

An Vranckx

CONTAINING DIVERSION:

**Arms end-use and
post-delivery controls**

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INTRODUCTION

In the interest of maintaining their monopoly on the legitimate use of violence, States attempt to control arms in their territory. They control imports, local industrial production of military goods and other arms, and transfer of these controlled goods to any other country. Exports and other types of transfers (imports, transits, trans-shipments) must be authorised by each country's competent arms transfer licensing authority.

These transfer control authorities are in an unenviable position. Great responsibility is implied in each decision they make on whether or not to authorise the export of certain types and volumes of military goods or technology. A decision to deny the requested transfer licence prevents a company from supplying a customer abroad and is bad for business, while a decision to authorise the transfer might result in the goods being used for ill.

These decisions are taken under the critical gaze of many. Authorities report on their arms exports decisions in an increasingly transparent way. The consequences are also increasingly likely to come to light if control authorities 'get it wrong', such as when arms later turn up at online arms bazaars, for all to see, and for all to buy, even in places where State control is minimal at best.¹ In some countries, authorities have also been taken to court by companies whose export licence requests they had denied.

Arms export control authorities can make sound decisions if exporting parties accurately inform them about the envisaged transfer, and if the intended end-use and user(s) in the recipient country is reliably identified. On the basis of that information, authorities in the exporting country can judge whether the intended use is truly in line with national laws and regional and international conventional arms control arrangements. To that end, they make an appraisal of the destination country's record for respecting international humanitarian law and other aspects pertaining to the conduct of the intended end-user.

While such and related criteria have been hotly debated at the United Nations in the negotiation of the international Arms Trade Treaty, there was far less controversy over a technical matter in arms transfer control assessment: the risk that the arms be used in ways other than declared in end-use documentation. If the arms end up being used elsewhere, by others and for other ends, export authorities' criteria-based deliberation about the acceptability of the declared end-user and end-use is futile. The need to avoiding arms control efforts be futile seemed a matter of consensus. Less clear were the steps to take to that effect.

1. A sample of such practices is documented in N.R. Jenzen-Jones et al., "The online trade of light weapons in Libya", *Security Assessment in North Africa Dispatch n° 6*, Small Arms Survey, April 2016; and summarised in C.J. Chivers, "Facebook Groups Act as Weapons Bazaars for Militias". *The New York Times*, 6 April 2016.

Awareness of the risk that arms transfers may be diverted to other users and uses has become notably more articulated in recent years. A number of high level international initiatives are in the works to help mitigate that risk. These seek to improve the reliability of end-use(r) documentation,² and ensure that relevant information is shared among concerned parties.

Before taking stock of these initiatives and outlining their context, this report first presents the state of play of arms export control practices in Europe and the United States. In this process, the report identifies where verification of end-use documentation, post-delivery control and actual end-use monitoring can be improved. It probes the progress made and reflects on what can realistically be achieved on the road ahead.

2. Such initiatives include the project UNIDIR launched in 2015 to examine Models for Harmonization of End Use/r Control Systems, which are referenced at the end of this report.

THE FIRST LINES OF DEFENCE: EMBARGOES AND CRITERIA- BASED ASSESSMENT OF END-USE DOCUMENTATION

Not all customers in every situation can procure arms and other controlled military goods, services and technologies. The availability of controlled goods to a potential customer is contingent on the licensing decision in the country of export (or transit). Officers in charge of transfer licensing check whether the country of final destination for the weapons is under an arms embargo from the United Nations or another international organisation, such as the European Union, the Arab League, the Economic Community of Western African States, the African Union, or the Organisation for Security and Co-operation in Europe (OSCE).³

The embargoes are in place to monitor closely what controlled items are transferred into embargoed countries. Parties in embargoed countries cannot be supplied unless the supplier obtains an exemption from the organisation that upholds and monitors the embargo. Some embargoes even explicitly list and target individuals or the organisation for which they may seek to procure goods. Even if no embargo is in place, the country where the customer resides can be deemed "sensitive". A sensitive country may be subject to on-going violence, non-respect for international humanitarian law, or internal repression in violation of human rights. Certain parties in a sensitive country may destabilise regional security, fail to comply with international duties to curb terrorism, or may even supply terrorist groups or organised crime syndicates. Diligent licensing authorities in the exporting country may hesitate to authorise transfers to a recipient country where such conditions prevail, and seek additional guidance.

And yet, the sad truth is arms proliferation is uncontrolled in many of the world's most problematic places. Some weapons have been about for decades, having been trafficked from one conflict zone to the next. But others appear sourced from fairly recently produced stockpiles. In tracing the origin and movement of certain arms, it has been possible to shed some light on a handful of modus operandi that traffickers use to get arms in place, including a practice known as diversion.

3. The embargoes which all of these organisations currently uphold are documented at www.grip.org in a regularly updated French-language Base de données: les embargos sur les armes (<http://www.grip.org/fr/node/1558>). An English-language data base of U.N. embargoes is made available by the Stockholm International Peace Research Institute (SIPRI).

To procure controlled goods, certain parties operating in sensitive locations have at times attempted to circumvent or break transfer control regulations. They were seen to target suppliers in countries where transfer control authorities are presumed lenient or easily convinced to turn a blind eye. In some cases, they involved a party in a third country that had previously imported similar goods and was believed to draw less attention from licensing officers.⁴ Such third party can then (be made to) pose as the declared recipient country on end-use documentation presented to the licensing authorities in the country of export on falsified end-use documentation. Authorities of the third country need not even be consciously involved in the scheme: An authentic but blank document bearing their letterhead and stamp may have been obtained from an accomplice with access to an institution that can legitimately pose as a customer for the controlled goods, such as the local ministry of defence.⁵

Once the competent export control authority is tricked into licensing the export to the country wrongly identified on the end-use documentation, a scheme is on that is known as “diversion”: The goods are shipped to the declared recipient country, where they are not intended to stay for long - or perhaps not even touch down - before continuing their journey to the intended customer elsewhere.⁶ In the process, the exported goods are transferred from a fully controlled “white” market to one commonly described as “grey.” From the “grey” market, the goods may eventually make it to an entirely problematic black market - such as those arms on display at the afore-mentioned (online) bazaars.

In addition to checking that the declared recipient country and end-user are no cause for concern, arms export control authorities are specific and selective about the type and quality of end-use documentation they require. In many cases, the export country’s licensing authority requests that local companies seeking to export controlled goods forward a document that clearly identifies the importers of the goods, or the person acting as consignee. The importers, in turn, are requested to sign an End-Use Certificate (EUC) that specifies the type, amount and estimated value of the goods that they seek to import, as well as their intended use of the imported goods.⁷ The EUC, or comparable end-use documentation should also contain the name and address of the importers, or consignees, and if applicable, intermediaries involved in the transfer to the end-user. This documentation allows export control officers to verify whether the identified parties exist and are really based at the address stated in the documents.

4. Efforts to keep an arms transfer arrangement under the radar of diligent export licensing authorities are recorded in *Small Arms Survey 2008 - Risk and Resilience*, Cambridge University Press, 2008; especially in the chapter by lead author Glenn McDonald “Who’s Buying? End-User Certification”, pp. 155-181.

5. For a graphic illustration of such scenario, see “Adventures of a Would-Be Arms Dealer”, in *Small Arms Survey 2008* op. cit., 2008, pp. 202-209.

6. Different varieties of diversion arrangements are described in Cédric Poitevin, *Pour un meilleur contrôle de l’utilisation finale des exportations d’armes*. Bruxelles: Note d’analyse du GRIP 29 June 2011.

7. International Small Arms Control Standard, 03.21: National controls over the end-user and end-use of internationally transferred small arms and light weapons, by the UN Coordinating Action of Small Arms in 2014.

However, even if this information appears to be correct, export control officers may be misled about the true end-user and use of the goods. Common sense would demand they contact the declared end-user for confirmation of his intention to procure the arms. Best efforts could also be made to authenticate the end-use documentation and confirm that it is signed by a person authorised to sign for arms imports into that country. Some exporting states request that an official stamp or seal of the end-user must be provided along with the authorised signature and a reference number. Sweden additionally specifies that end-users of Swedish military equipment must fill out an individually numbered EUC printed on bank-note-quality paper by the Swedish State, and that they return it through the Swedish mission in the country where they are based.⁸

Authentication and verification of end-use documentation should be all the easier if the exporting country has representation in the country of import. It would seem a little harder, but not impossible, in the absence of consular ties.

In addition to the EUC, several export licensing authorities request proof that the shipment has actually reached its authorised destination and end-user. This can take the form of a signed commitment to verify delivery of the goods and forward to the export licensing authority a Delivery Verification Certificate (DVC) or a copy of the customs documentation from the importing country as proof that the shipment has reached its authorised destination and end-user. The exporting country's authority may also insist on a "non-re-export clause", which captures the importer's commitment not to export the goods to another destination – at least not without first requesting and obtaining the exporting country's written consent for such re-transfer. In their best efforts to control the transfer of small arms and light weapons, German authorities may additionally request the importer's written statement about the proper disposal of the stockpile that the newly imported arms are intended to replace (preferably by destruction). This disposal avoids the replaced arms being used by others in the same country or re-exported in an undeclared way. The exporting country's authorities may also insist they be informed that the importing parties formally commit to alert the exporter in case they lose control over the goods.

In the pre-licensing phase, the export control authority must take at face value the commitment that the delivery will take place as intended, that it will be verified, and that the DVC will be forwarded. Once the export is licenced, it can keep track of the exporting company's diligence in obtaining the DVC and, if necessary, send reminders that it be forwarded. The exporter's DVC diligence track record for a repeated importer may help the export control authority assess the reliability of the declarations. For instance, absence of the delivery documentation on a prior deal would suggest unreliability of the declarations. But a good track record of reliability is no guarantee of reliability of documentation of future licences.

8. 2005 Swedish National Report to the UN Office of Disarmament Affairs on the implementation of the UN Programme of Action.

The export control authority must also take at face value the importer's signed declaration not to re-export the goods to another destination before permission for re-export is requested and obtained from the original exporting country. Whilst past behaviour is often the only predictor of future behaviour, it is impossible to be certain that a party, that has never re-exported goods in the past, will never do so in the future, with or without obtaining written consent from the exporter. But more problematic still, is the unlikelihood that the export licensing authority has evidence of a re-export that it was never requested to authorise.

Not all is guaranteed to go sufficiently well even if the goods physically remain in the territory of the intended recipient country. The army's assault rifles may turn up in the hands of police forces that use them on civilians in an unforeseen way. The truly intended user of a defensive weapon may come to put it to offensive use. These are eventualities that the export control licensing authority has few means to anticipate, at the time it needs to decide about an export licence application, and even after that decision is made.

Export control authorities' power to effectively sanction parties that diverted goods is undermined by prevailing unknowns and uncertainties. Aware that a party violated the non-re-export clause on a past deal, an export control authority would likely refrain from authorising exports to the same party in the future. But such awareness is not assured to be kept in the historic memory of a licensing authority with high staff turnover. It is even less guaranteed to be available to authorities of other countries that export similar goods and that may fall victim to the fraudulent party's next diversion scheme.

The sanction of denying more exports to the same party is easily circumvented if the aim is to import goods that are produced in and can be procured from many different countries, such as a particular, common standard of small arms and their ammunition. Importers would not necessarily seek to procure more from the same source in a country whose exporting authority is aware that they violated a non-re-export clause in the past. They may just as easily seek an alternative source in a country whose export control authorities have no prior experience with them and where they may benefit from the other authority's doubt.

DEALING WITH DIVERSION RISKS IN THE EUROPEAN UNION

The 28 Member States of the European Union (EU) as well as a handful of other countries in their near neighbourhood, abide by the Common Position defining common rules governing control of exports of military technology and equipment (henceforth, the EU Common Position).⁹ This legally binding instrument was put into place by the EU Council at the end of 2008. The EU Common Position consolidates an approach that was elaborated well over a decade earlier in an EU code of Conduct,¹⁰ for ensuring all of its Member States refer to the same criteria when making export licence decisions. Eight such criteria are specified in Article 2 of the EU Common Position. A User's Guide to that EU Common Position advises on how arms transfer control authorities can check licence applications against the eight criteria.¹¹ The Guide also identifies sources that report data deemed relevant to make that assessment.

The first of the criteria relates to the exporter States' international obligations (such as compliance with arms embargoes). Other criteria relate to the importing party's respect for international humanitarian law and on how the transfer may come to affect regional stability. Still other criteria involve the risk that a transfer of arms to the destination country will be used to seriously increase internal repression and human rights violations or that it facilitate terrorism.

Criterion 7 in this list requests the licensing authority examines the reliability of the end-use documentation, and therefore asserts the relevance of its entire criterion-based assessment. Criterion 7, in the most explicit terms, considers the risk that controlled goods licensed for export will be diverted to other users and uses than described to export control authorities in the end-use documentation. If that risk is judged too high, the export control authority may refrain from approving the export licence. But such consideration does not have the value of a prohibition, though it does weigh in along with the other criteria that the Common Position requires licensing authorities to examine.

The afore-mentioned EU instruments also oblige EU Member States to report on the arms exports licences they approve, as well as on those they deny, if possible with an indication of the grounds on which these were denied. Those licensing data are collated in the EU Council's Annual Reports.¹²

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9. European Union Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, *Official Journal*, L 335 of 13 December 2008, pp. 99-103.
 10. European Union Code of Conduct on arms exports, as adopted on 5 June 1998.
 11. Council of the European Union. User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment. Updated 20 July 2015, 155p.
 12. The Annual Reports "according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment" are published in the *Official Journal*, of which the relevant sections are accessible through the European External Action Service's non-proliferation and disarmament site.

Analysis of the reports indicates to what extent the different EU countries' export control authorities take "negative" licensing decisions in reference to the risk of diversion.

Although it is unusual for concern over diversion to be the sole reason to turn down an export licence application, Criterion 7 is the most commonly stated criterion as the grounds for denial of export licences by EU countries' export authorities over the past decade. As Table 1 below indicates, more than 50% of the denied licences stated that criterion among the grounds of all licences that were denied in 2009 and 2010, and in at least a third of the cases in all other years on record thus far. That is until 2014 - the most recent year on which the Council of the European Union had reported the EU Member States' licensing data by mid-2016.¹³

The outcome of the EU countries' export licensing decisions is reported in reference to 22 categories on an EU Common Military List (EUML).¹⁴ The ML category that corresponds to the larger number of approved and denied licences is ML1, that is "smooth-bore weapons with a calibre of less than 20 mm, other arms and automatic weapons with a calibre of 12,7 mm (calibre 0,50 inches) or less and accessories, and specially designed components therefor". "Ammunition and fuse setting devices, and specially designed components therefor" is categorised under ML3. Small arms and ammunitions are the categories of conventional weapons that most countries in the world import, and which manufacturers in several of EU Member States supply. In this last respect, they stand out against "Light Weapons", with which they share a conceptual realm in arms control (Small Arms and Light Weapons, or SALW). The EUML categorises these light weapons as ML2, and the corresponding larger calibre munitions is categorised as ML4. Arms export licensing data from EU countries over the past ten years indicate that comparatively fewer licences are being processed for ML2 and ML4 category arms, as compared to ML1 and ML3.

For this reason, light weapons and larger calibre munitions are left out of the discussion in the remainder of this section. This section mainly considers EU countries' export of the smaller calibre arms and ammunition. It does not consider the estimated monetary value of the small arms and ammunition exports for a number of reasons, including the observation that not all Member States report the value of exports. Fluctuations in that monetary value are likely to occur as the conjuncture changes and export promotion agencies show more or less prowess in marketing these goods abroad. As such, the (estimated) monetary value of arms exports is a less relevant indicator of EU countries' export control licensing policies and practices than are data capturing the simple number of licences that the competent authorities process, approve or deny, and the grounds on which such denials are based.

13. Council of the European Union, "Seventeenth Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment", noted by the EU Council at its 3457th meeting on 14 March 2016, published on 4 May 2016 in the *Official Journal* Volume 59 C163/1-544.

14. The Common Military List covers the minimum scope of military items that Member States must subject to export control. The current version of this List was published in the *Official Journal* C 129/1 of 21 April 2015.

Table 1 below is specific, then, in that it collates data on the number of export licences that the conglomerate of EU Member States' arms export control authorities approved and the amount they denied for exports worldwide, over the past decade. The years selected are 2005, 2009 and 2010 – when the then-27 EU member states approved the largest number of export licences thus far – and 2013 and 2014, the two last available years on record.

Data reported in the table are sourced from the Council's corresponding Annual Reports (Eighth through Seventeenth Annual Report).¹⁵ Five-year average data values for the 2005-2009 period and for the period 2010-2014 are calculated on the basis of actual data on all intermediate years. For all years and in the mode specified, the table breaks down the approved and denied licences relating to small arms (ML1) and ammunition (ML3), as well as the number of times Criterion 7 was stated among the grounds to deny the licence applications, for all EU Military List categories as well as for small arms and ammunition separately.

Table 1: Approved and denied export licences 2005 – 2014, denied licences

Year	2005	2009	Average 2005 - 2009	2010	2013	2014	Average 2010-2014
# Export licences approved all ML categories	31 550	62 482	45 446	64 848	46 548	42 449	49 956
# Export licences denied all ML	355	408	371	345	300	346	356
Denials-to-approval rate for all ML /1000	1,12	0,65	0,82	0,53	0,64	0,82	0,71
# ML1 licences approved	5 673	12 320	9 775	13 665	10 334	6 932	11 041
# ML1 licences denied	96	130	111	132	71	127	113
Denials-to-approval rate ML1/1000	1,69	1,06	1,13	0,97	0,69	1,83	1,02
# ML3 licences approved	1 998	3 384	2 750	3 119	3 159	2 966	3 120
# ML3 licences denied	52	51	47	45	34	40	46
Denials-to-approval rate ML3/1000	2,6	1,5	1,71	1,42	1,08	1,35	1,47
# Criterion 7 (diversion) stated among grounds for denial for all ML : % of total denials	173 49%	229 56%	187 50%	236 68%	107 36%	117 34%	161 45%
Diversion-denial-approval/1000 all ML categories	0,55	0,37	0,41	0,36	0,23	0,28	0,32
# Criterion 7 denials ML1: % of denials all ML categories	71 41%	89 39%	79 42%	103 44%	38 36%	67 57%	71 43%
# Criterion 7 denials ML3: % of denials all ML categories	36 21 %	28 12%	29 16%	29 12%	15 9,8%	15 13%	20 12%

15. Annual Reports as published in the *Official Journal*, relevant sections accessible through the European External Action Service's non-proliferation and disarmament site. Reports on exports licensed in 2004-2008 refer to the Code of Conduct on Arms Exports rather than to the Common Position defining common rules governing control of exports of military technology and equipment, which was put in place at the end of 2008. The latter consolidated the ML categories and list of eight criteria included in the Code of Conduct.

Table 1 shows that EU export control authorities have processed an increasing number of licence requests. In 2010, they approved more than double the number of export licences as compared to 2005.¹⁶ The export licencing volume decreased since 2010, even if comparison of the two 5-year averages reveals an increase in processed licence requests over the decade.

There is no comparable increase in the total amount of licences that EU countries' authorities denied. Over the recorded ten-year span, all licensing decisions taken by all EU Member States' export control authorities actually demonstrate a decreasing denial-to-approval rate. That decrease is most visible when comparing the 2005 denial-to-approval rate (1,12/1000) with the 2010 rate (0,53/1000), but the difference evens out when the 5-years averages are compared, that is 0,82/1000 on average for the 2005-2009 period, and 0,71/1000 for the last five years on record.

The breakdown boxes in the table indicate that concern over the risk of diversion (Criterion 7) is the grounds most often stated in the denials statistics,¹⁷ even if in recent years that criterion lost some of its prominence, hitting a "historic low" in 2013, at just over a third of all denied licences. The rate rose again the year after. The box that reports "diversion-denial-approval/1000 all ML categories" demonstrates a decreasing trend in reticence of export authorities to deny a licence based on diversion concerns: In 2005, 0,55/1000 licences were turned down over diversion concerns. That figure had more than halved by 2013, at 0,23/1000, and was at 0,28/1000 in the last year on record. The trend quite clearly indicates that export licence requests are increasingly unlikely to be turned down over diversion concerns.

The table further demonstrates increasingly fewer licences were denied to export ammunition, filed under ML3. In 2005, EU Countries' export licencing authorities denied 2,6/1000 such licence requests. That rate had halved to 1,3/1000 in the last year on record, and was lower still in the year before. An even sharper decline is seen when comparing the denial-to-approval rate for small arms export licences, filed under ML1: In 2005, 1,6/1000 ML1 licences were denied. Only 0,6/1000 such licences were denied in 2013. The rate picked up again to 1,8/1000 in the last year on record, when caution was higher than ever before, and concern over diversion inspired 57% of those denials – the highest percentage yet.

A relatively large portion of the export licences that the competent authorities denied concern small calibre arms and ammunition. This may be explained in that these relatively small and light goods are the least difficult to be diverted, and are of use (for better or for ill) to armed and security forces in almost every country in the globe. The remainder of the denied licences to an appreciable degree are categorised under ML18, that is production equipment and components of products referred to (elsewhere) in the EU Common Military List, such as small arms (ML1) and ammunition (ML3).

16. Bulgaria and Romania joined the EU in 2007, countries with relatively important small arms and ammunitions outputs.

17. Analysis of Criterion 7 denials as compared to others was reported in, amongst others, "Diversion", In: An Vranckx (ed.), *Rhetoric or Restraint? Trade in Military Equipment under the EU Transfer Control system*. Gent: Academia Press, 2009, pp. 65-74.

The prominence of that the ML18 category among denied licences would indicate an awareness that exported production equipment, such as to produce small calibre arms and their ammunition, can potentially turn into a vector for the proliferation of such small calibre arms – both in the importing country, and beyond its frontiers. Production equipment is anticipated to function over a long time-span, increasing the possibility that recipient countries' authorities come to see less need to comply with conditions agreed in the original end-use documentation, such as a prohibition to export the arms produced on that equipment.

About a decade ago, a comparative analysis of Belgian, French and German authorities' attitudes towards transferring production equipment for ammunition, found the latter two were more cautious and restrictive.¹⁸ A controversial German authorisation to transfer a production facility for G36 assault rifles to Saudi Arabia in 2008 would suggest less consistent caution with respect to small arms production equipment.¹⁹ It is feared, yet thus far unproven,²⁰ that arms produced in Saudi Arabia have been put at the disposal of warring factions in Syria in recent years.

Concern over the potential for proliferation of arms produced with transferred production equipment may explain reticence in licensing further export of equipment for overseas production. In the last 5 years on record, the German export authority accounted for the bulk of the denied ML18 licences, for production equipment. In 2014 the German denial-to-approval rate on ML18 licence applications peaked at 18/535, roughly 33,6/1000, and significantly above the 8,2/1000 all ML categories EU-wide denial-to-approval rate for that year. The ML18 licence applications denied by the German export control authority also stand out next to the observation that its Austrian counterpart approved 503 licences for ML18 items in 2014, and did not deny a single such licence.

The data in Table 1 cover the totality of EU Member States' export licensing practices. Significant differences become apparent when practices of specific countries are examined, as in Table 2 below, that records 9 EU member states' licensing practices of small calibre arms over the past four years. The selection illustrates that German and British authorities processed the larger number of ML1 licences in each of the years on record.²¹ But these are far from the only ML category for which these authorities processed export licences. The defence industry in both Germany and the United Kingdom produces a wide range of goods and technologies for which companies file export licence requests with the competent authorities.

18. Holger Anders, Exportation de matériel de production de munitions : les pratiques de la Belgique, de la France et de l'Allemagne. Bruxelles: Note d'analyse du GRIP, 26/5/2005.

19. "Report: Arms Maker Sued Germany Over Saudi Arabia Exports License", Defense-aerospace.com, 29/10/2015.

20. Conflict Armament Research response to author query.

21. In 2010, the UK's authority approved the larger number of such licences. While more German licences for ML1 exports were approved in all other years on record, the estimated value of these exports tended to be lower than the annual estimated value of Austrian and Belgian ML1 export licences.

Quite by contrast, small arms are the main type of controlled goods to be exported from Austria and the Walloon region of Belgium.²² On any average year of the past decade the competent export control authorities processed more than half of the licence requests under ML1. Three of the other four countries in Table 2 likewise qualified on the basis of the significance of their ML1 licences, as compared to other Military List category licences.²³

Table 2: Approved and denied ML1 export licences, 2011-2014, per exporting country

Year	2011	2012	2013	2014
All EU Member States				
Approved ML1 licences	12 098	12 174	10 334	6 932
Denied ML1 licences	111	123	72	127
Crit. 7 stated in denied licence	77	68	38	67
Austria	881 /9 /8	815 /11 /5	958 /0 /0	929 /1 /1
Belgium	791 /5 /2	882 /5 /2	816 /11 /6	708 /1 /1
Bulgaria	52 /2 /2	117 /0 /0	126 /2 /2	80 /2 /2
Czech Republic	229 /1 /1	212 /0 /0	258 /0 /0	218 /22 /15
France	169 /7 /4	12 /0 /0	86 /0 /0	58 /2 /0
Germany	5 433 /58 /44	5 306 /68 /46	5 169 /45 /26	2 243 /70 /45
Italy	56 /0 /0	68 /0 /0	79 /0 /0	112 /0 /0
Romania	133 /3 /2	118 /0 /0	102 /0 /0	104 /0 /0
United Kingdom	1 565 /14 /3	1 782 /12 /4	1 596 /6 /2	1 366 /14 /6

Table 2 reveals appreciable differences in ML1 licensing volumes, as well as differences in approval-to-denial patterns. French, Italian and Romanian export control authorities have in recent years seen few, or no grounds to deny ML1 export licences. This should not suggest that the competent arms export control authorities in these countries were not concerned about the end-users and recipient countries of their manufacturers' small arms exports. A more realistic explanation for the relatively few denials is that an additional, preliminary screening arrangement was established or was being used more than in prior years. Such arrangement typically allows defence contractors to approach the licensing authority on an informal basis first. This gives the contractors the option to only engage in the procedure of a formal licence request for deals that the licensing authority has already informally approved. The result is that licence requests are only sporadically met with a formal denial, which is the only type of denial authorities will report in the EU Council's Annual Reports.

22. In Belgium, transfer of controlled goods is licensed by the regional administrations of the Flemish and Walloon regions, and of the Brussels capital area, that each have their competent licensing authority. Production of small arms, light weapons and ammunition is concentrated in the Walloon region.

23. Italy was included on basis of the "notoriousness" of certain past small arms exports, as recorded in e.g. in "Supplying the Libyan stockpile". In: An Vranckx, Roy Isbister & Frank Slijper (eds.), *Lessons from MENA – Appraising EU transfers of military and security equipment to the Middle East and North Africa*. Gent: Academia Press, 2011, pp. 36-49.

Formal, recorded denials of licence applications have remained common in the German export licensing practice, thus far. In all years on record, the large number of processed German licences for small arms exports coincides with a large German share in the denied ML1 export licence requests. As recorded in Table 2, in 2011, the German export control authority approved 5 433 and denied 58 licences in the ML1 category (well over 1%), while stating diversion concerns in 44 of these cases. The same concerns were stated among the grounds in 46 of the 68 licences for small arms exports which that same export control authority denied in 2012 – the year it approved 5 169 such licences. The German export control authorities denied 26 licences over diversion concerns in 2013, having approved 5 169 that year, thus marking a trend towards proportionally fewer denials, until then. The denial-to-approval rate shot up again in 2014.

The Austrian export licence authority denied significantly fewer licences in the last two years covered in the table than it did in the years prior to that: 11 such licences were denied in 2012, and another 9 in the year before that, when it stated diversion concerns among the grounds in all but one case. The number of approved Austrian ML1 export licences remained roughly the same for each of those years on record.

Licensing practices of the EU's other specialist small arms exporter, Belgium, appear volatile as well. The denial-to-approval rate for the relevant licences peaked at well over 1% in 2013, when the 816 approved export licences in that ML category coincided with 11 export licences for ML1 goods denied, and diversion concerns were stated in 6 of the denied licence applications. The numbers stand out, as Belgian export authorities had denied far fewer export licence applications in earlier years.²⁴ In 2014 however, export control authorities in Belgium saw no reason to deny more than one ML1 export licence request, and another single one for ammunition categorised under ML3. If an increased awareness of the diversion risk is related to the 2013 peak in denied ML1 licences, that awareness appears to have been dealt with differently than with blunt denials in the year after. The lower denial rate may also be due to a change in arms producing and exporting companies' ambitions. The companies would no longer apply for export licences to supply clients in destinations they understood were now deemed too risky by the competent licensing authority. In 2014, the number of approved ML1 licences (708) is significantly lower than it was in three previous years (791, 882 and 816).

A similar "learning curve" is seen in French ML1 export licensing. Having turned down 7 such licences in 2011 and approved 169, far fewer formal export licence requests for small arms made their way to the French export licensing authority in the next years: 12 in 2012, 86 in 2013 and 58 in 2014.

24. The 2013 peak in denied licences occurred shortly after the revelation that an appreciable quantity of small arms had gone missing that the Belgian export control authority had licensed for export to Libya in 2009. Some of these arms were later photographed in sensitive corners of the Middle East, such as the Palestine territories.

The 2014 column in Table 2 further demonstrates that the German export control authority turned down far more licence requests for small arms transfers than it had done in previous years. The total number of approved German ML1 export licences in 2014 (2 243) was less than half of those approved in 2013 (5 169), yet the number of ML1 licences denied in 2014 (70) was higher than those denied in 2013 (45). The denial-to-approval rate that had been below 1% in 2013 thus shot up to over 3% in 2014. Even more indicative of a surge in caution over small arms exports licensing, is the prominence of diversion concern stated among the grounds for these denials. This ratio quadrupled from 26 diversion-concern-inspired denials to 5 169 approved ML1 licences in 2013 to 45 such denials versus 2 243 approved ML1 licences in 2014.

A similar evolution is seen in Czech export licensing of small arms: no such licences were denied in 2013 while 258 were approved, whereas in 2014, 15 were denied over diversion concerns to 218 approved. The denials in 2014 were at almost 7% of the Czech ML1 licences volume, and represent a clear surge in diversion concern.

However, the sudden increase in denied German and Czech ML1 licences in the 2013-2014 comparison, and the brief peak in Belgian denials for such licences in 2013, should not occlude the longer-term trend, EU-wide and all 22 licences categories taken together. These German and Czech peaks in ML1 licence denials rather offset the general declining trend in denial-over-diversion-concerns versus approved licences reported in Table 1 (0,55/1000 in 2005; 0,28/1000 in 2014).

The decreasing denial-over-diversion trend in all 22 ML categories reported in Table 1 is not explained by evidence that actual diversion practices are in decline. The illegal nature of diversion implies it is not being advertised out in the open. Cases are only recorded when detected by law enforcement operations or specialised tracing and tracking field research. Even if that research contributed to bringing more cases of diversion into the public eye, the corpus of documented cases provides no grounds to conclude diversion is currently being practiced less or more than it once was.

The declining overall denial-to-approval rate over diversion concerns would appear contradicted by the diversion risk awareness that some EU Member States' representatives have articulated in public debate. They have rather been constant, and eloquent, in their articulation of diversion risk in the negotiation of the Arms Trade Treaty that the United Nations adopted in 2013,²⁵ and in several other public fora since. A possible explanation for this apparent contradiction is that in recent times, the diversion risk awareness has begun to be responded to differently, or in more different ways, than by blunt denying of export licence applications. This can account for the increased expressed awareness of diversion risk, while explaining the downward trend in blunt denials of export license applications due to diversion concerns (denial-to-approval rate over diversion).

25. Statements in evidence of that awareness made during the lengthy negotiations by representatives speaking for the European Union and some of its Member States, are on record, e.g. through [Reaching Critical Will](#).

To examine this hypothesis further, the remainder of this paper will relate denial-over-diversion trends to end-use documentation and delivery verification practices, and seek comparative material from licensing practices in other arms control regimes – the United States and Switzerland.

The assumption underlying the hypothesis is that export control authorities have in recent years received end-use documentation of more satisfactory quality than they found such documentation to be in the past, and / or have had more effective means at their disposal to authenticate and verify such documentation.

More complete and verifiable end-use documentation in turn would have generated the assurances that export control authorities had lacked in the past. These assurances would lead export control authorities to decisions other than blunt denials of export licence applications. Without these assurances, older end-use control practices only allowed a blunt denial of the export licence request as the only way for export control authorities to sanction their concern of the possibility of diverted goods. More “surgical” or constructive means to address diversion concerns are thus assumed to have become available that would explain the downward denial-to-approval trend noted throughout this section.

THE US DEPARTMENT OF STATE “BLUE LANTERN”

Licensing authorities that seek assurance over the veracity of end-use documentation have good reasons to be in awe of the Blue Lantern programme that was set up in the United States over 25 years ago. The programme verifies the *bona fides* of foreign consignees and end-users of – what is called locally – “defense articles and defense services” that manufacturers based in the U.S. propose to supply. The Blue Lantern also aims to monitor that use after delivery.²⁶

The programme provides for pre-licence, post-licence, and post-shipment checks as required, including “through physical verification on locations with the proposed party of the transaction”, and all that with the aim to “determine if that party is a reliable recipient and that items are or will be used as agreed in the end use documentation”.²⁷

The Blue Lantern programmes can significantly help that deliberation process in conducting inspections at the site where, according to the end-use documentation, the controlled goods are proposed to be transferred, especially if those inspections are done before the licence is formally granted. The in-site checks are a means to address some of the unknowns about potential customers. An inspection visit can include an assessment of Physical Security and Stockpile Management (PSSM) at facilities where the end-user proposes to store the transferred equipment. Such assessment can help probe the risk that equipment will go missing from the facilities.²⁸

These and other pre-licensing checks are embedded in a monitoring cycle that actively follows through the transfer process after the licence is approved. After approval, this cycle includes the possibility to send Blue Lantern envoys on site to have a proper look at the use being made of the transferred equipment. The monitoring cycle in turn is integrated in an information system, which comprises a Watch List.

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26. “End-Use Monitoring and Third-Party Transfers”, *Greenbook* (Chapter 18), Ohio: Defense Institute of Security Assistance Management [consulted March 2016] ; detailed analysis and perceived shortcoming of the instrument is found in Fleur A. Burke, *How Little is Enough? U.S. End-Use Monitoring and Oversight of the Weapons Trade*. Washington: Center for Defense Information, 2001, 173p. The Blue Lantern has since been reorganised, but core components covered in the publication remain in place.
 27. Directorate of Defense Trade Controls, “End-Use Monitoring of Defense Articles and Defense Services – Commercial Exports FY 2014”. Washington D.C., 2015. This document sources the remainder of this section.
 28. Concern over leaks from stockpile facilities, that drives such probes, did not prevent (or may have been intensified by) the loss of an unknown number of assault rifles and pistols that the U.S. began transferring to security forces in Iraq from 2003. As many as 190000 were deemed lost, according to a 2007 report by the U.S. government accountability office (GAO) Report to congressional Committees, “Stabilizing Iraq – DOD Cannot Ensure That U.S.-Funded Equipment Has Reached Iraqi Security Forces” (GAO-07-711).

That list is a database that serves as an internal screening tool containing over 100 000 entities as of 2014.²⁹ That list includes files on clients that were effectively "sanctioned", but also files on clients where the investigation is still ongoing, that have the status of "suspect". The database is used to flag export license applications for possible Blue Lantern checks. Entities in the database are constantly being reviewed and modified – new entities are added, while others are deleted when the cause of concern is reliably proven to have gone away.

Following reorganisation of the U.S. Directorate of Defense Trade Controls (DDTC), which was completed in 2014, the Blue Lantern is currently managed by a Regional Affairs and Analysis Division, Office of Defense Trade Controls Policy, Bureau of Political-Military Affairs. DDTC continues to implement end-use monitoring provisions contained in the 1976 U.S. Arms Export Control Act (amended and updated since). The U.S. Arms Export Control Act conceived of the need, and the means to fill that need, to "confirm the legitimacy of proposed transactions, and to provide reasonable assurance that the recipient is complying with the requirements imposed by the U.S. government with respect to use, transfers, and security of defense articles and defense services; and that such articles and services are being used for the purposes for which they are provided".³⁰

The Act, as amended, further requires the submission to the U.S. Congress of an annual report describing action taken to implement the end-use monitoring of the articles and services exported abroad, including an account of the costs and number of personnel associated with the monitoring programme. According to its latest report,³¹ six State Department employees and two contractors in the Regional Affairs and Analysis Division managed the Blue Lantern in 2014. They also travelled to meet with U.S. embassy personnel involved in conducting the actual background checks, with host government officials, and local businesses engaged in trade of the items U.S. legislation stipulates they monitor.

The latest report further reveals that DDTC processed "roughly 63 000 licences" in 2014, and that it saw the need to formally initiate 564 checks in 79 countries (such checks are colloquially called "Blue Lanterns"). The highest ratio of Blue Lantern inquiries to licence application requests was seen in the Americas and South Central Asia 'due principally to concerns about unfamiliar foreign parties and the effect on regional security and stability of firearms and ammunition exports'. That same year, 641 Blue Lanterns were "closed" – some of which had been initiated before 2014. In 524 (82 per cent) of these 641 cases, the checks allowed to verify in a favourable way the *bona fides* of parties (including intermediaries to the delivery of the goods). The report further indicates that in many of these cases additional post-shipment inspections certified that the articles were received and secured by the authorised end-users.

29. Directorate of Defense Trade Controls, "End-Use Monitoring of Defense Articles and Defense Services – Commercial Exports FY 2014". Washington D.C., 2015.

30. Arms Export Control Act, Section 40A(a), 22 U.S.C. 2785(a)(2).

31. Directorate of Defense Trade Controls, *op.cit.*, 2015.

In the remaining 117 cases (18% of checks initiated that year), the findings of these inquiries were not consistent with information in the licence application request. In 29 instances, on-site checks to clear out the concern found the foreign party was indeed unreliable. In 23 cases a violation of licence terms was brought to light by a post-shipment check that found the involved parties had provided misleading information regarding the actual end-use of the transferred goods. These findings lead to the denial of 14 licence application requests, and revocation of one licence that had previously been approved. One case investigated by the Blue Lantern was referred to the U.S. law enforcement for criminal investigation.

The data about the verifications are rather compelling and worth examining up close: Two thirds of the aforementioned 117 cases had originally been examined due to diversion concern. Diversion concern as the source of the majority of the “unfavorable” cases points to the paramount importance of incorporating diversion risks into arms control policy and practice. If the diversion concern had remained unarticulated, two thirds of these “unfavorable” cases could have been missed entirely. In these cases, debate or regulation of the documented specific terms of arms control policy would serve as a distraction rather than serve their purpose. The Blue Lantern quite clearly helps ensure that arms controls serve their purpose. This would suggest that careful inspections incorporating diversion risks, similar to Blue Lanterns, are relevant, and necessary, to enforce the carefully crafted formal conditions for arms transfers across the globe.

Comparison of these latest Blue Lantern results with those on previous years indicates that the 18 per cent unfavourable rate is lower than had been the case in previous years. In some of those previous years, moreover, relatively more inspections were sent out to check on the end-use(r)s identified in the licence applications requests that the U.S. export control authority processed that year.

Table 3: Results of the US Department of State “Blue Lanterns”, 2011 – 2014³²

Year	Number of “closed cases”	“Unfavorable rate”
2011	592	27%
2012	706	20%
2013	1 029	19%
2014	620	18%

These data on U.S. arms export licence practices are difficult to compare as such with data from the EU Council’s Annual Reports according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment. Rather than the EU Common Military List, the U.S. uses the United States Munitions List (USML) as a control list “to guarantee national security and foreign policy with defense articles and services export regulations”.³³

32. The table is copied from Judd Stitzel, “Blue Lantern End-Use Monitoring Program”, U.S. Department of State, 2015.

33. “Overview of U.S. Export Control System”. *A Resource on Strategic Trade Management and Export Controls*. U.S. Department of State, s.d.

The U.S. system does not refer to assessment criteria in exactly the same terms as are found in the EU Common Position. Nevertheless, a concern over diversion is present in both export control regimes. The ways in which those concerns are tackled are consequently well worth the effort of comparing.

Table 4 below records the number of licence requests that the U.S. and E.U. Member States' respective arms export licensing authorities approved and "questioned" in their last year on record, 2014. The Blue Lantern Watch List allows the flagging of 'some concern' that may lead to an inspection to get clarity. As such the degree of concern is quantifiable. The EU Council's Annual Reports do not allow quantification of the number of cases where control authorities in EU Member States had 'some concern' over a diversion risk, which may or may not have been deemed sufficient to deny the licence request. That number of cases is assumed to be at least equal to the number of actually denied licences. Even if the two systems of control do not report on exactly the same aspect of their respective controls, at the least by volume, the number of export licence applications that the DDTC processed in 2014 compares well with the total amount of licences processed by the conglomerate of EU Member States in 2010, the year with the highest number on record. Both the 2010 and 2014 E.U. data are therefore collated in the table below.³⁴

Table 4: E.U. licensing practice and diversion concerns, 2010 – 2014; U.S. arms export licences, cases of concern and Blue Lanterns³⁵

	E.U. 2010	E.U. 2014	U.S. 2014
# Export licences approved	64 848	46 548	63 000
# Licence applications 'of concern' / 'some' diversion concern	≥ 236	≥ 117	564 / 75
# Licence applications denied, all grounds	371	346	14
"Diversion concerns" among grounds for denial of licence	236	117	< 14

The U.S. export control authority initiated 564 Blue Lantern inspections in 2014, which stand at less than 1% of the total number of licence applications that it had received that year. Blue Lantern checks investigated and found reasonable assurance of over 80% of 641 cases that U.S. inspectors were able to "close" in that year, some of which would have been initiated in the previous year(s). Of the cases that looked "unfavorable", only 14 lead to a denial of the corresponding licence requests.

34. Data on 2010 are sourced from the EU Council Twelfth Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, *Official Journal* Volume 52 C9/1-417 of 13 November 2011; 2014 exports are covered in the seventeenth such report, published in the *Official Journal* Volume 59 C163/1-544 of 4 May 2016.

35. Directorate of Defense Trade Controls, "End-Use Monitoring of Defense Articles and Defense Services – Commercial Exports FY 2014". Washington D.C., 2015.

The 14 denied licences to 63 000 approved licences in the U.S. are well below the denial-to-approval rate that was gleaned from EU Council reports on the EU Member States' licensing for all years in review. For the nearly 65 000 export licences that EU countries' authorities jointly approved in 2010, there is no way to know how many licence requests had raised "some concern" from the competent national export licensing officials. These officials may have approved the licences even while having doubts. The sole reported figure in this matter is that 371 formal licence requests were effectively denied in that year, and that diversion concerns figured in 236 of these denied applications. Also in the last year on record, in 2014, the EU Member States' export control authorities' denial-to-approval ratio was considerably higher than what U.S. export licensing authorities saw reason to deny in that same year, as was the case in previous years.

Comparison of EU Member States' export licensing data with those from the U.S. would confirm the tentative hypothesis formulated above: the denial-to-approval rate of arms export licences, and especially the rate of the denials motivated by concern over diversion risks, corresponds (inversely) with the means to access and "engage" proposed end-users. The more means available to reach out to the end-users, the more likely "reasonable assurance" is obtained that the end-use documentation is reliable, and the less need a licensing authority may see to bluntly deny the requested export licence. Export control authorities in EU member states had fewer means to reach out to the proposed end-users, conduct on-site checks and follow up in the post-delivery phase, than did the US Department of State's department controlling commercial arms sales by U.S.-based companies. It would appear that as a consequence, EU export control authorities translate their concerns into formal denial of a questionable licence request far more often than does the US Department of State.

In order to probe deeper into causes of the significant differences between U.S. and European export licensing practice, it is of note that the U.S. arms export control system is embedded in a much more encompassing endeavour, where the U.S. military-political establishment engages with parties on foreign soil. The U.S. may not have boots on the ground in all such places, but it does have a very extensive diplomatic corps and business relations, potentially also serving as a deterrent to diversion schemes. Such schemes are more likely to be found out and sanctioned when diverting U.S.-supplied defence articles to other parties and use for other ends than agreed in the licensing documentation. This would suggest that U.S. made equipment effectively stands a smaller chance to be diverted than is the case with equipment exported from elsewhere.

And yet, there are limits to what can be achieved with the means to help ensure that a recipient of U.S. made equipment "is complying with the requirements imposed by the U.S. government with respect to use, transfers, and security of defense articles and defense services; and [that] such articles and services are being used for the purposes for which they are provided".³⁶

36. Mission statement as in: Directorate of Defense Trade Controls, "End-Use Monitoring of Defense Articles and Defense Services – Commercial Exports FY 2014". Washington D.C., 2015, p. 1.

A recent case where those limits are exceeded concerns deployment of U.S. supplied goods by Saudi Arabia's armed forces. U.S. arms export control authorities must have had reasonable assurance as to the Saudi client's capacity and willingness to comply with the end-use documentation of solely legitimate defensive use of the goods. If the Watch List led any red flags to be raised when the deal to supply such goods was in the making, and even if such flags would have led to visits in site, the final decision was to approve the arms transfer. However as of mid-2015, some such equipment has been used for offensive goals in operations, as a Saudi-led coalition began deploying against Houthi strongholds in Yemen. The deployments were found to be in violation of international humanitarian law. By 2016, the international Cluster Munitions Coalition (CMC) reliably documented Saudi deployment of CBU-105 Sensor Fuzed Weapons (weapons that disperse canisters that release sub-munitions) in densely populated areas.³⁷ CMC also revealed that "in recent years", a Massachusetts-based company had obtained the licence from the U.S. government to supply these weapons to Saudi Arabia (and other recipient states that dispose of airborne means to deliver such weapons) under the strict condition not to use these weapons in civilian areas.

Non-compliance with these end-use conditions was established by CMC, not by Blue Lantern envoys. The U.S. export control agencies are nevertheless presumed eager to sanction non-compliant end-users, in line with their mission, as well as within the legal framework that mandates their activities. No information is available that the U.S. export control system (be that the Blue Lantern, or "Golden Sentry" programme that concerns Foreign Military Sales of defence articles and services via government-to-government channels) is currently taking action to recall licences for further supplies to the Saudi armed forces, nor to recover the equipment that was transferred in the past, nor even to prevent further unauthorised deployments of the equipment.

Proof of this unintended use would be expected to feed into the Blue Lantern monitoring cycle, and as such provide the U.S. export licensing authority with means to sanction this particular violation of end-use conditions. These sanctions could become part of a broader and longer-term endeavour to limit the use of any transferred equipment to the specific importer and exporter agreed on at the time of licensing. Proven non-compliance with end-use documentation in one case is sure to be noted and recorded in the Blue Lantern monitoring cycle. Such records generate "flags" on its Watch List, and can impact decisions to authorise new export licences that identify the once-non-compliant party as the end-user.

In this particular case, it is of note that Saudi armed forces hold a wide range of U.S.-supplied goods. This context makes the Saudi armed forces dependent on maintenance services and spare parts that the relevant U.S. suppliers can continue to supply only if the U.S. export control authority approves licence requests to that end. This gives the U.S. arms export licensing system leverage to deny future licence requests. However, it would not seem certain that the leverage is effectively used. Geopolitical considerations and foreign policy choices may demand that the U.S. licensing authority refrains from refusing further licence applications.

37. Cluster Muniton Coalition, "US-made cluster munitions in Yemen", 14 February 2016.

Unintended end-use of the cluster munition, as last documented in February 2016, would appear likely to be downplayed by the fact that these same Saudi forces are a major ally in the U.S.-led airstrikes on Syria.

The discussed case can serve here as a reminder that the situation in a recipient state may change. In Saudi Arabia, the context of possession and use of the goods evolved significantly over the past few years. In 2016 it no longer resembles the context that U.S. (and many other Western) arms transfer control authorities appraised in prior years, when they approved major export licences to Saudi Arabia. These same export control authorities may not come to the same decision about authorising transfer of the same goods and same end-user, if the latter were subject of a new export licence request. Transfer licences that were given at one time may be revoked, to prevent more transfers taking place under the same licence. But actual transfers authorised in the past when circumstances were different are difficult to undo. In all likelihood, the recipient at that time had intentions to use the goods in another way than a “defensive mode” recorded in the end-use documentation that the exporting country’s authorities had judged *bona fide*. The type of diversion in the documented case is one that takes transferred military goods “away from intended end-use” at an appreciable time after transfer. The diversion scheme, if there was one, could not possibly be anticipated nor detected at the time the decision was made to authorise that transfer.

For the purposes of this analysis, it appears instructive to consider this particular case of non-compliance with end-use documentation as an “unenvisioned” case of diversion. Such case needs to be distinguished from diversion operations that are designed with the purpose to mislead licensing authorities, and that enable authorised arms exports to be transferred to unauthorised – often illicit – end-use and end-users. However large the difficulty the U.S. State Department’s Blue Lantern would face to predict changes in the importer’s military policy, the programme is proving rather effective in detecting, and preventing, attempts to mislead the U.S. arms export control authority. Year after year it reports “unfavourable” findings of Blue Lantern checks that lead the requested licences to be denied, revoked or even passed on to criminal investigation. In the course of the years examined in Table 3, the “unfavourable rate” was also seen to diminish.

Diligent scrutiny of end-use documentation is a key line of defence against the latter, more deceptive type of diversion scheme, where “such documents are effective only in the context of a broader system that includes a thorough consideration of diversion risks at the licensing stage, the verification of end-user documentation, and complementary post-shipment controls”.³⁸ In the Blue Lantern programme, information gleaned from each of these controls and verifications is additionally ensured to feed into a monitoring cycle, which revolves around an agile and well-maintained information system. The importance of that information cycle in effectively detecting and preventing diversion is something that export licensing authorities elsewhere might care to bear in mind.

38. Small Arms Survey, “Who’s Buying? End-User Certification”, In: *Small Arms Survey 2008 - Risk and Resilience*, Cambridge University Press, 2008, p. 155.

SWISS POST-SHIPMENT VERIFICATION

In 2013, the Swiss export control authority began conducting on-site verification of the end-users that it authorised Swiss exporters to supply.³⁹ Mechanisms to allow for this type of verification were put in place shortly after the Swiss (and other) media reported on the presence of Swiss-made munitions in Libya – a country that had not been licensed to receive such arms (even before Libya was last placed under a U.N. embargo). On closer inspection, the ammunition proved to be sourced from stocks that the Swiss state-owned RUAG Ammotec factory had legally exported to Qatar by 2009 for use restricted to the Qatari armed forces. In the absence of evidence that the Qatari authorities ever requested authorisation to re-transfer such stocks, least of all to rebel forces in Northern Africa, the Swiss export control authority concluded they had a problem with the importer in Qatar. The problem became even clearer, when grenades that the same Swiss company had supplied in 2003-2004 were also found in use by rebel forces in Syria by 2012.⁴⁰

The Swiss temporarily froze export licences to Qatar, investigated the matter in depth, and installed a system to reduce the likelihood that similar situations could recur in the future. As of October 2012, article 5a alinea 3 of the Swiss War Material Ordinance (WMO) stipulates “If there is an increased risk in the country of destination that the war material to be exported will be passed on to an undesirable end recipient, the licensing authority may stipulate that it has the right to verify compliance with the non-re-export declaration on site. In the case of exports of substantial volume, a non-re-export declaration in the form of a diplomatic note from the country of destination is required”.⁴¹

The Swiss export control authority is not held to, nor able to, exercise the right to conduct the verification for each and every shipment it deems risky. Capacity to conduct inspection is limited, and its deployment is directed by risk assessment considerations. The calculus to identify the shipments deemed to be the riskiest, and therefore the neediest of post-shipment verification, takes into account the type of transferred materials: Small arms are believed to be passed on to another user more easily than is the case with anti-aircraft guns. Ammunition, for its part, is considered highly prone to diversion. However, whether or not a diversion of a munitions stockpile has occurred, is virtually impossible to verify. The Swiss post-shipment verification endeavour further aims for geographical spread and to be directed to countries where “previous incidents” have occurred.

39. The section is largely based on information provided by the Swiss State Secretariat for Economic Affairs' export licensing authority SECO, in private communications on 1 March 2016 and 16 March 2016.

40. Urs Geiser & Jeannie Wurz, “Swiss toughen rules for weapons sales”, Swissinfo, 12 September 2012.

41. WMO article 5a alinea 3, inserted by No I of the Ordinance of 10 October 2012, in force since 1 November 2012. An English version of the October 2015 status of the WMO is available at the web portal of the Swiss government

By March 2016, eighteen post-shipment verifications had been conducted – roughly six per year since the programme started.⁴²

The attempt to cover countries where “previous incidents” have occurred does suggest that findings from other types of inspections feed into the information base that directs the Swiss post-shipment control endeavour, such as monitoring of delivery verification documentation. In this, the Swiss initiative is reminiscent of Blue Lantern inspections that respond to “red flags” raised by constant reviewing of the Watch List. The Swiss WMO quite relevantly provides for a sanction in article 21, stating that if instances are detected of non-compliance “with the condition and requirements attached to licences and import certificates (...) the licensing authority may revoke the licence that has been granted (...) or may refuse to extend or renew the licence or to grant further licences (...) for a certain period of time”.⁴³ Articles 17-20 of the WMO provide the legal basis for eliciting information relevant to such exercise. Article 20 more particularly tasks a Central Office for Combatting the Illegal Trade in War Material to examine whether supplies of war materials have arrived at the planned and approved destinations.

Given its relative novelty it is not yet possible to conduct an in-depth evaluation of the Swiss post-shipment verification programme. The competent Swiss licence authority does not expect the programme will bring down the denial-to-approval rate (which is low in any case); it rather appraises the programme as a confidence building measure and therefore as an instrument to prevent undesirable diversion of exported war material.⁴⁴

42. Email exchange with the Swiss export licensing authority, 16 March 2016.

43. Swiss WMO, article 21 alinea 2.

44. Email exchange with the Swiss export licensing authority, throughout April 2016.

POST-LICENSING VERIFICATION BY EU COUNTRIES' ARMS EXPORT CONTROL AUTHORITIES

Several EU countries have had at their disposal some means to carry out limited end-use monitoring. Reports from nearly a decade ago already ascribed Bulgaria, Italy, Sweden and the United Kingdom procedures to conduct targeted in-country verification through consular services or defence attaches.⁴⁵ Austrian, Dutch, Estonian, Lithuanian, and Romanian post-delivery verification endeavours were described elsewhere.⁴⁶ All descriptions came with the caution that actual use of those means was at best sporadic due to lack of resources. Progress made in the EU in recent years is reviewed below.

France

Since 2012, France has a mechanism in place that provides for “ex-post controls”. In the French take on the matter, “post” certainly refers to the period after the arms export licensing authority has approved a licence. What puts these controls apart from others reviewed thus far is that inspections are not conducted at the site where the declared user is expected to store and use the imported materials. The measures implemented in France since June 2012 are restricted to inspection of documents and stocks on the premises of arms producing companies on French soil.

The aim of these controls is to verify that companies have acceptable delivery documents for each of the transfers that the exported licensing authority authorised these companies to make.⁴⁷ The transfer operations these companies engaged in should “match the authorisation granted or published. Those control measures, implemented since June 2012, are carried out by Ministry of Defence personnel (DGA – Defence Procurement Agency). They include two types of action: control of the export declaration documents and contracts that companies are obliged to send to the administration and checks carried out on the company’s premises”.⁴⁸ Information elicited by these controls is assumed to feed into the information available to French licensing officials at the time they decide whether or not to approve requests for follow-up and new export licences involving these same companies. French companies, and the importers of their products, that are found to be not entirely compliant, could potentially be sanctioned when they seek to get new licences approved for further and other exports.

45. The procedures were described in correspondence to Saferworld summarised in “EU NGO submission to COARM on harmonisation among EU Member States on end-use and post-export control”, 2008, p. 10.

46. Ilhan Berkhol & Virginie Moreau, *Post-export controls on arms transfers delivery and end-use monitoring*. Bruxelles: GRIP, 2009, pp 20-21.

47. The unavailability of delivery verification documentation was signalled as a problem for some EU countries, in Ilhan Berkhol & Virginie Moreau, *op.cit.*, Bruxelles: GRIP, 2009, 39p.

48. République française - Ministère de la Défense, 2015, *France and Arms Trade Control*. Paris, 2015, report, 38p. The measures are explained on p.12.

Germany⁴⁹

The German arms export control system likewise controls paperwork and stocks at the premises of defence companies based on German soil. It is to do more in the near future. As of 2013, when the current political coalition was installed, the Federal Government revealed its intentions to enhance its capacity to control the use and users of certain German defence items abroad.

By mid-2015, the German *Bundesministerium* had published a list of “key points” to guide the creation of a post-delivery verification programme. The points on that list announced to create legal means to allow for “selective post-shipment controls for future deliveries to third countries of war weapons and specific types of firearms (pistols, revolvers and sniper rifles)”.⁵⁰ The legal grounds for these inspections were effectively established in March 2016, when a new format of end-use certificates (“*Endverbleibserklärungen*”) was published,⁵¹ that contains a clause whereby the foreign state recipient of German defence items grants Germany the right to perform “on-the-spot checks”.⁵² It is also made clear that the end-user shall face consequences in case non-compliance with the end-use certificate is ascertained or on-the-spot checks are refused despite consent given in the end-use certificate.

The list of key points that the German government published in 2015 further explained the “purpose of the controls is to inspect whether the weapons supplied are still present in the recipient country and in the possession of the end-user specified by the end-use certificate. A visual inspection is [thought to be] usually sufficient for this purpose. Random checks [are envisaged to be made] for inspection of large quantities of arms”.⁵³ In charge of these inspections are the Federal Office for Economic Affairs and Export Control and the German diplomatic mission in the inspected country.

The timeline of the creation of the German end-use monitor programme coincides with the sudden “surge in caution” over ML1 licensing that was noted above, more particularly in Table 2 (‘Approved and denied ML1 export licences, 2011-2014, per exporting country’) and its analysis. Whatever brought the export control authority to approve ML1 export licences with greater caution at that particular time may also have driven the German Government to create the means to monitor end-use of defence items after delivery in the recipient country.

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49. Information for this section was obtained from the German Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA), in a series of communications that took place in March and April 2016.
 50. Bundesministerium für Wirtschaft und Energie, “Eckpunkte für die Einführung von Post-Shipment-Kontrollen bei deutschen Rüstungsexporten”, 8 July 2015.
 51. “Sechste Verordnung zur Änderung der Außenwirtschaftsverordnung Vom 14. März 2016” as published in Bundesanzeiger, 18 March 2016.
 52. “On-the-spot-checks” is the term used in the English-language summary of the “Eckpunkte für die Einführung von Post-Shipment-Kontrollen bei deutschen Rüstungsexporten” that the Bundesministerium für Wirtschaft und Energie published on 8 July 2015.
 53. Quoted from in the English-language summary of the “Eckpunkte für die Einführung von Post-Shipment-Kontrollen bei deutschen Rüstungsexporten”.

The German arms export control establishment is also assumed to have called for an in-site monitoring system in response to a series of diversion cases, including one involving German-made G36 assault rifles in Mexico.⁵⁴ In this particular case, the German manufacturer Heckler & Koch obtained a licence to export several thousands of rifles to the Mexican police forces, which it did in the years 2006 to 2009. However, by 2007, an additional condition was imposed in the licence that these arms not be put into the possession of the police forces of 4 of the 31 States of the Mexican Federation (Chihuahua, Jalisco, Chiapas, and Guerrero), where severe violations of human rights had been documented. "However, evidence began to accumulate that the ban [to supply these particular Mexican States] had been violated, culminating in 2011, when photos and witness testimony indicated that police used G36 rifles to open fire against a student protest in Guerrero".⁵⁵

In 2013, two staff members of the German manufacturer admitted to having arranged for the shipment of several thousands of the rifles to police forces in at least one of the four Mexican states excluded from the export licence the company had obtained.⁵⁶ Research published at a later date indicated G36 assault rifles were also diverted to end-users in Mexico that the German export licence excluded in more ways than one.⁵⁷ Police forces in at least one of the 26 Mexican States that the German export licence authority had deemed unproblematic, had nevertheless given or sold the G36 rifles to drug trafficking cartels. The *Guerreros Unidos* cartel, either directly or through recycling on the local black market, then obtained a significant number of these German-made rifles and in their turn, gave or sold the rifles to police forces in Guerrero – one of the four Mexican States explicitly excluded from the German export licence. Some members of the police forces in the State of Guerrero were found to enforce illegal transactions for that local organised crime cartel, *Guerreros Unidos*. The case thus illustrates a process of "reverse trafficking" - from illegal armed non-state actors, to the regular Mexican security forces.

There is no evidence that the German arms export authority had been particularly concerned about the Mexican client at the time it licenced the transfer of the first G36 rifles. But its concern, about human rights violations rather than diversion, became clearly articulated soon after, when Germany set conditions to further use of the export licence. An end-use monitoring system would have made it possible to verify compliance with such conditions – if that system had been in place. It might have brought the transfer to unintended users to light earlier, and in that case lead the export licence to be revoked, and prevent further transfers that brought the company's executives to the courthouse.

54. The assumption of that motive was clearly spelled out in specialist Latin American sources familiar to that 'Mexican case'. None of the German sources queried on the matter could validate this assumption.

55. Myriam Wells, "Germany Arms Firm Illegally Sold Weapons to Mexico", InSight Crime, 7 May 2013.

56. Wolf-Dieter Vogel, "Heckler & Koch gibt illegale Exporte zu - Deutsche Waffen für Mexiko", Die Tageszeitung, 6 May 2013.

57. Marguerite Cawley & Steve Dudley, "German Guns in Mexico and the 5 Levels of Police Collusion", InSight Crime, 12 December 2014; Wolf-Dieter Vogel, "Die Spur führt nach Iguala", in Die Tageszeitung, 10 December 2014.

A condition for the post-shipment control system that the German *Bundesministerium* hints at in its key points for the introduction of post-shipment controls for German arms exports, is that it serve rather than harm German defence contractors. Spokesmen for German industry are reportedly “very keen” on the post-shipment control to get in place.⁵⁸ They recognise the system in the making as a means to better safeguard their exports, and thus, their reputations, and hopefully deter those that would try to divert the controlled goods Germany can supply.

The concern is nevertheless that the implementation of such a system should not unbalance the level-playing field that German exporters have, when compared to competitors elsewhere in the European Union. The list of key points recognises this concern explicitly where it states that “the competitiveness of German industry and armament cooperation with third countries must not be compromised by the post-shipment controls system”.⁵⁹ It adds that “Germany shall address the system of post-shipment controls at the EU level in order to align national arms export guidelines in the EU (...). Moreover, the Federal Foreign Office shall advocate the introduction of comparable controls on the part of their partners in the EU and NATO”.⁶⁰

Mechanisms for harmonising end-use monitoring practices within the EU

A forum for advocacy that the German Foreign Office may usefully contemplate using is the European Union Council Working Party on Conventional Arms Exports, known by the acronym COARM. On a fairly regular basis, COARM brings together the representatives of the 28 EU Member States, who also meet with non-governmental researchers and arms control campaigners.⁶¹ Such encounters that have brought together representatives of these different communities have been a setting to discuss post-delivery verification,⁶² and have been an occasion to raise awareness of the risk of diversion in general.

Decision-making to move this endeavour further ahead is, however, undermined by the fact that the European Union institutions have very limited competence on war materials and other conventional arms. Thus far, these institutions have been channels to install instruments to bring some coherence in the different EU Member States’ national arms export control policies and practices.

58. Appraisal by staff from the Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA), communicated in a telephone conversation with the author on 7 March 2016.

59. Quote from the English-language summary of the “Eckpunkte für die Einführung von Post-shipment-Kontrollen bei deutschen Rüstungsexporten” that the Bundesministerium für Wirtschaft und Energie published on 8 July 2015.

60. *Ibidem*.

61. Among their most recent encounters is the Conference “EU arms exports: Steady-as-they-go in times of crisis?”, that Saferworld, GRIP, the Flemish Peace Institute and the European External Action Service jointly organised on 29 May 2015 at the Flemish Parliament. The conference was also an occasion for a representative of the Swiss export control agency to explain the Swiss Post-shipment Verification programme.

62. E.g. “EU NGO submission to COARM on harmonisation among EU Member States on end-use and post-export control”, op. cit., 2008, 18p.; Ilhan Berkhol & Virginie Moreau, Post-export controls on arms transfers delivery and end-use monitoring, op. cit., 2009, 36 p.

The strongest of these instruments, the legally-binding Common Position that the EU Council enacted in 2008, was up for review 3 years after its adoption.⁶³ A first phase of the review found the instrument fit for its purpose, and yet in need of further clarification on how to interpret some of the criteria that licensing officials are tasked to assess before deciding to approve or deny an export licence.⁶⁴ These clarifications in turn led to an updated User's Guide to be adopted in July 2015.⁶⁵

The best practice sections for some of the assessment criteria were expanded considerably in the update, most notably the User's Guide section on Criterion 7, which is the risk of diversion. The update has not altered a first substantial chapter of the User's Guide on licensing practices. That chapter proposes a common core of elements and best practices in the area of end-use certificates and makes the following recommendations on post-shipment verification:

"Whereas the emphasis of export controls remains on the pre-licensing phase, post-shipment control can be an important supplementary tool to strengthen the effectiveness of national arms export control.

Post-shipment measures, e.g. on-site inspections or delivery verification certificates, are particularly useful tools to help prevent diversion within the buyer country or re-export under undesirable conditions.

In order to share available information on a voluntary base, Member States implementing post-shipment control are invited to inform partners about their experience in this field and about knowledge of general interest gathered by post-shipment measures".⁶⁶

The section in the User's Guide on assessing the risk of diversion encourages licensing officials from different EU Member States to share their expertise and specific insights. Especially relevant in this context is information about importing parties that are presumed or proven to have violated the non-re-export clause. Sharing that information is essential to increase the impact of future sanctions of the EU Member States. If information about cases of proven diversion are shared, that information can lead the licensing authority of each of these EU States not to authorise any further and new exports to the same "unreliable" party.

For this sanction to have maximum effect, the evidence that a client violated a non-re-export clause must be known and taken into account by all 28 EU Member States.

63. The obligation to review the instrument is created by Article 15, "European Union Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment", Official Journal, L 335 of 13/12/2008, pp. 99-103.

64. Kloe Tricot, *The EU and Arms Exports: Options and Limitations of the Common Position Review*, Brussels : GRIP, 3 September 2014.

65. Council of the European Union. *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*. Updated 20 July 2015, 155 p. (Brussels, 20 July 2015 (OR. en) 10858/15 COARM 172 CFSP/PESC 393).

66. *Ibidem*, chapter 1, section 3, p. 9.

In case the export licensing authority in any of the other 27 EU member States were requested to approve an export licence to the same party, they should all be able to refer to an evidence base that has incorporated the “bad” experience suffered by the one other Member State. Evidence that a client has violated the conditions of a licensing agreement with one Member State would show the diversion risk to be apparent for any future export licence request. A request referring to similar goods would thus stand a bigger chance to be refused by all other EU Member States.

The EU mechanism already provides for a coherence-generating mechanism. This mechanism is to prevent that parties, who were denied an export licence for particular goods from one EU Member State licensing authority, can successfully “shop around” for the same type of goods from any other country within the EU. The ground for this arrangement is in Article 4 of the EU Common Position.

For the mechanism to work in this way, the European External Action Service operates a confidential “denials database”, that contains reports on all export licences that EU Member States’ export control authorities have denied in the past three years. Each EU Member State licensing authority evaluating end-use documentation for a new export licence request must consult the authority of the other EU Member State that denied a license for the same goods to a party in the same recipient country. The information of that consultation then feeds into their deliberation on the licence request. The most recent EU Council Annual Report on the implementation of the Common Position, from March 2016, announces that a “dedicated IT platform of a more accessible and user-friendly nature” will support the denial notifications and consultations in the near future.⁶⁷

EU Member States do not currently operate a comparable information sharing arrangement on approved licences. The Common Position does oblige their export control authorities to report all approved licences annually, but that information is not guaranteed to be circulated promptly, nor to be available to those it may concern in real time. The concerns a licensing authority may have had when authorising a transfer are not recorded in another than confidential way. As a consequence, there is no guarantee that future requests to other countries’ licensing authorities will be appropriately informed about the concerns other authorities may have had, e.g. requests they deemed risky, but not sufficiently risky to refrain from authorising the transfer.

Suspicion of or actual evidence of diversion or other non-compliance with end-use conditions, is not guaranteed to be communicated to other licensing authorities in the process of assessing diversion risk for a licence request by the same end-users. Even if arrangements have been announced to promote the sharing of diversion concerns, it is unclear whether pertinent information is currently being shared on more than an informal, haphazard basis.

67. Council of the European Union, “Seventeenth Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment”, as noted by Council at its 3457th meeting on 14 March 2016.

The information-sharing arrangement that EU Member States' export control authorities currently operate compares badly with the Blue Lantern Watch List. Even if the EU's confidential denials database is topped with some information on actually approved licences, circulating over closed channels amongst the EU Member States' licensing officials, the information base available to them is far more limited than the Watch List. The latter puts pertinent information on approved licences at the disposal of the U.S. export licensing authority in real time, as well as records of outstanding delivery verification and any available evidence of non-compliance with end-use documentation. It is also fed with evidence that was found during pre- and post-licensing visits, evidence that only very few European countries can obtain at present.

SHARING INFORMATION GLOBALLY

Counter-diversion measures can become more efficient and effective if arms exporting countries align their policies and practices. Ideally, all parties involved in global arms transfers collaborate in this endeavour, including countries that primarily import arms. Control mechanisms of countries that export arms and those that primarily import arms constitute and collaborate in a global partnership with a joint interest in combating illegal arms transfers and diversion from authorised transfers.

That understanding is reflected in the international Arms Trade Treaty (ATT) that United Nations Member States adopted on 2 April 2013, and that went into force on 24 December 2014. The principles' section of the Treaty refers to the "responsibility of all States, in accordance with their respective international obligations, to effectively regulate the international trade in conventional arms, and to prevent their diversion, as well as the primary responsibility of all States in establishing and implementing their respective national control systems".⁶⁸ The ambition to contain illegal markets for arms and to stop diversion from authorised transfers is elaborated further in several of the Treaty articles.

ATT Article 11 obliges each State Party to the Treaty to take measures to prevent diversion, along lines worth recalling here at length: The exporting State Party is held to at the least seek to prevent diversion "through its national control system, by assessing the risk of diversion of the export and considering the establishment of mitigating measures such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States. Other prevention measures may include, where appropriate: examining parties involved in the export, requiring additional documentation, certificates, assurances, not authorizing the export or other appropriate measures".⁶⁹

"Importing, transit, trans-shipment and exporting States Parties shall cooperate and exchange information (...) in order to mitigate the risk of diversion of the transfer of conventional arms".⁷⁰ A State Party to the Treaty that "detects a diversion of transferred conventional arms (...) shall take appropriate measures (...) to address such diversion [such as] alerting potentially affected States Parties, examining diverted shipments of such conventional arms (...), and taking follow-up measures through investigation and law enforcement".⁷¹

68. United Nations, *The Arms Trade Treaty*. 2013, here after referred to as "ATT".

69. ATT Article 11, §2.

70. ATT Article 11, §3.

71. ATT Article 11, §4.

The same article also provides for longer-term preventive measures, where it adds that in “order to better comprehend and prevent the diversion of transferred conventional arms (...) States Parties are encouraged to share relevant information with one another on effective measures to address diversion. Such information may include information on illicit activities including corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, or destinations used by organized groups engaged in diversion”.⁷² The article’s final paragraph encourages States Parties “to report to other States Parties, through the Secretariat, on measures taken in addressing the diversion of transferred conventional arms”.

The strength of this defence against diversion would seem to depend less on the number of countries that sign and become State Parties to the Treaty, than on the availability of relevant information and willingness to share such information on the voluntary basis that is proposed in this article. On the upside of this awareness is the assurance that information relevant to preventing diversion is also being shared by one of the arms exporting countries that have thus far refrained to become State Party to the ATT, that is the U.S. Certain findings of the Blue Lantern programme have reportedly been shared with authorities of other countries from times long before the ATT went in force or was even being negotiated.⁷³ In other words, the United States does not “need” to be State Party to the Treaty to respond to the need to share information and therefore contribute to the global partnership to help combat and eradicate the illicit trade in arms.

Meanwhile, the capacity of countries that are primarily importers of arms, and occasionally allow for transit or re-export of arms over their territory, are being made aware of the phenomenon of diversion and of the many ways in which it can affect their security over time and in broader regional contexts. An UN Trust Facility Supporting Cooperation on Arms Regulation (UNSCAR) had already been put in place to assist countries in this endeavour, even before the ATT went into force. That Treaty, in turn, contains an article that strongly encourages all State Parties to cooperate to detect and prevent arms diversion schemes, and provides implementation assistance to State Parties that require and request such assistance.⁷⁴ UNSCAR funding allowed the United Nations Institute for Disarmament Research to examine several options to enhance common understanding and strengthen end-use and end-user control systems – with the specific aim to detect diversion schemes and prevent their execution.⁷⁵

Proposals to standardise such systems have also been examined in the scope of the International Small Arms Control Standards (ISACS), which are relevant for the transfer of more types of conventional arms than small arms only.⁷⁶

72. ATT Article 11, §5.

73. Private conversation with a representative of the U.S. Department of State, August 2015.

74. ATT Articles 15 and 16, respectively.

75. UNIDIR, *Examining Options to Enhance Common Understanding and Strengthen End Use and End User Control Systems to Address Conventional Arms Diversion*. Geneva: UNIDIR Resources, 2015, 124p

76. More particularly International Small Arms Control Standard, 03.21: *National controls over the end-user and end-use of internationally transferred small arms and light weapons*. UN Coordinating Action of Small Arms, 2014.

TENTATIVE CONCLUSIONS

Under review has been a long list of initiatives, measures and instruments to (better) authenticate end-user documentation for arms exports. Their potential was discussed to strengthen the lines of defence against those keen on circumventing restrictions and undermining arms transfer controls. Increasingly more research and reports on such practices make arms control practitioners aware of diversion risks and inspire reflection on what they can do to contain such risks. All stakeholders are also encouraged to share information and cooperate to detect and avoid diversion of authorised arms export transfers. The evolution is clear and positive, and progress undeniable.

While relatively good news for business, the observed overall decrease of the denial-to-approval ratio in export licensing by EU member states is not by definition a sign of progress in all respects. If a cue can be taken from the US Department of State's Blue Lantern, the post-shipment and end-use monitoring programmes that EU countries authorities are putting in place will bring down their export licensing denial-to-approval ratio further. No true progress is made if export control authorities drop their guard before they can monitor end-use sufficiently well beyond the delivery phase. A position articulated on this matter nearly a decade ago is well worth recalling:

“[W]here specific concerns exist, delivery verification and end-use monitoring can be an invaluable tool in subsequent licensing decisions, thus helping to prevent future diversion and misuse. Note that such checks should not be an excuse for undertaking less stringent pre-licensing checks; they should be used as an additional safeguard. The two systems should complement each other, setting up a 'virtuous loop', with post-delivery verifications feeding into subsequent pre-licensing risk assessments”.⁷⁷

In the short term, calls for information sharing on an ATT-wide scale and EU countries' actual end-use monitoring programmes won't close the virtuous loop in the same way as the Blue Lantern. Their arms export control authorities may also want to hold on to the awareness that in the foreseeable future, the exports they authorise will remain more likely to be diverted than are exports by U.S. companies, that are embedded in the US's encompassing military, diplomatic and economic grid.

77. "EU NGO submission to COARM on harmonisation among EU Member States on end-use and post-export control", compiled for Saferworld by Jackie Macalesher in 2008, pp 8-9.

Post-delivery verification, end-use monitoring and exchange of relevant information cannot guarantee that no more arms will be diverted from legal exports. It will remain inherently difficult to evaluate to what extent the instruments discourage diversion schemes and effectively prevent authorised arms transfers from becoming available to unauthorised users. Violations of non-re-export clauses and other modes of illegal arms transfers are not usually advertised. Such re-exports are unlikely to be reported – especially in open sources – and evidence that they happened is rarely ever collated in statistics. The end-use monitoring instruments that have recently been put in place could create the illusion of control and forge some sort of assurance that leads arms export licensing authorities to OK end-users they would have had good reason to be concerned about in earlier days.

Finally, even if transferred arms remain under the control of the designated users and in the country that the end-use documentation described as their destination, the use of the arms is not guaranteed to be restricted to the purposes described in that documentation. Deployment for other purposes is a more visible type of diversion than are hidden re-exports. Under current conditions, however, such visible unintended use has not given sufficient ground to try and recuperate the arms, or ensure that further deployment is restricted to intended end-use.
