COARM

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EUROPEAN EXTERNAL ACTION SERVICE

Department for Non-Proliferation and Disarmament

Subject:	Questionnaire on the review of Common Position 2008/944/CFSP
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Following discussion at the last COARM meetings on 13 May and on 22 June 2011 (cf. COREU SEC/0338/11, SEC/0516/11, and EAS/1017/11) and comments received on the first draft version of the questionnaire on the review of Common Position 2008/944/CFSP (cf. COARM DS 30/11 and COREU BER/0348/11), the EEAS hereby circulates the final draft version of the questionnaire aimed at gathering national opinions on the implementation of Common Position 2008/944/CFSP. **Delegations are invited to send any final comment on the draft by Friday 26 August COB. In case no comment is received by this deadline, the current version of the questionnaire will be considered as the final one and delegations will be requested to submit their replies to the questionnaire via COREU by 7 October 2011, COB.**

The purpose of the questionnaire is to prepare the review process of the Common Position, by collecting EU Member States' assessments of the way the provisions of the Common Position have been implemented to date. The questionnaire does not prejudge in anyway the result of the actual review process, nor does it imply that specific changes should be introduced to the Common Position or to the User's Guide.

The review process of the Common Position will be formally conducted by COARM, on the basis, inter alia, of the replies to the questionnaire received, and might result, if necessary and as appropriate, in changes to the text of the User's Guide or of the Common Position, agreed unanimously by the relevant Council bodies

Questionnaire on the review of Common Position 2008/944/CFSP

I. General questions

According to the latest 11th and 12th EU annual reports on conventional arms exports, and in particular in table C annexed therewith, EU Member States follow different practices in the implementation of the CP at national level. These range from administrative guidance to legislative

transposition, while a few Member States have not reported any specific measures adopted to ensure the national implementation of the Common Position.

- **Q 1: How do your authorities ensure implementation of Common Position 2008/944/CFSP in their domestic legislation and national export control framework?**

A number of Member States informed that the eight criteria of the Common Position are applied at national level together with national criteria or national adds-on to the criteria of the Common Position. Such national additions, while they can specify and strengthen the application of criteria, testify to the fact that Member States can apply more restrictive national policies as set out in article 3 of the Common Position.

- **Q 2: Does your national arms export regime implement the eight criteria of the CP as such or does it rely on amended and/or additional criteria? When amended or additional criteria are used, is the set of criteria public and, if so, can you please provide a link to or a copy of them?**

In recent meetings of the COARM Working Group, Member States have continued to stress the importance to conduct regular consultations on destinations of concern, to be prepared by submission of relevant information in writing ahead of the meeting. The development and use of these consultations have been defined by some delegations as one of the most important element to ensure even application and implementation of the Common Position. However, information provided in writing and during COARM meeting on destination of concern vary significantly in terms of form and substance and it does not always allow to have substantial and informed discussions on export policies toward selected third countries or regions.

- **Q 3: Do your consider that the current COARM information exchange mechanism on destination of concerns should be improved? If so, to what extent and in which way? Do you think that the Common Position should contain provisions to this end, other than those contained in its Articles 7 and 9?**

II. Questions article-by-article

1. Article 1:

Article 1

1. Each Member State shall assess the export licence applications made to it for items on the EU Common Military List mentioned in Article 12 on a case-by-case basis against the criteria of Article 2.

2. The export licence applications as mentioned in paragraph 1 shall include:
— applications for licences for physical exports, including those for the purpose of licensed production of military equipment in third countries,
— applications for brokering licences,
— applications for 'transit' or 'transhipment' licences,
— applications for licences for any intangible transfers of software and technology by means such as electronic media, fax or telephone.

Member States' legislation shall indicate in which case an export licence is required with respect to these applications.

The case-by-case assessment required by article 1 does not completely reflect the real practice of export applications assessment. General and global licensing is already in use in some Member States (to both EU and non EU destinations), and in some cases global or general licenses are issued following the submission of general or global license applications. The application of Directive 2009/43 as from June 2012 will imply that all Member States apply general and global licences to intra-EU transfers, thereby reducing the scope of transactions assessed on a case-by-case basis through an individual licensing procedure. The debate on the case-by-case assessment has also been raised in the framework of the ATT negotiations.

- **Q 4: Should the review of the Common Position depart from "the case-by-case assessment of licence applications" and, where relevant and applicable, seek a more appropriate wording reflecting the practice of general and global licensing?**

2. Article 2:

Article 2 sets out the eight criteria that should guide national arms export policies. Additional and more operational guidance on the application of the criteria is provided by the User's guide. Criteria are currently divided into two categories with, on the one hand, criteria that shall lead to a denial in case of inconsistency of the licence application with existing international obligations (criteria 1 to 4) and, on the other hand, criteria that shall be taken into account in the licensing process (criteria 5 to 8).

- **Q 5: Does the scope of the current eight criteria adequately cover the full scope of issues that are addressed in your national licensing-making process? If not, which additional issues would deserve to be addressed (please specify if whether, in your opinion, such additional issues should be reflected in the description of the eight criteria or under possible additional criteria)?**

- **Q 6: Is the current distinction between criteria leading to denials in case of inconsistency of the licence application (1-4) and criteria to be taken into account (5-8) still relevant? If not, which amendment would you recommend?**

- **Q 7: Which of the Common Position's eight criteria poses the greatest challenge in terms of assessing potential exports in your State? Why?**

- **Q 8: Does your State have a standardized procedure for applying the criteria?**

- **Q 9: Should the use of the criteria be further harmonized, in particular criteria 2, 3, 4 and 8? If so, to what extend and how?**

- **Q 10: What is the procedure followed by your state authorities to come to apply and reach a decision under criterion 8?**

- **Q 11: What are the difficulties faced by your national authorities in applying criterion 8?**

3. Article 3

Article 3

This Common Position shall not affect the right of Member States to operate more restrictive national policies.

- **Q 12: To what extent have your licensing authorities made use of this article? Does Article 3 need to be reviewed?**

- **Q 13: If your national policy is more restrictive than the Common Position, could you please specify how further restrictions concretely apply (e.g stricter and/or additional criteria, etc…)?**

4. Article 4

Article 4

1. Member States shall circulate details of applications for export licences which have been denied in accordance with the criteria of this Common Position together with an explanation of why the licence has been denied. 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 shall 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 shall notify the Member State or States issuing the denial(s), giving a detailed explanation of its reasoning.

2. The decision to transfer or deny the transfer of any military technology or equipment shall 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 export of the military technology or 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. Member States shall keep such denials and consultations confidential and not use them for commercial advantage.

Article 4.1 stipulates that "Member States shall circulate *details* of applications for export licences which have been denied in accordance with the criteria of the Common Position together *with an explanation of why the licence has been denied"*. Additional operational guidance on those provisions is provided in Chapter 1/ Section 2 and Form 1 of the Users' guide.

Details of denied licence applications and an explanation of why the licence has been denied are critical information for other Member States, in particular to allow them to better ascertain the possible essentially identical nature of the transaction they might review some time later. Practice also demonstrates that Member States often have to consult one another to have access to further information on the specifics of the transaction and the exact reasons that justified the denial. Had more details been provided in the initial denial notification, this type of "fact-finding consultations", carried out before an essentially identical transaction can be detected could be used less frequently and reduce the time needed to identify a transfer as essentially identical to another one.

- **Q 14: As Member State notifying but also consulting denials notified by other Member States, is your experience in implementing article 4.1 satisfactory? If so, why? If not, what are the main deficiencies you experienced? Is there any change in the denial notification system you would suggest?**

In the framework of the denials notification process, the notion of "essentially identical transaction" over a three-year period is extremely important. Unlike the notion of denial that is described in detail in Article 4.2, no detail of what should be understood by an essentially identical transaction is provided by the Common Position, nor is it detailed by the User's guide.

- **Q 15: What is the national practice you follow to define whether a transaction is essentially identical to another? What are the elements you take into account to reach a decision?**

- **Q 16: In your opinion, is additional guidance needed to define what an essentially identical transaction should be? If so, do you consider that such guidance be provided by the Common Position itself, or rather by the User's guide? What are the issues such guidance should focus on?**

The current notification regime foreseen by the Common Position applies to denials only. As suggested in recent COARM meetings by some Member States consideration could be given to extend the notification regime to suspended licences. Should such an extension be considered, careful attention should be paid to whether a consultation mechanism would also be needed (in cases when a Member State intends to grant a licence for an essentially identical transaction that has been suspended by another Member State) and to the precise procedures of such additional notification system (timelines, content of the notification, information exchange when the licence is reinstated…). The resulting administrative burden should also be carefully considered, bearing in mind that the current legislations of a number of Member States does not allow to suspend licences (in some Member States licences can either be granted, denied or revoked only, but they cannot be suspended).

- **Q 17: What's your opinion on the advisability of extending the notification mechanism to suspended licences? What could be the main features of such notification mechanism?**

5. Article 5:

Article 5

Export licences shall be granted only on the basis of reliable prior knowledge of end use in the country of final destination. This will generally require a thoroughly checked end-user certificate or appropriate documentation and/or some form of official authorisation issued by the country of final destination.

When assessing applications for licences to export military technology or equipment for the purposes of production in third countries, Member States shall in particular take account of the potential use of the finished product in the country of production and of the risk that the finished product might be diverted or exported to an undesirable end user.

Article 5 deals with end-use assurances, defining them in general rather than prescriptive terms (use of the wording "*generally*" in the first paragraph and use of *" in particular"* in association with *"take account"* in the second paragraph). Additional guidance on elements of end-use certificates (EUC) is provided in Section 1/ Chapter 2 of the User's guide.

- **Q 18: Could you please specify the added value of article 5 for your national policy?**

- **Q 19: Would you recommend exploring ways to make article 5 more operative (e.g harmonisation of end-use documentation, more detailed description of conditions where an EUC and Delivery Verification Certificates are required…)?**

6. Article 6

Article 6
Without prejudice to Regulation (EC) No 1334/2000, the criteria in Article 2 of this Common Position and the consultation procedure provided for in Article 4 are also to apply to Member States in respect of dual-use goods and technology as specified in Annex I to Regulation (EC) No 1334/2000 where there are serious grounds for believing that the end-user of such goods and technology will be the armed forces or internal security forces or similar entities in the recipient country.
References in this Common Position to military technology or equipment shall be understood to include such goods and technology.

- **Q 20: What's your opinion on article 6 and its implementation in your national export control regime? To what extent had it been applied at national level and with which results? Does it need to be reviewed?**

7. Article 7

Article 7

In order to maximise the effectiveness of this Common Position, Member States shall work within the framework of the CFSP to reinforce their cooperation and to promote their convergence in the field of exports of military technology and equipment.

This article mostly relates to the work undertaken in COARM meetings (exchange of views on destinations of concern, elaboration and update of the User's guide…). Its wording is however not rather general.

- **Q 21: What's your opinion on article 7 and its implementation in your national export control policy? A part from activities already conducted in COARM, how do you think article 7 could be implemented? How could further convergence among national policies be achieved? Should the text of the article be amended/reviewed[1]? Should relevant sections of the User's guide be further developed?**

8. Article 8

Article 8
1. Each Member State shall circulate to other Member States in confidence an annual report on its exports of military technology and equipment and on its implementation of this Common Position.

2. An EU Annual Report, based on contributions from all Member States, shall be submitted to the Council and published in the 'C' series of the *Official Journal of the European Union*.

3. In addition, each Member State which exports technology or equipment on the EU Common Military List shall publish a national report on its exports of military technology and equipment, the contents of which will be in accordance with national legislation, as applicable, and will provide information for the EU Annual Report on the implementation of this Common Position as stipulated in the User's Guide.

[1] See also questions relating to article 9 under para.9.

The current practice resulting from para.1 and 2 of article 8 is that Member States report both their exports (to third countries) and their intra-EU transfers. Such comprehensive reporting raised no special issue since, in most Member States, both types of transactions were processed in the same way, i-e essentially through individual licensing. This situation will significantly change with the application of Directive 2009/43, since most intra-EU transfers will be subject to global and general licensing, which will directly impact the type of reporting information available[2]. If defence companies using global and general licences are not required to report *a posteriori* on the value of defence items they transferred in the EU under the general and global licences they were granted, no reporting will be available for the intra-EU transfers under general and global licences. Reporting in the EU annual report only intra-EU transactions that were subject to individual licensing would have an impact on the comprehensiveness of the EU report and possibly on its relevance.

- **Q 22: What kind of reporting obligations will you impose on your companies using global and general licences under Directive 2009/43?**

- **Q 23: Will those reporting conditions allow you to preserve the same level of reporting as the one you currently forward to the EEAS (ex GSC) with a view to the publication in the EU annual report? If not, how would you suggest addressing this discrepancy? Should the Common Position and/or the User's Guide explicitly specify that EU annual reports should cover only exports to third countries to ensure coherence with the provisions of Directive 2009/43? Should reporting on intra-community transfers be voluntary?**

Article 8.3 provides that each Member State, *"which exports technology or equipment on the EU Common Military List"* shall publish a national report.
A number of Member States have not yet done so. A few of those Member States that do not publish a national report have very few military exports, which to some extent might justify the lack of publication of a national report. At the same time, since all EU Member States provide data to the EU level for the EU annual report, it could reasonably be argued that the data collection is already carried out to this end, and that data provided to the EU could simply be used also for the publication of a national report at minimum administrative costs.

It is however important to note that no Member State have ever declared no export at all. If read in its literal meaning, the first sentence of article 8.3 entails that all EU Member States publish a national report, a requirement so far formally met by 21 Member States only. In this regard, the review of the CP could acknowledge that these precise provisions have never been implemented by a number of Member States and analyzed the rationale for this lack of implementation. Three or more options could be explored:

- to strictly stick to the current wording of article 8.3 and ensure that all arms-exporting Member States publish a national report whatever the value and significance of their arms exports are;

- to adapt the wording of article 8.3 to the extent that only Member States with a *certain level* of exports (e.g set a threshold of arms exports for reporting at national level, refer to "arms-manufacturing" Member States etc…) would be required to publish a national report.

[2] See also para.14 and 15 in the report of COARM on 13 October 2010 in Coreu SEC/2144/10. See also the definition of an export licence in Directive 2009/43 under article 3.6: *"'export licence' means an authorisation to supply defence-related products to a legal or natural person in any third country"*.

- to suppress the obligation of national reporting in article 8.3, leaving it to Member States to decide whether a national report should be published.

- **Q 24: What is your interpretation of article 8.3 and in particular your interpretation of the sentence *"which exports technology or equipment on the EU common military list"*?**

- **Q 25: Should the review of the Common Position consider the possibility that some Member States would not be required to publish a national report (provided that reporting at the EU level is preserved) and possibly set clear criteria to define threshold and conditions under which Member States should be required to publish a national report?**

- **Q 26: Alternatively, should the review of the Common Position explore ways to ensure that all arms-exporting Member States publish a national report (including through a requirement for non-reporting Member States to justify their lack of implementation of the provisions contained in article 8.3)?**

9. Article 9

> *Article 9*
> Member States shall, as appropriate, assess jointly through the CFSP framework the situation of potential or actual recipients of exports of military technology and equipment from Member States, in the light of the principles and criteria of this Common Position.

Provisions of article 9 are of a general nature and to some extent, overlap with provisions of article 7. In 2004/2005, when carrying out the first review of the Code of Conduct on arms exports, COARM WG elaborated a concrete and ambitious instrument aimed at promoting further convergence of national arms export policies and at supporting shared assessment of sensitive destinations. Such a mechanism had been usually referred to as "toolbox"[3]

Although the "toolbox" envisaged in 2004/2005 was meant to apply to post-embargoed destinations, its rationale and additional scrutiny and transparency mechanism could also apply to any destination deemed of special concern, be it or not a destination previously under an EU arms embargo. Recent events in the Arab world have shown how Member States policies still tend to significantly differ in the way transfers to sensitive or post-embargoed destinations (see the case of Libya between 204 and 2011) are assessed. Additionally, consultations at COARM level on sensitive destinations that took place before the breakout of the "Arab spring" did not seem to offer a sufficient tool to ensure a certain level of harmonization in the assessment of transfers to the region. This might have also been due to the limited or incomplete information and lack of willingness to enter into a substantive discussion on the matter.

- **Q 27: What is your assessment of the functioning of the Common Position in ensuring a certain harmonization of national policies in the assessment of transfers to destinations of concern? To what extend do you consider that the Common Position**

[3] See Council document 9974/05 for the complete text of the draft "toolbox". The full title of the "toolbox" was "Additional transparency and mutual control measures to be applied upon the lifting of an arms embargo, for inclusion in the User's guide to the Council Common Position defining common rules governing the control of exports of military technology and equipment".

has managed or not managed to ensure such harmonization? In this context, what are the main assets and drawbacks of the Common Position and consultation mechanism thereof?

- **Q 28: Taking into consideration recent events in Arab countries and the level of scrutiny and public criticism to which EU Member States' exports to these destinations have been exposed, do you considered that a higher level of consultations among Member States on exports towards the region should have taken place?**

- **Q 29: What's your opinion on the added value of a mechanism similar to the "toolbox"? In the framework of the review of the Common Positions, would you recommend reconsidering it or considering other mechanisms in order to further substantiate the provisions contained in article 7 and 9**

10. Article 10

Article 10
While Member States, where appropriate, may also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, these factors shall not affect the application of the above criteria.

- **Q 30: What's your opinion on article 10 and its implementation in your national export control policy? To what extent are the factors defined therein taken into account in your national practice? Would you suggest a revision of this article?**

11. Article 11

Article 11
Member States shall use their best endeavours to encourage other States which export military technology or equipment to apply the criteria of this Common Position. They shall regularly exchange experiences with those third states applying the criteria on their military technology and equipment export control policies and on the application of the criteria.

Pursuant to article 11, Member States (and not only the EU as such) should encourage other arms-exporting countries to adopt the criteria set out in article 2 of the Common Position. Article 11 focuses on the criteria of the Common Position and does not explicitly refer to other important provisions of the Common Position such as transparency and public reporting[4].

- **Q 31: To what extent were provisions contained in article 11 taken into account in your national export control policy and possible national outreach activities?**

- **Q 32: Should the present focus of Article 11 on the criteria be retained or be extended to cover also other features of the Common Position?**

- **Q 33: What is your assessment of the outreach activities conducted by the EU? To what extent was your country involved in the organization of these activities? What are**

[4] Operative provision n°11 of the former Code of Conduct provided that "*Member States will use their best endeavours to encourage other arms exporting States to subscribe to the principles of the Code of Conduct*".

the main assets and drawback of EU outreach in promoting the provisions of the Common Position vis-à-vis third countries? What would be your recommendation to enhance the impact of such activities?

- **Q 34: Should specific provisions in article 11 be considered to address the issue of third countries that aligned and that can align themselves with the Common Position? If so, to what extent and in which way?**

12. Article 12

Article 12
Member States shall ensure that their national legislation enables them to control the export of the technology and equipment on the EU Common Military List. The EU Common Military List shall act as a reference point for Member States' national military technology and equipment lists, but shall not directly replace them.

The EU CML represents the basis for Member States' military control lists. The centrality of the EU CML as main reference for EU Member States' national control lists will be further strengthened by the fact that the EU CML is also referred to as the scope of Directive 2009/43 that has to be transposed into national legislations.

Some Member States also control additional items with national adds-on in their control lists. Those national adds-on however never challenge the structure of the EU CML since they are placed either at the end of the EU CML (for instance as additional control categories ML 23, ML 24…) or clearly identified in the EU CML categories themselves.

Against this background, the requirement laid down in 2008 that the EU CML shall not directly replace national control list might appear disproportionate. The practice observed today is rather that the EU Common Military List acts as a reference point for Member States' military control lists, but does not prejudice the possibility for Member States to control additional items.

- **Q 35: What's your opinion on the requirement laid down at the end of article 12 that the EU CML shall not directly replace national control lists? Should it be preserved or amended in the framework of the review taking into account the transposition of Directive 2009/43 and the current practice?**

13. Article 13

Article 13
The User's Guide to the European Code of Conduct on Exports of Military Equipment, which is regularly reviewed, shall serve as guidance for the implementation of this Common Position.

Reference to the *" European Code of Conduct on Exports of Military Equipment"* should be updated to refer to the present title of the User's guide ("User's guide to Council Common Position 2008/944/CFSP"…). More importantly, article 13 defines the nexus between the Common Position and the User's guide, providing that the User's guide "*shall serve as guidance for the implementation of the Common Position"*.

- **Q 36: What's 'your opinion on article 13, the "status" granted to the User's guide and its regular review? Do you consider that this article should define more precisely the**

role of the User's Guide, modalities for its update, and possibly its promotion vis-à-vis third countries? Please provide justification for your answer.

14. Article 15

Article 15 This Common Position shall be reviewed three years after its adoption.

Though not mandatory, the Council chose in 2008 to insert a review clause in the text of CP 2008/944/CFSP.

- **Q 37: Should the principle of a review clause be retained for the future? If yes, according to which timeline? Should further details on the modalities of the review be included in this article?**