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FORWARDING NOTE

from : Secretariat

to : Delegations

prev. docs : 5645/98, 6046/98, 6112/98, 7081/98,
7255/98, 7717/98, 8163/98

Subject : EU CODE OF CONDUCT ON ARMS EXPORTS

Delegations will find attached the fourth revised draft proposal for an "EU code of conduct on arms exports" circulated by the Presidency.

ANNEX

[DECLARATION BY EU MEMBER STATES ON AN] EU CODE OF CONDUCT FOR ARMS EXPORTS

[The Governments of the EU Member States]:

BUILDING on the Common Criteria agreed at the Luxembourg and Lisbon European Councils in 1991 and 1992,

RECOGNISING the special responsibility of arms exporting states,

DETERMINED to set high common standards of management of, and restraint in, conventional arms transfers by all EU Member States, and to strengthen the exchange of relevant information with a view to achieving greater transparency,

DETERMINED to prevent the export of equipment which might be used for internal repression or international aggression, or contribute to regional instability,

WISHING within the framework of the CFSP to reinforce their cooperation and to promote their convergence in the field of conventional arms exports,

NOTING complementary measures taken by the EU against illicit transfers, in the form of the EU Programme for Preventing and Combating Illicit Trafficking in Conventional Arms,

ACKNOWLEDGING the wish of EU Member States to maintain a defence industry as part of their industrial base as well as their defence effort,

RECOGNISING that states have a right to transfer the means of self-defence, consistent with the right of self-defence recognised by the UN Charter,

[ACKNOWLEDGING the right of EU Member States to operate more restrictive national policies],

have adopted the following Code of Conduct and operative provisions:

CRITERION ONE

Respect for the international commitments of EU Member States, in particular the sanctions decreed by the UN Security Council and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations.

An export licence should be refused if approval would be inconsistent with, inter alia:

- a) the international obligations of Member States and their commitments to enforce UN, OSCE and EU arms embargoes;
- b) the international obligations of Member States under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;
- c) their commitments in the frameworks of the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement;
- d) their commitment not to export any form of anti-personnel landmine.

CRITERION TWO

The respect of human rights in the country of final destination

Member States will:

- [a) take into account respect for human rights and fundamental freedoms in the recipient country, including its attitude towards relevant principles established by international human rights instruments;]
- [b) give particularly careful consideration to exports to countries where serious violations of human rights have been established by the competent bodies of the UN or by the EU;

OR

- b) on a case by case basis, exercise a high level of restraint in respect of exports to countries where serious violations of human rights have been established by the competent bodies of the UN or by the EU;

OR

- b) abstain from or show restraint in, depending on the nature of the equipment, issuing licences if there are widespread and serious violations of human rights in the recipient country;]
- c) not issue an export licence if there is a clear risk that the proposed export might be used for internal repression.

[For these purposes equipment which might be used for internal repression will include equipment where there is evidence of the recent use of similar equipment for internal repression by the proposed end-user, or where there is reason to believe that the equipment will be diverted from its stated end-use or end-user and used for internal repression. The nature of the equipment will be considered carefully; this will apply in particular to any proposed export which is to be used by the recipient country for internal security purposes. Internal repression includes extra-judicial killings, arbitrary arrest, torture, suppression or major violation of human rights and fundamental freedoms. The use of force by a government within its own borders does not necessarily constitute internal repression. However force may only be used in accordance with international human rights standards.]

CRITERION THREE

The internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts

Member States will not allow exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

CRITERION FOUR

Preservation of regional peace, security and stability

Member States will not issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim.

When considering these risks, EU Member States will take into account inter alia:

- a) the existence or likelihood of armed conflict between the recipient and another country;
- b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;
- c) whether the equipment would be likely to be used other than for the legitimate national security and defence of the recipient;
- d) the need not to affect adversely regional stability in any significant way.

CRITERION FIVE

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;
- 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.

CRITERION SIX

The behaviour of the buyer country with regard to the international community, as regards in particular to its attitude to terrorism, the nature of its alliances and respect for international law

Member States will take into account inter alia the record of the buyer country with regard to:

- a) its support or encouragement of terrorism and international organised crime;
- b) its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts;
- c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to in sub-para b) of Criterion One.

CRITERION SEVEN

The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions

In assessing the impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user, the following will be considered:

- a) the legitimate defence and domestic security interests of the recipient country, including any involvement in UN or other peace-keeping activity;
- b) the technical capability of the recipient country to use the equipment;

- c) the capability of the recipient country to exert effective export controls;
- d) the risk of the arms being re-exported or diverted to terrorist organisations (anti-terrorist equipment would need particularly careful consideration in this context).

CRITERION EIGHT

The compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources

Member States will take into account, in the light of information from relevant sources such as UNDP, World Bank, IMF and OECD reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They will consider in this context in particular whether the recipient country's level of military expenditure is out of proportion to its level of social expenditure, taking into account also any EU or bilateral aid.

OPERATIVE PROVISIONS

1. Each EU Member State will assess export licence applications for military equipment made to it on a case-by-case basis against the provisions of the Code of Conduct, while reserving the right to operate more restrictive national policies.
2. EU Member States agree to circulate through diplomatic channels details of licences refused in accordance with the Code of Conduct for military equipment together with an explanation of why the licence has been refused. The details to be notified are set out in the form of a draft pro-forma at Annex A. Before any Member State grants a licence which has been denied by another Member State or States for an essentially identical transaction within the last three years, it will first consult the Member State or States which issued the denial(s). If following consultations, the Member State nevertheless decides to grant a licence, it will:

[notify the Member State or States issuing the denial(s), giving a detailed explanation of its reasoning.]

[provide the Member State or States issuing the denial(s) with a detailed explanation, and notify its decision to all other Member States.]

The decision to transfer or deny the transfer of any item of military equipment will remain at the national discretion of each Member State. A denial of a licence is understood to take place when the Member State has refused to authorise the actual sale or physical export of the item of military equipment concerned, where a sale would otherwise have come about, or the conclusion of the relevant contract. For these purposes, a notifiable denial may, in accordance with national procedures, include denial of permission to start negotiations or a negative response to a formal initial enquiry about a specific order.

3. EU Member States agree to keep such denials and consultations confidential and not to use them for commercial advantage.
4. EU Member States agree to work for the early adoption of a common list of military equipment covered by the Code, based on similar national and international lists. Until then, the Code will operate on the basis of national control lists incorporating where appropriate elements from relevant international lists.
5. The criteria in this Code and the consultation procedure provided for by paragraph 2 of the operative provisions will also apply to dual-use goods as specified in Annex 1 of Council Decision 94/942/CFSP as amended, where there are grounds for believing that the end-user of such goods will be the armed forces or internal security forces or similar entities in the recipient country.

6. In order to maximise the efficiency of this Code, EU Member States agree to work within the framework of the CFSP to reinforce their cooperation and to promote their convergence in the field of conventional arms exports.
7. [Each EU Member State will prepare on agreed lines and circulate to other EU Partners an annual report on its defence exports and implementation of the Code of Conduct. EU Member States will submit national reports at an annual meeting held within the framework of the CFSP. The meeting will also review the functioning of the Code, identify any improvements which need to be made and submit a consolidated report to the Council for approval. The consolidated report will then be made available to the public.]

OR

[An annual EU meeting will be held within the framework of the CFSP, with a view to ensuring the proper implementation of the Code and identifying any improvements which need to be made. On that occasion, an annual report will be drafted on the basis of national contributions. After having been discussed in the working group on conventional arms exports, this report will be transmitted to the Council.]

8. EU Member States will, as appropriate, assess jointly through the CFSP framework the situation of potential or actual recipients of arms exports from EU Member States, in the light of the principles and criteria of the Code of Conduct.
- [8bis. Member States which are exporters of defence equipment may also take into account the potential effect of proposed exports on their economic, commercial and industrial interests, while recognising that these factors will not affect the application of the above criteria.]
9. This Code of Conduct and the operative provisions will replace any previous elaboration of the 1991 and 1992 Common Criteria.

ANNEX A to ANNEX

..... (name of Member State) has the honour to inform partners

of the following denial under the EU Code of Conduct:

Destination country:.....

Short description of equipment, including quantity and where appropriate, technical specifications:.....

Proposed consignee:.....

Proposed end-user (if different):.....

Reason for refusal:.....

Date of denial:.....

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