conflict or tensions and the probable use of the proposed export in the conflict. In assessing the potential risks in the recipient country the competent authority might ask the following questions:

- What is the end-use of the proposed export (military technology or equipment)? Would the export be used to enforce internal security or to continue with the hostilities?
- Is the military equipment or technology intended to support internationally-sanctioned peace-keeping/peace enforcing operations or humanitarian interventions?
- Is the end-user participating or closely related to a party involved in the armed conflict within the country? What is the role of the end-user in the conflict?
- If components or spares are being requested, is the recipient state known to operate the relevant system in armed conflict in the country?
- Have there been recent reports that the existing tensions might be aggravating? Is there a risk that the existing tensions might turn into an armed conflict when one or more of the participants gain access to the military equipment and technology to be exported?
- Is the recipient country subject to regional or UN embargoes because of the internal situation in the country (see also criterion1)?

The nature of the equipment

The nature of equipment will impact the judgement of whether to approve or refuse a licence. Consideration should be given as to whether the equipment or technology to be exported actually is related, directly or indirectly, to the tensions or conflicts in the country of final destination. This will be all the more important when there already is an existing armed conflict.

Some questions to consider might be:

- Is the export in nature such, that it is or could be used in an armed conflict within the country of final destination?
- Is there a risk that the existing internal tensions might turn into an armed conflict when the proposed end-user obtains access to this military equipment and technology?

The end-user

The end-user also plays an important role in the analysis. If there are concerns related to criterion 3, it is important to establish exactly for which branch of the armed forces, police or security forces the export is intended. For example, in a recipient country the army and police might be involved in an armed conflict in which the navy has no role. In this respect, the risk of internal diversion should also be considered.

More complex cases arise when equipment may be going to a research institute or private company. Here a judgement should be made on the likelihood of diversion, and the views on criterion 3 should be based on the other criteria, specifically concerns related to criterion 7, the risk of diversion.

The following might be considered:

- What is the end-user's role in the recipient state? Is the end-user part of the problem, or rather attempting to be part of the solution?
- Is the end-user involved in the internal armed conflict or tensions?
- Are there any relevant reports of such involvement?

3.2.4 *Arriving at a judgement*

Based on information and the over-all risk assessment as suggested in the paragraphs above, Member States will reach a judgement on whether the proposed export should be denied on the basis of Criterion 3.

Non-exhaustive list of Internet websites of relevant information sources include:

United Nations

(www.un.org/peace/)

1540 Committee

(<http://disarmament2.un.org/Committee1540>)

OSCE/arms controls

(www.osce.org/activities/13014.html)

European Union

(www.consilium.europa.eu)

Section 3: Best practices for the interpretation of Criterion 4

How to apply Criterion 4

3.3.1 The EU Code of Conduct applies to all exports by Member States of military equipment and technology included in the Common Military List and dual use items as specified in operative paragraph 6 of the Code of Conduct. Criterion 4 applies to all recipient countries without distinction. However, these best practices follow the principle that where there is a greater risk of regional conflict, greater scrutiny of criterion 4 is required than in cases where there is a lesser risk. All export licences should be assessed on a case-by-case basis and consideration given to criterion 4 where there are concerns over the preservation of peace, security and stability in the region.

The purpose of criterion 4 is to ensure that any export does not encourage, aggravate, provoke or prolong conflicts or tensions in the region of the intended recipient country. The criterion makes a distinction between the intention to use the proposed export for aggressive as opposed to defensive purposes. The criterion is not intended to preclude exports to countries that are (potential) victims of aggression or a threat of aggression. A careful assessment would need to be carried out as to whether there are sound indications of an intention by the intended recipient country to use the proposed export to attack, potentially attack or threaten to attack another country.

3.3.2 *Information sources*

Information on whether the equipment is a risk to the preservation of the regional peace, security and stability should be sought from a Member States' mission in the country concerned, as well as from Foreign Ministry country desks; both desks responsible for the recipient country and those responsible for the threatened/aggressor country.

A common EU base of information sources available to all Member States consists of EU HOMs reports, EU reports, and in some cases, EU Council statements/conclusions on the respective recipient country and the region. Extensive use of the EU SitCen (Country Risk Assessment) could be made. The EU Watchlist contains destinations that may deserve particular attention with respect to criterion 4. When consulting other Member States on their denials to an area of concern, the Member States are encouraged to share their analysis and interpretation of the regional situation.

The wider Internet and intelligence reports – from national intelligence services - are also helpful, especially when assessing the possible increase in capabilities.

Additional information can be obtained from:

- Local UN/EU/OSCE missions
- Documentation from the UN (UNGA, UNSC, UN Arms register), International Criminal Court and/or other international and regional bodies;
- Research institutes (e.g. SIPRI)
- Reports from international NGOs;
- Information from local and regional NGOs / civil society.

A non-exhaustive list of relevant internet websites is contained as Annex I.

Elements to consider when forming a judgement

3.3.3 *Key concepts*

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.

All nations have the right to defend themselves according to the UN Charter. This criterion addresses the issue of whether the recipient state has intentions to use or threaten to use the proposed export aggressively against another country. An assessment should therefore be made of the recipient's intentions, as well as whether the import is an appropriate and proportionate response to the recipient country's need to defend itself, to ensure internal security, and assist in international peace-keeping and humanitarian operations.

Licence applications to sensitive and potentially sensitive destinations are carefully assessed on a case-by-case basis, especially when the export destination regards a country that is or has been involved in armed conflict. When analysing whether there is a clear risk, the history of armed conflict and the current prevailing circumstances in the recipient state and the region should be

taken into consideration, as well as any identifiable trends and/or future events that might reasonably be expected to heighten tensions or lead to aggressive actions.

The wording ‘will not issue’ in this criterion means that if in the assessment of a licence application it has been established that there is a clear risk that the proposed export would be used aggressively against another country or to assert by force a territorial claim, the export licence must be denied regardless of the outcome of the analysis with respect to the other criteria of the Code of Conduct, or any other considerations.

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*

For the purposes of this element, a judgement will have to be made as to whether there is a clear risk that this equipment will be used in an existing armed conflict between the recipient country and its neighbours or another conflict in the region. Where there is no armed conflict, the regional situation should be considered. Growing tensions in the region, increased threats of conflict or weakly held peace arrangements are examples of where there is a likelihood of a conflict, putting the preservation of the regional peace, security and stability at risk. In these cases, a judgement would need to be made as to whether there is a clear risk that supplying this piece of equipment would hasten the advent of conflict, for instance by giving the recipient country an advantage over its neighbours or others in the region. Where the equipment to be exported will add to the military capability of the recipient country, a judgement will have to be made as to whether there is a clear risk that this equipment will prolong an existing conflict or bring simmering tensions into armed conflict.

The following questions are indicators that may be taken into consideration as appropriate:

- Is there an existing conflict in the region?
- Is the current situation in the region likely to lead to an armed conflict?
- Is the threat of conflict theoretical / unlikely or is it a clear and present risk?

- (b) *a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;*

An assessment should be made on whether there is a clear risk that the recipient country will by armed conflict or threat of force assert a territorial claim on a neighbouring country. Such a territorial claim might be stated as an official position or be voiced by official representatives or relevant political forces of the recipient country and could relate to land, sea or arial space. The neighbouring country does not have to be the direct neighbour of the recipient country.

That there have been recent claims by the recipient country on another's territory should be factored in, when making a judgement. Where the recipient country has tried in the past to pursue by force a territorial claim or is threatening to pursue a territorial claim, a judgement should be made as to whether the nature of this equipment will let it seem probable, that it would be used in such a case and as to whether it would give the recipient country an additional capability to try to pursue again this claim by force, thus destabilising the region.

The following questions are indicators that may be taken into consideration as appropriate:

- Is the recipient country pursuing a claim against the territory of a neighbouring country?
- Has a territorial claim led to conflict in the region, or underlying tensions between the recipient country and its neighbours?
- Has the recipient country tried to resolve the issue through peaceful means, has it tried in the past to assert by force its territorial claim, or has it threatened to pursue its territorial claim by force?

- (c) *whether the equipment would be likely to be used other than for the legitimate national security and defence of the recipient*

When assessing this element of Criterion 4, the exporting state should estimate whether the recipient state has expressed an aggressive military doctrine, and the likelihood of the requested equipment being used in accordance with this doctrine. The exporting state should also estimate whether the requested equipment is compatible with, or constitutes a necessary addition to or replacement of, existing armament systems in the defence forces of the recipient state. It may also be relevant to take into account the quantity and quality of the equipment to be exported.

(d) *the need not to affect adversely regional stability in any significant way*

A judgement on this criterion will have to be made on whether supplying the recipient country with the equipment will significantly improve their military capability, and if it does, would a neighbouring country as a result be put under threat of conflict. Where there are existing tensions in the region, would supplying this equipment enhance the recipient country's capability by introducing a new piece of equipment into the region which could threaten a neighbouring country.

The following questions are indicators that may if appropriate be taken into consideration:

- Why does the recipient wish to acquire the equipment or technology?
- Is this equipment simply a replacement or for maintenance for existing items that might be old or in disrepair, or is the recipient developing new capabilities, such as a significantly improved air strike capability?

The nature of the equipment

The nature of the equipment to be exported will impact the judgement of whether to approve or refuse a licence. Consideration should be given as to whether there is a clear risk that the equipment can be used in a conflict between the recipient country and its neighbours. This will be used to a greater extent where there are existing regional tensions or an existing armed conflict. Where there are existing tensions, the type of equipment is all the more important as the equipment could significantly increase the recipient country's capability to move to armed conflict or threaten armed conflict. Could a neighbouring country be moved to increase its arms imports due the export of this equipment? Given tensions in certain regions, an export could be seen as an increase in threat to a neighbouring country, and thus consideration of this question becomes vital.

Some questions to consider might be:

- Would the recipient's capability be enhanced by the export, and if so, would it be enhanced to the point where an existing power balance would be upset? Given the circumstances in the recipient country and its intentions, would an enhanced capability present a clear risk of hastening the advent of conflict?

- Would a neighbouring country feel threatened by the military technology or equipment to be exported?
- Is there a risk that the existing regional tensions might turn into an armed conflict when one or more of the participants obtains access to this military equipment and technology?
- Is the export in nature such, that it is or could be used in an armed conflict within the region? What is the likelihood of this equipment being used in a conflict?

The end-user

A judgement would have to be made on whether the end user would allow this equipment to be used in a manner inconsistent to Criteria 4. If it is going directly to the military/government, a decision has to be made on whether the equipment will be used in any military action against another country.

More complex cases arise when equipment may be going to a research institute or private company. Here a judgement should be made on the likelihood of diversion, and views on criterion 4 should be based on the other criteria, specifically concerns related to criterion 7, the risk of diversion.

The following might be considered:

- Is the export likely to be deployed in conflict with a neighbouring state? Or would it most likely go to the Police / a UN contribution, or some other branch of the security forces not directly connected to the criterion 4 concern?

3.3.4 ***Arriving at a judgement:*** Based on the information and assessment of elements suggested in the guidance above, Member States will reach a judgement on whether the proposed export should be denied on the basis of Criterion 4.

Non-exhaustive list of Internet websites of relevant information sources include:

United Nations

(www.un.org/peace/)

1540 Committee

(<http://disarmament2.un.org/Committee1540>)

OSCE/arms controls

(www.osce.org/activities/13014.html)

European Union

(www.consilium.europa.eu)

Section 4: Best practices for the interpretation of Criterion 7

How to apply Criterion 7

3.4.1 The EU Code of Conduct applies to all arms exports by Member States. Thus a priori Criterion 7 applies to exports to all recipient countries without any distinction. However, these practices follow the principle that cases where there is a higher potential risk should be subject to a greater degree of scrutiny than cases with less risk. Evaluation of individual export license applications should be done on a case-by-case basis and include an over-all risk analysis, based on the potential risk level in the recipient state, the reliability of those involved in the transactions, the nature of the goods to be transferred and the intended end-use. Member States are encouraged to exchange information regarding countries of concern on a case-by-case basis through the co-operation in COARM, or by other channels. In addition, improved documentation in diversion risk-assessment at the licensing stage would make diversion more difficult. Effective systems of end-user control contribute to the prevention of undesirable diversion or re-export of military equipment and military technology. End-user certificates and their authentication at the licensing stage should play a central role in counter-diversion policies. (see also Chapter 2). Nevertheless, using end-user certificates cannot substitute for a complete risk assessment of the situation in the particular case.

3.4.2 **Information sources.** Information on diversionary risks should be sought from a wide variety of sources. A common EU base of information sources available to all Member States consists of EU HOMs reports, Open-source defence publications and Export Control regimes information exchanges and websites as well as reports from relevant Security Council Committees, in particular Security Council Committee established pursuant to resolution 1540 (2004); additional information might be obtained as appropriate from Member States diplomatic missions and other governmental institutions such as customs, police and other law enforcement services as well as those providing Intelligence information or through exchange of views among Member States regarding export to the country in question. A non-exhaustive list of relevant internet websites is contained in Annex I.

ELEMENTS TO CONSIDER WHEN FORMING A JUDGEMENT

3.4.3 **Key concepts.** Criterion 7 refers to a broad field of overarching issues which should be taken into account in any assessment. It should be kept in mind that diversion can be initiated at various levels, can take place within a country or can involve detour or retransfer to a third “unauthorised” country. It can be of possession (end-user) and/or function (end-use).

“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)”.

Ad (a) The legitimate defence and domestic security interests of the recipient country, including any involvement in United Nations or other peace keeping activity.

All nations have the right to defend themselves according to the UN Charter. Nonetheless, an assessment should be made of whether the import is an appropriate and proportionate response to the recipient country’s need to defend itself, to ensure internal security, or assist in United Nations or other peace-keeping activity. The following questions might be asked:

- Is there a plausible threat to security that the planned arms import could meet?
- Are the armed forces equipped to meet such a threat?
- What will the destination be of the imported goods after the participation in UN or other peace-keeping activity has been terminated?

Ad (b) The technical capability of the recipient country to use the equipment;

The “technical capability of a recipient country to use the equipment” can be a key indicator of the “existence of a risk” of diversion. A proposed export that appears technically beyond what one might normally expect to be deployed by the recipient state may be an indication that a third-country end-user is in fact the intended final destination. This concept applies equally to complete goods and systems, as well as components and spares. The export of components and spares where there is no evidence that the recipient country operates the completed system in question may be a clear indicator of other intent.

Some questions that might be asked are:

- Is the proposed export high-tech in nature?
- If so, does the recipient have access to, or are they investing in, the appropriate technical backup to support the sale?
- Does the proposed export fit with the defence profile of the recipient state?
- If components or spares are being requested, is the recipient state known to operate the relevant system that incorporates these items?

Ad (c) The capability of the recipient country to exert effective export controls;

Recipient states' adherence to international export control norms can be a positive indicator against either deliberate or unintentional diversion. Some questions that might be asked are:

- Is the recipient state a signatory or member of key international export control treaties, arrangements or regimes (e.g. Wassenaar)?
- Does the recipient country report to the UN Register of Conventional Arms; if not, why not?
- Has the recipient country aligned itself with the principles of the EU Code of Conduct or similar regional arrangements?
- Does the recipient country apply effective export and transfer controls encompassing dedicated control legislation and licensing arrangements that conform to international norms?
- Is stockpile management and security of sufficient standard?
- Are there effective legal instruments and administrative measures in place to prevent and combat corruption?
- Is the recipient state in the proximity of conflict zones or are there on-going tensions or other factors within the recipient state that might mitigate against the reliable enforcement of their export control provisions?
- Does the country of stated end-use have any history of diversion of arms, including the re-export of surplus equipment to countries of concern?

Ad (d) The risk of arms being re-exported or diverted to terrorist organisations (anti-terrorist equipment would need particularly careful consideration in this context);

In assessing the potential risk in the recipient state, the competent authority might ask the following questions:

- Does the recipient state have a record of past or present terrorist activities?
- Are there any known or suspected links to terrorist organisations (or even individual terrorists) or any reason to suspect that entities within the recipient state participate in the financing of terrorism?
- Is there any other reason to suspect that the arms might be re-exported or diverted to terrorist organisations?

If the answer is “yes” to one or more of the questions asked, a higher degree of scrutiny is necessary. The competent authority should consult with open and other sources when continuing that risk assessment.

In addition to the considerations pursuant to lit. a) – d) the competent authority should also assess the reliability of the specific consignee:

- Is the equipment intended for the government or an individual company?

If the importer is the government:

- Is the government/the specific government branch reliable in this respect?
- Has the government/the specific government branch honoured previous end-user certificates?
- Is there any reason to suspect that the government/the specific government branch is not reliable?

If the importer is a company:

- Is the company known?
- Is the company authorised by the government in the recipient state?
- Has the company previously been involved in undesirable transactions?

3.4.4 ***Arriving at a judgement.*** Based on information and the over-all risk assessment as suggested in the paragraphs above Member States will reach a judgement on whether the proposed export should be denied on the basis of Criterion 7.

INTERNET WEBSITES OF RELEVANT INFORMATION SOURCES INCLUDE:

United Nations/conventional arms

(<http://disarmament.un.org/cab/register.html>)

Security Council Sanctions Committees

(<http://www.un.org/Docs/sc/committees/INTRO.htm>)

Security Council Counter Terrorism Committee

(<http://www.un.org/sc/ctc/>)

1540 Committee (<http://disarmament2.un.org/Committee1540>)

Global Programme against Corruption, UN Office on Drugs and Crime

(<http://www.unodc.org/unodc/corruption.html>)

United Nations Institute for Disarmament Research/UNIDIR

(www.unidir.org)

OSCE/arms control (<http://www.osce.org/activities/13014.html>)

European Union (www.consilium.europa.eu)

Wassenaar Arrangement (www.wassenaar.org)

Nuclear Suppliers Group (www.nuclearsuppliersgroup.org)

The Australia Group (www.australiagroup.net)

Zangger Committee (www.zanggercommittee.org)

MTCR (<http://www.mtcr.info>)

Jane's foreign report (www.foreignreport.com)

Jane's Defence (jdw.janes.com)

Small Arms Survey (www.smallarmssurvey.org)

Security Council Report, (www.securitycouncilreport.org)

International Action Network on Small Arms (<http://www.iansa.org>)

SIPRI (www.sipri.org)

How to apply Criterion 8

3.5.1 The EU Code of Conduct applies to all arms exports by Member States. Thus a priori Criterion 8 applies to exports to all recipient countries without any distinction. However, because Criterion 8 establishes a link with the sustainable development¹ of the recipient country, special attention should be given to arms exports to developing countries. It would be expected only to apply when the stated end-user is a government or other public sector entity, because it is only in respect of these end-users that the possibility of diverting scarce resources from social and other spending could occur. **Annex A** outlines a two-stage “filter” system to help Member States identify export licence applications which may require assessments against Criterion 8. Stage 1 identifies country-level development concerns, while Stage 2 focuses on whether the financial value of the licence application is significant to the recipient country.

3.5.2 **Information sources.** If the filter system outlined in paragraph 3 indicates that further analysis is required, **Annex B** lists a series of social and economic indicators for Member States to take into account. For each indicator it provides an information source. The recipient country’s performance against one or more of these indicators should not in itself determine the outcome of Member States’ licensing decisions. Rather these data should be used to form an evidence base which will contribute to the decision-making process. Paragraphs 6-12 outline elements of criterion 8 on which further judgement needs to be reached.

Elements to consider when forming a judgement

3.5.3 Criterion 8 refers to a number of broad, overarching issues which should be taken into account in any assessment, and which are highlighted in the following text.

*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**.*

¹ The Millennium Development Goals encapsulate sustainable development and include progress on goals related to poverty, education, gender equality, child mortality, maternal health, HIV/AIDS and other diseases, the environment and a global development partnership.

*Member States will take into account, in the light of information from relevant sources such as UNDP, 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**.*

Technical and Economic Capacity

3.5.4a **Economic capacity** refers to the impact of the arms import on the availability of the financial and economic resources of the recipient country for other purposes, in the immediate, medium and long term. In this regard, Member States might consider taking into account:

- both the capital cost of the arms purchase and the likely follow-on ‘life-cycle’ costs of related operation (e.g. ancillary systems and equipment), training and maintenance;
- whether the arms in question are additional to existing capabilities or are replacing them, and - where appropriate – the likely savings in operating costs of older systems;
- How the import will be financed by the recipient country² and how this might impact on its external debt and balance of payments situation.

3.5.4b **Technical capacity** refers to the ability of the recipient country to make effective use of the equipment in question, both in material and human terms. In this regard, Member States should consider the following questions:

² This needs to be considered because the payment methods could have detrimental macro-economic and sustainable development effects. For example if the purchase is by cash payment then it could seriously deplete a country's foreign exchange reserves, impeding any exchange rate management safety net, and also have short term negative effects on the balance of payments. If provided on credit (of any form) it will add to the recipient country's total debt burden – and this may already be at unsustainable levels.

- Does the recipient country have the military infrastructure to be able to make effective use of the equipment?
- Is similar equipment already in service well maintained?
- Are enough skilled personnel available to be able to use and maintain the equipment? ³

Legitimate Needs of Security and Defence

3.5.5 All nations have the right to defend themselves according to the UN Charter. Nonetheless, an assessment should be made of whether the import is an appropriate and proportionate response to the recipient country's need to defend itself, to ensure internal security, and assist in international peace-keeping and humanitarian operations. The following questions should be considered:

- Is there a plausible threat to security that the planned arms import could meet?
- Are the armed forces equipped to meet such a threat?
- Is the planned arms import a plausible priority considering the overall threat?

Least diversion for armaments of human and economic resources

3.5.6 What constitutes "least diversion" is a matter of judgement, taking all relevant factors into consideration. Member States should consider *inter alia* the following questions:

- Is the expenditure in line with the recipient country's Poverty Reduction Strategy or programmes supported by the International Financial Institutions (IFIs)?
- What are the levels of military expenditure in the recipient country? Has it been increasing in the last five years?
- How transparent are state military expenditures and procurement? What are the possibilities for democratic or public involvement in the state budget process?

³ For instance, are a high proportion of the country's engineers and technicians already working in the military sector? Is there a shortage of engineers and technicians in the civilian sector that could be aggravated through additional recruitment by the military sector?

- Is there a clear and consistent approach to military budgeting? Is there a well-defined defence policy and a clear articulation of a country's legitimate security needs?
- Are more cost-effective military systems available?

Relative levels of military and social expenditure

3.5.7 Member States should consider the following questions in assessing whether the purchase would significantly distort the level of military expenditure relative to social expenditure:

- What is the recipient country's level of military expenditure relative to its expenditure on health and education?
- What is the recipient country's military expenditure as a percentage of Gross Domestic Product (GDP)?
- Is there an upward trend in the ratio of military expenditure to health and education and to GDP over the last five years?
- If the country has high levels of military expenditure, does some of this "hide" social expenditure? (e.g. in highly militarised societies, the military may provide hospitals, welfare etc)
- Does the country have significant levels of "off-budget" military expenditure (i.e. is there significant military expenditure outside the normal processes of budgetary accountability and control)?

Aid Flows

3.5.8 Member States should take into account the level of aid flows to the importing country and their potential fungibility⁴.

- Is the country highly dependent on multilateral as well as EU and bilateral aid?
- What is the country's aid dependency as a proportion of Gross National Income?

⁴ Fungibility refers to the potential diversion of aid flows into inappropriate military expenditure.

Cumulative Impact

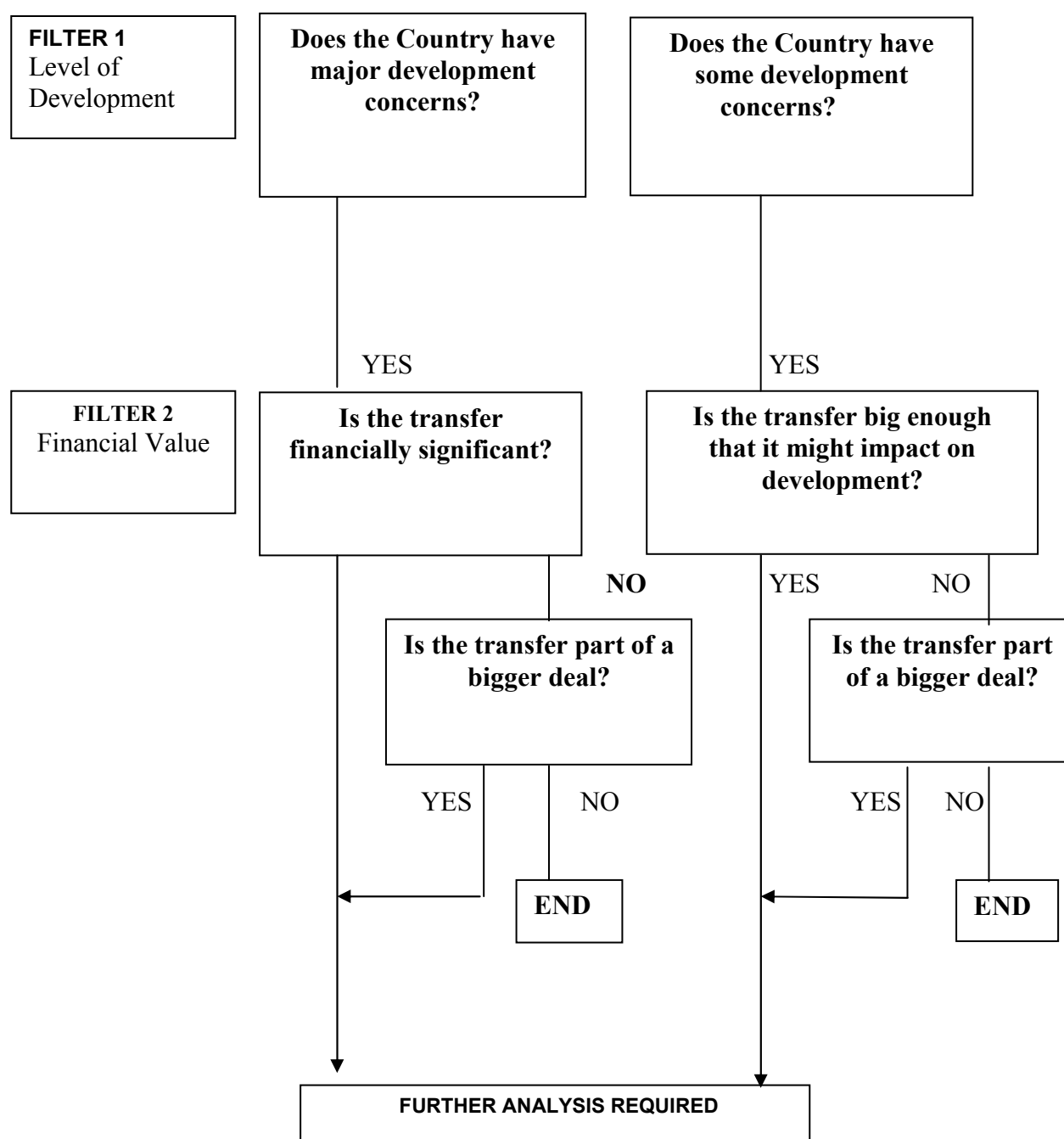
3.5.9 An assessment of the cumulative impact of arms imports on a recipient country's economy can only be made with reference to exports from all sources, but accurate figures are not usually available. Each Member State may wish to consider the cumulative impact of its own arms exports to a recipient country, including recent and projected licence requests. It may also wish to take into account available information on current and planned exports from other EU Member States, as well as from other supplier states. Potential sources of information are, inter alia, the EU Annual Report, Member States' annual national reports, the Wassenaar Arrangement, the UN Arms Register and the annual reports of the Stockholm International Peace Research Institute.

3.5.10 Data on cumulative arms exports may be used to inform a more accurate assessment of:

- historical, current and projected trends in a recipient country's military expenditure, and how this would be affected by the proposed export.
- Trends in military spending as a percentage of the recipient country's income, and as a percentage of its social expenditure.

3.5.11 ***Arriving at a judgement:*** Based on data and assessment of critical elements suggested under paragraphs 3.5.6 to 3.5.10 above, Member States will reach a judgement as to whether the proposed export would seriously hamper the sustainable development in the recipient country.

In order to make an initial decision as to whether an export licence application merits consideration under Criterion 8, Member States will need to consider the level of development of the recipient country and the financial value of the proposed export. The following graph is designed to assist Member States in their decision-making process:



Annex B (to Chapter 3 Section 5)

Member States may wish to consider a number of social and economic indicators relating to recipient countries, and their trend in recent years which are listed below, along with data sources.

| Indicator | Data source |
|--|--|
| Level of military expenditure relative to public expenditure on health and education | IISS Military Balance; SIPRI; WB/IMF Country Reports; WDI |
| Military expenditure as a percentage of Gross Domestic Product (GDP) | IISS Military Balance; SIPRI; WB/IMF Country Reports; WDI. |
| Aid dependency as a proportion of GNI | WDI |
| Fiscal sustainability | WDI, WDR, IFI Country Reports |
| Debt sustainability | WB/IMF, including Country Reports |
| Performance against Millennium Development Goals (post-2005) | UNDP, Human Development Report |

LIST OF ABBREVIATIONS

| | | |
|-------|---|--|
| IFI | : | International Financial Institutions watchnet |
| IISS | : | International Institute For Strategic Studies |
| IMF | : | International Monetary Fund |
| SIPRI | : | Stockholm International Peace Research Institute |
| UNDP | : | United Nations Development Programme |
| WB | : | World Bank |
| WDI | : | World Development Indicators |
| WDR | : | World Development Reports |

LIST OF SOURCES (WEBSITES)

| | | |
|-------|---|---|
| IFI | : | http://www.if-watchnet.org |
| IISS | : | http://www.iiss.org |
| IMF | : | http://www.imf.org |
| SIPRI | : | http://www.sipri.org |
| UNDP | : | http://www.undp.org.in |
| WB | : | http://www.worldbank.org |
| WDI | : | http://www.publications.worldbank.org/WDI |
| WDR | : | http://econ.worldbank.org/wdr |

CHAPTER 4 – TRANSPARENCY

Section 1: Requirements for submission of information to the EU Annual Report

4.1.1 Operative Provision 8 of the Code of Conduct states that *“Each EU Member State will circulate to other EU Partners in confidence an annual report on its exports of military equipment and on its implementation of the Code of Conduct”*

4.1.2 An EU Annual Report, based on contributions from all Member States, will be submitted to the Council and published in the "C" series of the Official Journal of the European Union. In addition, each Member State which exports equipment on the EU Common Military List will publish a national report on its defence exports, the contents of which will be in accordance with national legislation, as applicable, and will provide information for the EU Annual Report on the implementation of the Code of Conduct as stipulated in the User's Guide.

4.1.3 Each Member State shall provide the following information to the Council Secretariat on an annual basis. The information elements labelled with a * will not be published directly in the EU Annual Report, but aggregated in a manner to be agreed by Member States:

- (a) Number of export licences granted to each destination, broken down by Military List category (if available);
- (b) Value of export licences granted to each destination, broken down by Military List category (if available);
- (c) Value of actual exports to each destination, broken down by Military List category (if available);
- (d) Number of denials issued for each destination, broken down by Military List category*;

- (e) Number of times each criterion of the Code is used for each destination, broken down by Military List category*;
- (f) Number of consultations initiated;
- (g) Number of consultations received;
- (h) Number of undercuts carried out*;
- (i) Address of national website for annual report on arms exports.

4.1.4 Where Member States make use of open licences, they shall provide as much of the above information as possible.

Section 2: Common template for information to be included in national reports

"[Member State] also produces statistical data for inclusion in the EU Annual Report on arms exports in accordance with operative provision 8 of the European Union Code of Conduct on Arms Exports. Member States have identified continued harmonisation of national reports, including statistical data, in order to promote more homogeneous data for inclusion in the EU annual report, as a priority for the near future. In order to facilitate this process [Member State] includes the table below which gives an outline of the data that all Member States will seek to provide to the EU Annual Report¹.

EU ARMS EXPORTS PER DESTINATION

| Destination Country (A) | | | | | | | | | | | | | | | | | | | | | | | | |
|----------------------------|---|---------|---------|---------|---------|---------|---------|---------|---------|---------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|--------------------------|
| | | ML 1 | ML 2 | ML 3 | ML 4 | ML 5 | ML 6 | ML 7 | ML 8 | ML 9 | ML 10 | ML 11 | ML 12 | ML 13 | ML 14 | ML 15 | ML 16 | ML 17 | ML 18 | ML 19 | ML 20 | ML 21 | ML 22 | TOTAL per destination |
| | a | | | | | | | | | | | | | | | | | | | | | | | |
| | b | | | | | | | | | | | | | | | | | | | | | | | |
| | c | | | | | | | | | | | | | | | | | | | | | | | |

¹ With respect to the breakdown of figures by military list category, and with respect to figures for actual exports (row (c)), for those Member States that are able to provide this data.

| Destination Country (B) | | | | | | | | | | | | | | | | | | | | | | | | |
|-------------------------|---|------|------|------|------|------|------|------|------|------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-----------------------|
| | | ML 1 | ML 2 | ML 3 | ML 4 | ML 5 | ML 6 | ML 7 | ML 8 | ML 9 | ML 10 | ML 11 | ML 12 | ML 13 | ML 14 | ML 15 | ML 16 | ML 17 | ML 18 | ML 19 | ML 20 | ML 21 | ML 22 | TOTAL per destination |
| | a | | | | | | | | | | | | | | | | | | | | | | | |
| | b | | | | | | | | | | | | | | | | | | | | | | | |
| | c | | | | | | | | | | | | | | | | | | | | | | | |

| Destination Country (C) | | | | | | | | | | | | | | | | | | | | | | | | |
|-------------------------|---|------|------|------|------|------|------|------|------|------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-----------------------|
| | | ML 1 | ML 2 | ML 3 | ML 4 | ML 5 | ML 6 | ML 7 | ML 8 | ML 9 | ML 10 | ML 11 | ML 12 | ML 13 | ML 14 | ML 15 | ML 16 | ML 17 | ML 18 | ML 19 | ML 20 | ML 21 | ML 22 | TOTAL per destination |
| | a | | | | | | | | | | | | | | | | | | | | | | | |
| | b | | | | | | | | | | | | | | | | | | | | | | | |
| | c | | | | | | | | | | | | | | | | | | | | | | | |

Etc...

**Key: (a) = number of licences issued, (b) = value of licences issued in Euros, (c) = value of arms exports in Euros.
ML = EU Common Military List category (cf. OJ C 127 of 25 May 2005 for the full EU Common Military List)."**

Section 3: Internet addresses for national reports on arms exports

The Internet addresses of Member States' national websites on arms export controls are shown below:

| | |
|-----------------|---|
| Austria: | http://www.bmaa.gv.at/view.php3?f_id=24&LNG=de&version= |
| Belgium: | (Flanders) www.vlaanderen.be/wapenhandel (Walloon Region and Brussels capital under construction) |
| Czech Republic: | http://www.mzv.cz/wwwo/mzv/default.asp?ido=15135&idj=2&amb=1&ikony=True&trid=1&prsl=True&poccl=8 (www.mzv.cz/kontrolaexportu) |
| Denmark: | « Utforsel af vaben og produkter med dobbelt anvendelse fra Danmark 2004 » http://www.um.dk/NR/rdonlyres/5D6C5BD3-E876-484B-B974-AA62D12D949B/0/2004Udfoerselafvaabenogdualuseprodukterrev2.pdf |
| Estonia: | http://www.vm.ee/eng/kat_153 |
| Finland: | www.defmin.fi/index.phtml/page_id/75/topmenu_id/5/menu_id/75/this_topmenu/65/lang/3/fs/12 |
| France: | http://www.defense.gouv.fr/sites/defense/decouverte/activites_des_forces/rapports_dactivite/ |
| Germany: | http://www.bmwi.de/Navigation/Service/bestellservice.did=72610.html (national report on German arms exports) and: http://www.bafa.de/1/en/tasks/01_control.htm (general information on the German export control system). |
| Hungary: | http://www.mkeh.hu |
| Ireland: | http://www.entemp.ie/trade/export/military.htm |
| Italy: | http://www.camera.it/dati/leg14/lavori/documentiparlamentari/indiceetesti/067/elenco.htm |
| Latvia: | http://www.mfa.gov.lv |
| Lithuania: | http://www.urm.lt/index.php?1703452064 |
| Luxembourg: | www.mae.lu |
| Malta: | www.mcmp.gov.mt/commerce_trade04.asp |
| Netherlands: | http://www.exportcontrole.ez.nl |
| Poland: | http://dke.mg.gov.pl |
| Portugal: | "Exportação e importação de bens e tecnologias militares realizadas em:" http://www.mdn.gov.pt/Defesa/Estrutura/Organigrama/DGAED/relatorios_anuarios.htm |
| Slovakia: | www.economy.gov.sk |
| Slovenia: | www.mors.si |

Spain: <http://www.revistasice.com/Estudios/Documen/bice/2827/BICE28270101.PDF>
(www.mcx.es/sgcomex/mddu)

Sweden: <http://www.sweden.gov.se>

United Kingdom: <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029390554>

CHAPTER 5 - ADHERENTS TO THE CODE OF CONDUCT

Section 1: List of adherents, contact points, and further information relating to their adherence

5.1.1 Norway:

Contact person/Institution

Name: Ministry of Foreign Affairs,
Department for Security Policy and Bilateral Relations
Section for Export Controls

Contact person: Anne Kari Lunde

Address: 7 juni pl./Victoria Terrace
N-0032 Oslo

Telephone: 47 22 24 35 96
Fax: 47 22 24 34 19

Email: s-ekso@mfa.no
anne.kari.lunde@mfa.no

Annual Report website reference: <http://www.eksportkontroll.mfa.no>

Background

- Aligned with the Code of Conduct when it was established in June 1998
- Respects embargoes on arms sales imposed by the EU.

Relevant International Agreements

- OSCE Criteria on conventional arms exports.
- The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies.
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Landmines and on their Destruction.

Relevant national legislative and other provisions

- Law of 18 December 1987 no.93 on Control over the Export of Strategic Goods, Services and Technology;
- Ministry for Foreign Affairs Decree of 10 January 1989 to implement export regulations for strategic goods, services and technology.

CHAPTER 6 – EU COMMON MILITARY LIST

6.1.1 The EU Common Military List has the status of a political commitment in the framework of the Common Foreign and Security Policy. The most recent version of the EU CML was published in Official Journal C 66 of 17 March 2006, and takes into account changes agreed within the Wassenaar Arrangement since publication of the previous list in May 2005.

6.1.2 The list will be updated to reflect changes in relevant international lists, and to incorporate any other changes agreed upon by Member States.

6.1.3 The most recent version of the EU CML is available at the following internet address: <http://www.consilium.europa.eu/export-controls> (i.e. the Security-related export controls web-page of the Common Foreign and Security Policy section of the Council Internet site).

FORM 1 - Denial Notification under the EU Code of Conduct

(* denotes an obligatory field)

1. Identification

- 1.1 Identification number* :
- 1.2 Notifying government* :
- 1.3 Country of final destination* :
- 1.4 Date of notification* :
- 1.5 Contact details for more information :

2. Goods

- 2.1 Short description of goods* :
- 2.2 Control list reference* :
(with sub-category if appropriate)
- 2.3 Quantity :
- 2.4 Value (voluntary) :
- 2.5 Manufacturer (voluntary) :

3. Stated End-Use* :**4. Consignee**

- 4.1 Name* :
- 4.2 Address :
- 4.3 Country* :
- 4.4 Telephone number(s) :
- 4.5 Fax number(s) :
- 4.6 E-mail address(es) :

End-user (if different)

5.1 Name* :
5.2 Address :
5.3 Country* :
5.4 Telephone number(s) :
5.5 Fax number(s) :
5.6 E-mail address(es) :

6 Reason for Denial (Criteria)* :

7. Additional Remarks (voluntary) :

8. For brokering DNs only

8.1 Country of origin country of the goods :
8.2 Brokers' name(s)
8.3 Business address(es)
8.4 Telephone number(s) :
8.5 Fax number(s) :
8.6 E-mail address(es) :

FORM 2 - Amendment or Revocation of a DN under the Code of Conduct

(* denotes an obligatory field)

Identification

- 1.1 Identification number* :
- 1.2 Issued by* :
- 1.3 Country of destination* :
- 1.4 Effective date of amendment or revocation*:
- 1.5 Contact details for more information* :

For Amendments only

- 2.1 Information element(s) to be amended* :
- 2.2 New information element(s) :
- 2.3 Reason for amendment :

For Revocations only

- 3.1 Reason for revocation* :

FORM 3 - Denial Notification on Arms Broker Registration under the Council Common Position 2003/468/CFSP on the Control of Arms Brokering

(* denotes an obligatory field)

1. Identification:

1.1 Identification number*:

1.2 Notifying government*:

1.3 Denied broker*:

1.4 Regions or countries of final destination (if known):

1.4 Date of notification*:

1.5 Contact details for more information*:

2. Broker(s):

2.1 Denied broker:*

2.2 Other companies involved*:

2.3 Names and functions of persons involved*:

2.4 Business address(es)*:

2.5 Telephone number(s):

2.6 Fax number(s):

2.7 E-mail address(es):

3. Goods (if known):

3.1 Short description of goods:

3.2 Control list reference (with sub-category if appropriate):

3.3 Origin country of the goods:

3.3 Quantity:

3.4 Value:

3.5 Manufacturer:

4. Reasons for Denial*:

5. Additional Remarks: