BRIEFING

Working to prevent armed violence

Saferworld Submission to the Council Working Group on Conventional Arms (COARM) on the elaboration of criterion 5 of the EU Code of Conduct on Arms Exports

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Criterion 5:

The national security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries

Member States will take into account:
(a) the potential effect of the proposed export on their defence and security interests and those of friends, allies and other Member States, while recognizing that this factor cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability;
(b) the risk of use of the goods concerned against their forces or those of friends, allies or other Member States;
(c) the risk of reverse engineering or unintended technology transfer.

(from the *European Code of Conduct on Arms Exports*, 1998)

Introduction

Criterion 5 of the EU Code of Conduct on Arms Exports (EU Code) is virtually unique in that this criterion contains both restrictive and permissive elements, whereas almost all the other criteria are fundamentally restrictive in nature.[1] The primary focus of criterion 5 is the impact of a transfer on the security interests of the licensing state and its friends and allies. This would suggest that as well as being a reason to deny an arms transfer licence, national security concerns can be used to justify a transfer that would be otherwise be refused under other criteria. Saferworld believes that this confusion of message creates a potential loophole in the licensing process and that the elaboration of criterion 5 should place clearer, tighter limits on the occasions when this criterion can be used permissively. This is particularly important in terms of the value of the criteria elaborations for EU member states' officials who may be new to the EU Code, as well as relevant officials from non-EU states that have either professed an intention to adhere to the principles of the EU Code or wish to understand better

[1] The only other exception is contained in criterion 6; see the Saferworld submission on the elaboration of criterion 6 of the EU Code of Conduct on Arms Exports (EU Code) for more details.

how a criteria-based system of transfer controls can be applied ion practice. In addition, member states should agree special protocols for information-sharing and transparency where licences are awarded under criterion 5 that would otherwise have been refused.

The permissive aspect of criterion 5

In both the chapeau and sub-paragraph (a), criterion 5 of the EU Code contains language that can be used as the grounds for not only refusing an arms transfer licence, but also as the grounds for awarding a licence, potentially when other of the criteria would argue in favour of refusal. That is, member states may approve transfers of controlled items where this is deemed to be in "their defence and security interests" or "those of friends, allies and other Member States" (sub-paragraph (a)), or the "national security" interests of same (chapeau). Sub-paragraph (a) then notes that these defence and security interests cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability (effectively criteria 2 and 4 of the EU Code).

This formulation is problematic on two counts.

1. The explicit prioritising of the application of criteria 2 and 4 over that of criterion 5 implies that defence and security interests *can* take precedence over the restrictive guidance in all of the *other* criteria (1, 3, 6, 7 and 8). Saferworld has serious doubts about whether this is consistent with the commitment in the EU Code to "set high common standards which should be regarded as the minimum for the management of, and *restraint* in, conventional arms transfers by all Member States".[2] Such an approach is especially problematic in terms of criterion 1 (international obligations and commitments). There are certain non-derogable international obligations which have special status in the international legal system. These include the prohibition of aggression, prohibition on recourse to force or the threat of force, genocide, apartheid and torture, as well as basic rules of international humanitarian law. Also of particular importance are the articles of the UN Charter and the binding decisions made by the UN Security Council.[3] A literal reading of criterion 5 would call into question the non-negotiable nature of these commitments.

2. The use of terms such as "national security" and "defence and security interests" are malleable to the point of being a potential enemy of good practice. As such, they do not provide an appropriate framework on which to base licensing decisions. For example, the national security concerns were used by some states as justification for the use of military force against Iraq in 2003, whereas other states took an entirely contrary view, i.e. that the use of military force would be damaging to national security. Saferworld recognises that arms transfer licensing will inevitably involve the exercise of judgement, and accepts the inherent right of all states to self-defence under Article 51 of the UN Charter, however unqualified references to national security or defence interests would seem to provide far too much room for interpretation. This undermines the declared aim of the EU Code to "reinforce cooperation and to promote convergence in the field of conventional arms exports."[4]

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[2] Preamble to the EU Code, http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf, emphasis added.

[3] For more on non-derogable international obligations, see section 5 of the Saferworld *Submission on the elaboration of criterion 1 of the EU Code of Conduct on Arms Exports*, March 2007, http://www.saferworld.org.uk/publications.php?id=252.

[4] Preamble to the EU Code, *op. cit*.

Addressing the weaknesses of criterion 5

In order to address the weaknesses identified above, member states should set out the circumstances under which criterion 5 would permit a transfer where this would contradict the outcome of the strict application of the other criteria. Saferworld appreciates that when considering whether to licence the transfer of controlled goods, the right to self-defence may take precedence over, for example, certain concerns over likely diversion. However, it is incumbent upon member states to:

- limit the prioritising of permissive over restrictive elements to the bare minimum; and
- elaborate in as much detail as possible those circumstances where the permissive use of criterion 5 could trump the restrictive application of the other criteria (while acknowledging that no elaboration could, or should attempt to, anticipate every situation).

This approach would require the elaboration of a number of terms included in the text of criterion 5. These include:

- national security;
- friendly and allied countries; and
- defence and security interests.

When elaborating these terms, it is essential that when considering how to relate them to arms transfers, member states apply several interrelated tests, within the limitations set out by customary international law.

First, member states must consider whether the perceived threat is of an existential nature. There will be plenty of occasions where it will be possible to argue that a transfer would be relevant to national security or defence and security interests, for example in the context of the "war on terror" or "war on drugs", however on many such occasions the threat could be relatively trivial. Second, military force should be used only as a last resort, and only to deal with the particular threat that is faced. Third, the force used must be proportionate to the threat faced and must be limited to what is necessary to deal with that threat. In this respect, when evaluating prospective transfers against criterion 5, member states should reject the concept of pre-emptive self-defence. So while self-defence is an inherent right of states under international law, there are limitations on its usage. The concept of self-defence requires that an armed attack has happened or is imminent.

This is not to say that transfers can never be authorised in other circumstances, but rather that where criterion 5 is in conflict with certain of the other criteria (but not all, as discussed above), these tests should be applied.

Restrictive elements of criterion 5

In addition to the issues surrounding the permissive aspect to this criterion, there are also several issues relating to the restrictive component that are in need of elaboration.

Sub-paragraph (b)
Given that criterion 5 can be used to justify an otherwise problematic transfer, the explicit reminder in sub-paragraph (b) that transfers of controlled goods or technology might pose a threat to friends and allies is extremely welcome.

As with all the criteria, this sub-paragraph has application not only in terms of the risk that the end-user could be a *direct* threat, but also the risk that the equipment in question could be *diverted* (see criterion 7). However this may be of particular relevance when the permissive part of criterion 5 is arguing *for* a transfer to be authorised, while at the same time those items could present a threat through possible diversion. For example, while member states may be inclined to authorise transfers to arm local police authorities in Iraq to facilitate the development of their own internal security and defence interests, they must also consider the likelihood that those arms could end up in the hands of insurgents, and thus be used against the interests of EU member states or their allies.

As mentioned above, Saferworld supports the substance of sub-paragraph (b). It would seem, however, that in many cases the circumstances referred to therein would already be covered by other of the criteria, most notably criteria 3, 4, 6 and 7. This robust, mutually reinforcing approach is welcome. However, given that EU member state officials new to transfer controls or officials from other non-EU states may not be familiar with the "added value" of this sub-paragraph, it would be helpful if the elaboration could set out the circumstances where member states anticipate it could be *uniquely* applied, rather than, as would seem the most likely scenario, being used as a basis for refusal in addition to other criteria.

Sub-paragraph (c)
Reverse engineering or unintended technology transfer is potentially a major proliferation issue, hence it is to be applauded that it is referred to in the EU Code. But by locating it within criterion 5 (in sub-paragraph (c)), the implication is that reverse engineering and unintended technology transfer are not reasons to refuse a transfer licence unless they have a downstream impact on national security.

Reverse engineering and unintended technology transfer, while not exactly the same as what is normally understood as "diversion"[5], do share some of the same characteristics. That is, as with diversion, they only become problematic when they subsequently result in any of the negative consequences set out in the rest of the criteria (e.g. human rights abuses, regional instability, etc.). It would therefore seem sensible to position them within the general "diversion criterion" (criterion 7).[6] It is welcome, then, that the draft Common Position, which is expected at some point to replace the EU Code, does place the risk of reverse engineering and unintended technology transfer inside criterion 7. If and when the draft Common Position is adopted, this will therefore be an advance over the current structure. However, until such a time, the elaboration of criterion 5 should include reference to the need to consider these particular risks in the context of the other criteria as well as criterion 5 (note that the extant elaboration of criterion 7 does not cover this[7]).

[5] Diversion typically relates to *equipment* being misused or retransferred without permission; reverse engineering and unintended technology transfer involve the loss of control of *technology* and the *capacity to produce* equipment.

[6] Draft Council Common Position 2005/…/CFSP Defining Rules Governing the Control of Exports of Military Technology and Equipment.

[7] User's Guide to the EU Code of Conduct on Arms Exports, *The Council of the European Union*, 16440/06, 18 December 2006, pp. 46-50, http://register.consilium.europa.eu/pdf/en/06/st16/st16440.en06.pdf.

Sources of Information

Member states will be expected to utilise a wide variety of information sources, governmental and non-governmental, when making licensing decisions under criterion 5. It is critical that when assessing the worth of this information the inputs of certain actors are not privileged at the expense of others simply due to their identity or status. For example, claims by recipient states should not be given greater credence than those of armed groups or civil society simply because they are states. Indeed, there is an obvious danger in privileging the information provided by a recipient state, as it is hardly a disinterested party to the transaction. Member states should seek corroborating evidence or testimony from other knowledgeable actors, with particular attention paid to disinterested expert opinion (where available).

Where there are conflicting accounts of the nature of a national security concern, the conduct of the recipient and/or the risk of the equipment in question being used in breach of criterion 5, member states will of course be required to exercise their judgement. However, in situations where reliable information is scarce or where there are credible conflicting accounts of the risks involved, member states should use the precautionary principle and refuse the licence.

Information-sharing and transparency

As another way of narrowing the likely divergence of decisions taken on the basis of national security considerations, where licences are issued on the basis of criterion 5 despite concerns under other criteria, member states should circulate information to this effect in all cases to all other member states, potentially through the existing denial notification mechanism.

Although this advice would be retrospective, it would be helpful if other member states had the option to ask for further elaboration or clarification, and to lodge a "reservation" on the denials notification database where they would have made a different decision. These could be kept on file, and in addition to functioning as assistance to licensing officials confronted by difficult cases, they would form an obvious start point for any subsequent discussions regarding the interpretation of criterion 5.

In addition, it is important that member states are held accountable for arms transfer decisions made in the name of national security. Therefore, in the interests of transparency, member states should include in their national reports and in the EU Consolidated Report summary data on cases of this type, i.e. where criterion 5 is invoked to allow a transfer that would otherwise have been refused under another of the criterion. This information should include:

- the identity of the authorising state (in the EU Consolidated Report);
- the identity of the recipient state;
- the quantity and type of equipment authorised for transfer; and
- the criterion or criteria trumped by criterion 5.

Conclusions and recommendations

Aspects of criterion 5 risk undermining some of the other criteria of the EU Code. Therefore, while acknowledging making arms transfer licensing decisions requires the exercise of judgement and that states enjoy the inherent right to self-defence, it is critical that member states elaborate strict limitations on the circumstances in which the permissive elements in criterion 5 can be prioritised

over the restrictive elements elsewhere in the EU Code criteria. As part of this, member states need to clarify what they mean by terms such as “national security”, “friendly and allied countries”, and “defence and security interests”. The elaboration should explicitly reject the concept of pre-emptive self-defence as a rationale for authorising transfers.

With respect to the language in the criterion that stipulates that licences can be *denied* on national security grounds, the elaboration should set out the circumstances where this might be the *only* grounds for a refusal, rather than, as would seem the most likely scenario, being used as a basis for refusal in addition to other criteria. The elaboration should also make it clear that reverse engineering and unintended technology transfer are not only relevant in terms of their impact on national security, but also in the context of all the other EU Code criteria.

To assist the development of common understandings among member states regarding how to interpret criterion 5, member states should commit to share more information on those cases where this is used as the basis for authorising transfers that would otherwise be denied. Summary information should be published on these cases to reassure the public (and other states) that EU member states are not using the defence of national interest to approve irresponsible arms transfers.

Saferworld – 28 Charles Square, London N1 6HT, UK |
Registered Charity no 1043843 | Company limited by guarantee no 3015948 |
Tel: +44 (0)20 7324 4646 | **Fax**: +44 (0)20 7324 4647 |
Email: general@saferworld.org.uk | **Web**: www.saferworld.org.uk