

The Risk of Potential Illicit Arms Trafficking in Eastern Europe and Leak of Technological Secrets due to the West's Arms Export to Ukraine

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Massive support from the EU, its Member States and the U.S since the begging of the war

Since the Federation of Russia started its aggression against Ukraine, the West and EU Member States multiplied conventional arms exports toward the continent to reinforce the Ukrainian Army's capacities on the ground to face what appears to be the second most equipped conventional army in the world (Small arms survey, 2021). The massive European support (which the Parliament explicitly supports), the Member States and American exports of military equipment to Ukraine will raise the question of the risks of proliferation of these weapons in Eastern Europe, the post-Soviet hub of arms trafficking, in which Ukraine had the third-largest stockpile in the world. The feared scenario would be a bis repetita of ex-Yugoslavia conflict 30 years ago, where (among other) diversion, shadows brokering, unauthorised retransfers, poorly watched stockpiles and destabilising accumulation all lead to uncontrolled proliferation and dangerous expansion which in fine spread toward all the continent, the illegal arms trafficking issues, with a return of these weapons to Western Europe, following the channels of illicit trafficking throughout West and South-West of Europe the EU are still trying to curb this issues (2020-2025 EU action plan on firearms trafficking).

In light of this new armed conflict right in front of the gate of the EU, it actively mobilises the CFSP, multiplying initiatives, particularly concerning arms exports. It seems to have begun an ideological shift (Schneider, 2022), financing for the first time the export of lethal military equipment and technologies by some of its Member States to the tune of 1.350 billion, for which it can be estimated that it will contribute to the risks of uncontrolled dissemination because of the difficulty of tracing on the battlefield, the lack of guarantees introduced into export contracts by the Member States, the impossibility of keeping transparent accounts of stocks in wartime, the propensity for popular self-defence after armed conflicts.

West's arms exports and international rules on arms control: A balanced support

This conflict will require the concentration of Western states' efforts to comply with all existing legal export control tools and frameworks they engaged in especially the Arms Trade Treaty (ATT) and the common position 2008/944/CSFP. The main issue is to make sure the virtuous collective effort to consolidate Ukraine's military capacities did not (legally speaking) takes place in a grey area, nourished by blind and irresponsible export practices and decision, only leaded by individual pecuniary opportunity. A subtle balance must be held so collective effort from the West did not end up being the start of a new illegal arms trafficking crisis in tomorrow's Europe. The EU and the United States of America's support deserve attention regarding the substantial material help they provide and the high-security risks they could provoke in the coming years. What is at stake it's the ability of both the U.S and the EU to keep track of the weapon they shipped to Ukraine since they not only shipped SALW but also heavy weapons and sophisticated technologies (i.e. CAESAR, proximity fuzes, NLAW, HIMARS, DM Brimstone). This created perfect conditions for arms trafficking and illicit transfers, leading thousands of arms to flow into EU countries and weakening global and domestic security and peace structures.

The quantity of equipment shipped to Ukraine raises concerns about their containment for their authorised users and to authorised end-users to avoid fueling future illegal trafficking. So it seems those transfers must comply with EU international engagement on arms control (mainly the Arms Trade Treaty and articles 5, 6, 7, 8, 10 and 11 and the common position 2008/944/CFSP, article 2). Even though there are still challenges to the abilities of the Member States and the U.S to enforce and interpreted relevant acts and provisions coherently and effectively. Since all Members States are states parties to the ATT, article 11 (2) ATT stated exporting States Parties shall seek to prevent the diversion of the transfer of conventional arms (though it is still unclear what the ATT calls a « diversion », (Wood, Holtom, 2020) through the national control system, by assessing the risk of diversion and considering the establishment of mitigation measures such as confidence-building measures, joint programmes, examining parties involved in the export, requiring additional documentation, certificates, assurances, not authorising the export or other appropriate measures. Since the interpretation given to keys terms of the ATT are currently discussed within Conference of States Parties 8 (CSP8) started earlier this year (from February 17th until April 30th). States Parties are working on a « Voluntary Guide » to harmonise and unify the interpretation and the meaning of the keys formula and provisions. Many States Parties admit they interpret and apply the ATT in the light of the interpretation by Member States of their common position (ATT CSP8). The EU could use the influence of their own legal production to lead by example and make sure the West's support complies with states (and the Member States) own obligations, especially those taken from international law the article 3(5) of the Treaty of the European Union (TEU) imposes to respect and help to develop in a dual dynamic (respect it while contributing to it). Different UN bodies and NGOs stressed the need for States Parties to implement their post-shipment control by improving their own national regimes. The sub-work and the Work Plan Sub-Working Group on Article 11 reveal the need to improve direct contract, information transfers and communication between nations' points of control and improve the efficacy of national system to strengthen risk assessment on less detectable diversion (aerial transport). Not only decision of exportation must be more deeply rooted in European and international rules for exportation and importations, but they should also be followed by bigger means to insure efficient tracking on the ground of those weapons.

Member States' potential leading role comforted by the EU's advanced legal framework on arms export

Concerning the common position, the wish of a common behaviour regarding this act suffers from differing national approach and interpretations since the Member States still have different strategic cultures, and various geopolitical and national vital interests topped by different national security concerns (Cops, Duquet, 2019). But with that being said, let's not forget since 2008, the common position became legally binding, so Member States should not forget they have to stick to key provisions, including articles 2 (2).b §1, 2(3) §1, 2(7) §1. (a), (c), (d), (e), (f).

They stated Member States should not export arms if there is a risk of diversion from the initial and authorised use and/or user or if there's a that such technology or equipment might be diverted to an undesirable end-user or for undesirable end-use. The EU Member States should focus their risks assessment on the following criteria: the legitimate defence and domestic security interests of Ukraine, its capability to apply effective export controls; the risk of such technology or equipment being re-exported to undesirable destinations, and the record of the recipient country in respecting any re-export provision or consent before re-export which exporting Member States consider appropriate to impose; the risk of such technology or equipment being diverted to terrorist organisations or individual terrorists; the risk of reverse engineering or unintended technology transfer. European Council recently tasks the Working Party on Conventional Arms Export Controls (COARM) to consider a decision on implementing end-user certificates for the export of SALW, in the light of article 5. We hope the recent EU Council decision adopting a common approach on the elements of an end-user certificate (Council decision (CFSP) 2021/38 of 15 January 2021) serves as the key reference for national authorities currently authorising export as it involves substantial change on the common position content. By reinforcing the control of end-user while exporting, such an initiative could be another safeguard for Member States when exporting and should constitute a proper mitigation measure against the risk of diversion, in the light of Article 11(2) ATT. It would lead to an implementation of the common position by a high level of standards and compliance with the ATT requirements. Member States should use and carefully observe those provisions in the current context of massive arms export to Ukraine. As the Brussel Effect spreads (Bradford, 2020), the EU appears as a « model of regulation », including its domestic framework for arms control and considering recent work on an end-user guarantee. It should play a leading role in West's support to Ukraine, making sure Allies are still committed to an international order base on rules.

Furthermore, vigilance must stay relevant principles since all legal text cited above did not apply to all West exporting states and the insufficient observations of their own sovereign international engagements, could weaken the virtuous collective effort to help Ukraine contain the aggressor. Multilateral arms control treaties like the ATT didn't apply to the U.S since they always denied it any effect (Sarah Huckabee Sanders, 2019) and had recently stressed they will not be bound . Even if they mostly (and only) rely on their Federal regulation for arms export (article 22 U.S.C. 2778 of the Arms Export Control Act (AECA) and Executive Order 13637 & The International Traffic in Arms Regulations "ITAR," 22 CFR 120-130), U.S could face the challenges to enforce non retransfers clause includes in its export contract (the same they recently overreach and breach, by delivery Ukraine with Russian Mi-17 Helicopters, for which they sign non retransfer clause, the ATT foreseen) (Sprengrer, 2022).

Risk of technological leaks and merging of potential new criteria

On top of that, many fears capture risk calculation seems to weigh more and more in the decisional price of arms delivery. Once against, the feared scenario would be a capture of sensitive and sophisticated technologies and equipment by the Russian Army, which could use and/or copy technologies or equipment for its benefit. The major risk would be the Russian Army's ability to analyse and break down the West's sensitive military technologies, allowing them to defend in a better way against it. But the more the weapons and technologies exported are sensitive, the more the capture risk calculation will be tense since senior official of West export States seems to grant preponderant importance to the sole criteria of the level of sophistication of the equipment shipped (Sprenger, 2022). In other words, the degree of sophistication of the equipment shipped could somehow become one of the prevalent criteria for risk assessment before export. While none of the ATT or the common position is foreseen clearly, not even the article 2(7) §1 (b). In fine, a risk of excessively overreached current criteria for arms export could be balanced by the increasing consideration of national authorities to keep Western armies' technologies out of opponent hands. Somehow these de facto criteria could have a more dissuasive effect on export state behaviour, being more cautious and worrisome.

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