



GROUP FOR RESEARCH  
AND INFORMATION ON  
PEACE AND SECURITY

•  
467 chaussée de Louvain  
B – 1030 Brussels  
Tel. : +32 (0)2 241 84 20  
E-mail : [admi@grip.org](mailto:admi@grip.org)  
Web : [www.grip.org](http://www.grip.org)  
Twitter : [@grip\\_org](https://twitter.com/grip_org)  
Facebook : GRIP.1979

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GRIP is supported by  
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Wallonie-Bruxelles.

GRIP INSIGHT – 24 February 2020

Camello Maria. *Tackling (Arms)Diversion: Challenges for European States*, GRIP Insight, 24 February 2020, Brussels.

<http://www.grip.org/en/node/2885>



## Tackling (Arms)Diversion: Challenges for European States

by **Maria Camello**

24 February 2020

Diversion is at the core of the proliferation of illicit weapons. It is the main form of arms and ammunition supply for non-state armed groups, paramilitary groups or transnational criminal organisations, all of which cannot have access to this kind of equipment in any other way. The diversion of conventional arms and ammunition contribute to increasing insecurity and instability in countries and regions affected by conflict or showing high levels of criminality, undermining in this way any sustainable development efforts.

At European level, norms and procedures meant to strengthen arms export controls, including preventing and countering diversion, are considered to be among the firmest in the world. Yet, suspected and confirmed cases of arms diversion continue to occur. Indeed, the number of disclosed cases of European weapons and ammunition illegally ending up in Africa, the Middle East or Latin America is increasing.<sup>1</sup> In several cases, the exported military equipment was originally intended for countries such as Saudi Arabia or the United States, both of which are among the largest customers of European arms producers.<sup>2</sup>

This article addresses some of the challenges faced by European states to both prevent and tackle arms diversion. First, it presents some proven cases of diversion of European arms and ammunition. Second, we look at existing export control initiatives in European countries and their effectiveness, in order to identify the main challenges faced by those states that have introduced such controls. Finally, recommendations are proposed and discussed with the aim of improving controls and reducing, or eliminating, the risk of diversion.

## Proven Cases of Diversion of European Arms

Arms diversion generally refers to a situation where military (or dual use) goods (1) end up in the possession of unauthorized users or (2) are used under prohibited conditions. The risk of arms diversion can occur at any stage of the export process. I.e. at the end of the production process, during the transfer, after the delivery of the equipment or even several years after the material was received.<sup>3</sup> The three examples of arms diversion that are reviewed below illustrate some of the different forms in which this phenomenon can occur.

In 2011, the police of the Mexican state of Guerrero was photographed opening fire with German-made G36 rifles on a student demonstration.<sup>4</sup> A German arms manufacturer, *Heckler & Koch (H&K)*, admitted to illegally selling thousands of G36 automatic rifles to Mexico, where they were reportedly used to commit human rights violations. While the official destination of the weapons was the Mexico City Police, nearly half of these guns were found in four Mexican states to which the German government had banned all transfers of military equipment. Indeed, the German authorities prohibited the supply of arms to the states of Chihuahua, Jalisco, Chiapas and Guerrero in 2007 due to human rights concerns. *Heckler & Koch*, which produces weapons such as pistols, machine guns and grenade launchers, was on trial for diverting more than 9,000 G36 rifles. In February 2019, eight years after the case was discovered, a German court ordered the company to pay a fine of 3.7 million EUR.<sup>5</sup> As part of the sentence, two former *H&K* employees have been sentenced to suspended prison terms of 17 and 22 months. Initially, prosecutors had put the focus on five former employees and had requested prison sentences for at least three of them.

Also in 2011, the Swiss media discovered that ammunition, sold by the Helvetic company *RUAG Ammotec* to Qatar in 2009, was used by Libyan rebels to fight the Gaddafi regime. Following the revelation, the Swiss Economic Secretariat imposed a six-month freeze on all arms exports to the Middle Eastern country and sent officials to Doha to ask for explanations.<sup>6</sup> Everything went back to normal after the Qatari government claimed that the delivery of these weapons to the Libyan rebels, despite the ban on re-exporting Swiss ammunition, was due to "*an error in military logistics*". Shortly thereafter, in 2012, an arsenal of *RUAG* hand grenades was found in the Syrian town of Marea, in the hands of the Free Syrian Army fighting the government of Bashar al-Assad.<sup>7</sup> They were initially sold to the United Arab Emirates (UAE) between 2003 and 2004 with the commitment not to re-export the grenades to countries at war. A joint investigation by Switzerland and the UAE retraced the path of the grenades since their delivery to the UAE. According to the Swiss Federal Department of Economic Affairs, in 2004, the UAE offered the Jordan authorities part of this material in an effort to support the country in its fight against terrorism. From Jordan the grenades were transferred

to Turkey and then to Syria. However, the details of these transfers have not yet been clarified.

In 2015, the British organization *Conflict Armament Research* (CAR) confirmed that the Islamic State (IS) forces had in their possession weapons from Iraqi arsenals. These machine guns and rockets were legally sold by Bulgaria to Iraq between 2005 and 2011. However, IS recovered a big majority when Mosul was taken in June 2014. Part of the arsenal was then found in Kobane, a city in Iraqi Kurdistan that IS was trying to conquer. In addition to the diversion cases described above, many others have been confirmed. Since 2011, CAR has documented more than 11,093 cases of arms diversion in 23 countries in conflict.<sup>8</sup>

### End-User and End-Use Certificates (EUC)

In order to prevent or at least reduce the risk of diversion, the licensing process must include an in-depth analysis of the situation in the country wishing to acquire weapons. Furthermore, any exports of conventional weapons should only be authorised by the competent authorities after they have obtained detailed information on the goods being transferred, their destination and the conditions prescribed to their use by the buyer. In this respect, end-user and end-use certificates play an essential role in preventing arms diversion.

An EUC can be part of the conditions attached to the export licence and help ensure that the delivery and use of the weapons comply with what was agreed by the supplier and the recipient of the goods. An EUC identifies the different actors involved in a transaction, but it can also prescribe specific conditions or commitments (non-re-export clause, geographical restrictions, use and user reserves or post-export verification procedures).<sup>9</sup> Many international arms export control instruments, such as the United Nations Programme of Action on Small Arms, the Wassenaar Arrangement, the Organisation for Security and Cooperation in Europe, the European Union (EU) or the Arms Trade Treaty (ATT), advocate for a more systematic use of EUCs in export licensing processes. Nonetheless, the obligation to request this certificate depends on the type of export licence. For example, some of the transfers within the EU community are exempt from the obligation to provide an EUC.<sup>10</sup> This official document is requested from the competent authorities of the importing country. However, many exporting states impose their own form to be completed.

Although EUCs have become an essential tool in the fight against diversion, several cases of fraudulent certificates highlight the importance of verifying their authenticity and the accuracy of the information contained in them.<sup>11</sup> One way to increase the reliability of EUCs, thus to reduce the possibility of falsification, is to provide accurate and detailed data. The more information there is, the higher the possibility of identifying inconsistencies. The International Small Arms Control

Standards recommend, among other things, using secure paper to print EUCs, a similar technique to that used in the production of banknotes.<sup>12</sup> Verification measures may also include post-shipment controls of the exported goods in order to ensure that they have arrived at their intended destination and that end-users respect the commitments made.

## Post-Export Controls: European Practices

Growing awareness on the risk of diversion, reinforced by many proven cases, has led to more diversified calls for action than just the refuse of an export licence. According to the information made available on open source, many European states have made progress in recent years in the design and implementation of post-export controls.

Belgium<sup>13</sup>, Bulgaria, Estonia, the Netherlands, Romania or Spain have each put in place a **Delivery Verification Certificate (DVC)**. This mechanism allows them to request the final recipient of the goods to provide, after delivery, the customs documents certifying that the cargo has reached the intended country of destination.<sup>14</sup> The possibility of carrying out such checks must initially be foreseen in the export contract and in the EUC. Hence, the DVC is used to control whether the exported weapons were diverted during the transfer. These countries may request proof of delivery via their diplomatic service in the final country of destination, for example in the form of customs documents (or copies thereof). However, these verification processes are not carried out systematically and they do not offer any real protection against potential diversion of weapons after delivery.

Although most European countries plan to introduce EUCs in their export licence, few of them check if they are complied with once the delivery has taken place. Such inspection measures, so-called **Post-Shipment Verifications**, should be considered an essential element of arms transfer controls, as they allow cases of diversion to be uncovered. In addition, the acceptance of these verifications as a prerequisite of an export licence may act as a deterrent to potential offenders. Countries such as Belgium<sup>15</sup>, Bulgaria, Finland, France or Portugal, formally provide the possibility of carrying out end-use controls.<sup>16</sup> However, as with DVCs, in practice the implementation of these inspections is rather rare.<sup>17</sup>

In August 2019, at the Fifth Conference of States Parties to the ATT (CSP5), Sweden and Spain reaffirmed their intention to introduce post-shipment verifications.<sup>18</sup> The responsible authorities in Sweden may require the insertion of a clause in the EUCs committing the recipient of light weapons to allow on-site inspections. The Spanish representative has confirmed that a working group has been set up in order to establish an onsite post-shipment verifications system by the responsible

authorities in Spain. However, the implementation of these controls in both countries has not yet been determined.

## **Germany and Switzerland: A Step Further in the Fight Against Diversion Practices**

Currently, only two European countries, Germany and Switzerland, carry out onsite post-shipment verifications to control the end-use of the weapons they export. The German and Swiss authorities regularly participate in events to raise awareness and exchange information on their practices in the field of these procedures. As an example, representatives of both countries participated in a side event on this subject at the CSP5 held in August 2019.

### **Germany: An Instrument in the Pilot Phase**

The introduction of a post-shipment verification instrument by the German authorities followed the revelation of several cases of diversion of weapons. Among them stands the case mentioned above, involving the diversion of automatic rifles manufactured by the German society *Heckler & Koch* to Mexico.

In order to prevent such incidents, Germany announced in July 2015 the creation of an instrument for the selective control of small arms and light weapons (SALW) to third countries.<sup>19</sup> Through the EUCs, the recipient countries grant Germany the right to carry out inspections onsite of the equipment exported. In this way, it is possible to verify whether the delivered weapons are still available in the recipient country and in the possession of the end user specified in the EUC.<sup>20</sup> Physical examinations, including their date and location, must be prepared and carried out with prior notice and in agreement with the competent authorities of the importing country.

A two-year pilot phase began in May 2017, following the first on-site inspection in India. Since then, inspections have been also conducted in the UAE (December 2017), South Korea (June 2018), Indonesia (January 2019), Malaysia (April 2019), Brazil (April 2019) and Jordan (June 2019).<sup>21</sup> The German authorities have not made public the results of these onsite checks. Since no irregularities have been found during the inspections carried out up to date, it is not yet clear what type of measures will be put in place in the event of non-compliance with the commitments made in the EUC.<sup>22</sup> After the end of the pilot phase in mid-2019, the Federal Government is currently evaluating the instrument of the post-shipment controls.

## Switzerland: A Pioneering Instrument in Europe

In 2013, the Swiss government carried out the first physical inspection to verify compliance with the EUCs included in its military equipment export contracts. As in the German case, the implementation of post-shipment verifications was carried out in response to diversion cases such as those presented above..

Given their lack of resources to ensure that onsite verifications are carried out for each delivery of SALW that is deemed risky, the Swiss authorities base their decision on an assessment of the risks associated with a specific arms export. These evaluations take into account the type of war material exported, the geographical distribution of these weapons, the results of past controls and the existence of previous incidents.<sup>23</sup> Since 2013, Switzerland has carried out 41 inspections in the final countries of destination. Only in 2018, the Swiss authorities conducted post-shipment verifications in six countries: Indonesia, Kazakhstan, Qatar, Lebanon, Lithuania and South Africa.<sup>24</sup>

Unlike in the German case, it should be noted that Article 21 of the Swiss Ordinance on War Material sets out sanctions against countries that do not fulfil their commitments towards EUCs.<sup>25</sup> According to the Swiss representatives present at the side event on post-export controls that took place during CSP5, some cases of nonconformity have been detected during the inspections. Some examples of the sanctions applied were presented, without, however, any information being given about the offending States:

- More obligations would be added to the EUC. If the subsequent post-shipment verification is in order, the need for such additional obligations would be re-evaluated.
- All exports to the non-compliant state would be suspended for one year. Afterwards, exports would be reviewed on a case-by-case basis.
- Exports can no longer be authorized to the offending state.

The adoption of post-export controls presents a number of challenges for the countries that are trying to implement them. First, the process of introducing such controls into a State's legislation and implementing them is long and complex. The German case illustrates these constraints. Indeed, the German government created an instrument to control arms deliveries in 2015. The first inspection only took place two years later and is only part of an experimental phase. Then, a procedure for adapting the control instrument will have to be implemented in order to make it more effective and efficient.

Second, the organisation of onsite verifications in the territory of a third country requires the dispatch of personnel specialised in legal, customs and armament matters as well as in the situation in the importing country. This implies a long

organizational process as well as an important financial effort from the exporting state.

Finally, at the diplomatic level, the introduction of such controls can be seen as a loss of trust between supplier and recipient countries.

This dimension may not be without impact at the commercial, regulatory and industrial level. For the importing State, the benefits of post-export controls are not necessarily clear with respect to the obligations undertaken. By accepting these controls, the customer may well claim to be aligned with best practice and thus enjoy the positive image of an actor of good will, but the constraints in terms of cost, flexibility and freedom of action in the context of military deployments may prove to be a deterrent. There is a risk that importing countries will turn to suppliers with less stringent legislation or decide to develop their own arms production capacities.

## Conclusion

Although the implementation of EUCs and of post-shipment verification measures is an important step in the fight against diversion, these measures alone are not sufficient to solve the problem effectively. To avoid that the weapons exported are used for undesirable purposes, it is necessary to adequately evaluate the risks of each transfer. Therefore, in the event of a history of misuse, doubt about the end user's commitment or about the authenticity of the certificates provided, a refusal of the export licence must be made to a state.

If an export licence is granted to a country, other measures can significantly help to combat diversion and enhance the effectiveness of EUCs and post-shipment controls. Good marking, for example, facilitates the tracing of weapons, which allows for more effective controls. An adequate marking confirms if a weapon has been diverted and helps to identify the point at which it has happened. This is crucial to preventing similar cases in the future and allows law enforcement officials to develop investigative leads. The application of stricter sanctions and the conviction of those individuals responsible for diversion cases contributes to deterring other potential criminals. Similarly, the safe management of national stockpiles of arms and ammunition is critical to reducing diversion risks. Indeed, the poor security of stockpiles makes them easy targets for arms traffickers, armed groups or criminals.

Past experiences can play a key element in reducing the risk of diversion. If unauthorised transfers of arms and ammunition have been detected, special caution is needed if the same actors or transport routes are involved in future shipments. Cooperation and information sharing among states on proven or suspected cases can also maximize international efforts to prevent new diversion issues from arising.

There are still major differences in the statutory powers, as well as in the technical and analytical capacities of parliaments across Europe.<sup>26</sup> Too often, the parliaments of the countries studied do not have access to detailed information on its country's arms exports policies, which prevents effective scrutiny of the government's commitments in this area.<sup>27</sup> Greater government transparency on arms exports and the active involvement of parliaments in developing policies in this field can ensure the responsible implementation of arms control agreements.

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## Author

*Maria Camello* is a research fellow at GRIP for the project "Small Arms and Arms Transfer" where she works on the strengthening of arms transfer controls, especially at EU level.

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