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CORE ANALYSIS

A constitutional perspective on EU arms controls: mediating trade, security, and humanitarian responsibility

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Abstract

This article examines how European Union (EU) arms control measures are tailored to its constitutional foundations. EU Member States subject shipments of arms and components to controls so as to screen them for risks and potentially block them. In this context different Member States may make different geopolitical and humanitarian risk assessments. Existing EU measures have achieved only limited security screening harmonisation, and have left room for Member States to shirk their obligations under international humanitarian law. But in case of joint arms production, which the EU subsidises to become more autonomous, one Member State's arms controls may block another State's exports and thereby jeopardise cooperation. This article posits that any reform of EU arms controls should start by re-evaluating their present legal basis. A constitutional competence analysis shows that controls on arms shipments to non-EU states should be regulated in part through the Common Commercial Policy (CCP), and not just through the Common Foreign and Security Policy (CFSP). This would be consistent with other EU regulatory regimes for trade security. While a joint CFSP-CCP approach cannot fully prevent conflict, since this would require further foreign policy harmonisation, it could help foster security convergence and strengthen humanitarian due diligence mechanisms.

Keywords: EU constitutional law; EU defence integration; arms controls; competence; international humanitarian law

1. Introduction

The war in Ukraine has created a renewed sense of urgency for EU Member States to deepen their collaboration in developing, producing, and procuring military equipment.[1] To overcome the still-prevalent 'buy national' tendencies in defence, which drive up production costs and reduce interoperability, the European Commission is redoubling its efforts to subsidise collaborative defence–industrial projects.[2] But money alone is not enough to kickstart cooperation. Military–strategic alignment is an obvious necessity, since this determines what equipment should be developed and obtained.[3] Yet it is perhaps equally important for participating states to agree also on the terms and conditions under which that equipment may be sold to states not participating in

[1]European Council, 'A Strategic Compass for Security and Defence' (doc. no. 7371/22, 21 March 2022).
[2]European Commission, 'Commission Contribution to European Defence' (COM(2022) 60 final, 15 February 2022).
[3]B Vroege, 'Strategic Autonomy in Military Production: The EDF and the Constitutional Limits to EU Defence-Industrial Spending Power' 28 (2023) European Foreign Affairs Review 341, 352–8.

the production process. That is because of the existence of *arms controls*, through which the trade in armaments and components thereof is subjected to prior governmental approval. In the EU those controls are conducted at national level, which leads to delays, generates costs, and jeopardises security of supply.[4]

A. National controls in a Europeanising industry

Arms controls spring from a combination of military necessity and moral conviction, which together have informed the development of a layered system of national, European, and international legal norms. From an international relations perspective a state's military power hinges on comparative material and technological advantage,[5] which it must maintain by denying adversaries access to its domestic military equipment and know-how. Parallel to this, moral conviction may bring a state to deny certain bad actors access to weaponry even if its own security is not at stake.[6] Both perspectives generate an impetus for states to limit the commercial freedom of defence companies by controlling what equipment they may sell and to whom they may sell it.

Though the EU has attempted to regulate arms controls, policy evaluations and academic literature show that existing regulations leave much to be desired.[7] Both EU and international control norms leave Member States largely sovereign in their export licensing decisions, which they take primarily based on national analyses and convictions. Yet when arms are produced in a collaborative fashion, their exportation becomes subject to multiple national control regimes. Divergences in military and moral perspectives can subsequently breed conflict due to one Member State blocking exports of jointly produced products to another Member State's foreign allies.[8]

To address this problem the European Commission has recently suggested implementing a form of mutual recognition of arms export licences. This would shift control to the Member State where final assembly takes place, and would require other Member States that supply only components to grant automatic approval.[9] But this proposal has incurred criticism. The main point of concern is that without clearer common export norms, arms production could shift to Member States with laxer controls and thereby trigger a regulatory race to the bottom.[10]

[4]European Commission, 'Impact Assessment Accompanying the Proposal for a Directive of the European Parliament and of the Council on Simplifying Terms and Conditions of Transfers of Defence-Related Products within the Community' (SEC/2007/1593 final, 5 December 2007).

[5]N Meershoek, 'The Constraints of Power Structures on EU Integration and Regulation of Military Procurement' 6 (2021) European Papers 831, 841–54.

[6]J Christensen, 'Arming the Outlaws: on the Moral Limits of the Arms Trade' 67 (2019) Political Studies 116.

[7]L Mampaey et al, 'Study on the implementation of Directive 2009/43/EC on transfers of defence-related products', (European Commission Ref. Ares(2014)2758238, 22 August 2014); M Trybus and L Butler, 'The Internal Market and National Security: Transposition, Impact and Reform of the EU Directive on Intra-Community Transfers of Defence Products' 54 (2017) Common Market Law Review 403; I Ioannides (ed), 'EU Defence Package: Defence Procurement and Intra-Community Transfers Directives: European Implementation Assessment' (European Parliamentary Research Service ref. PE 654.171, 19 October 2020) pp 120; D Cops et al, 'Towards Europeanized Arms Export Controls? Comparing Control Systems in EU Member States' (Flemish Peace Institute Report 2017) <https://vlaamsvredesinstituut.eu/wp-content/uploads/2019/03/Towards-Europeanized.pdf> accessed 24 February 2023; C Bonaiuti, 'Convergence Around What? Europeanisation, Domestic Change and the Transposition of the EU Directive 2009/43/EC into National Arms Exports Control Legislation' (PhD thesis, Newcastle University 2020) <https://theses.ncl.ac.uk/jspui/handle/10443/4964>; S Wizotzki and M Mutschler, 'No Common Position! European Arms Export Control in Crisis' 10 (2021) Zeitschrift für Friedens- und Konfliktforschung 273.

[8]Recent figures on the prevalence of such conflicts are not available. Prominent publicised examples include Germany's decision to block French exports to Saudi-Arabia ('German opposition to Saudi Eurofighter exports a 'real problem' – Airbus CEO' (*Reuters*, 17 October 2023)), Germany's blockade on other countries' Leopard exports to Ukraine ('Ramstein summit fails to agree Leopard tanks deal for Ukraine' (*Reuters*, 20 January 2023)), and Sweden's arms embargo on Turkey ('Sweden moves closer to NATO, lifts arms embargo on Turkey' (*Associated Press*, 30 September 2022).

[9]European Commission (n 2), 7–9.

[10]Wizotzki and Mutschler (n 7), 285–6.

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Furthermore, Member States would still retain the authority to intervene in trade on a case-by-case basis.[11] This means that a free flow of arms and components within the Union would still not be guaranteed, thus giving rise to continued impediments to industrial cooperation.

As important as it is to debate how EU arms controls ought to be shaped substantively, a strictly content-focused approach may obscure from view certain more fundamental choices that were made in its regulation. This concerns in particular how arms controls measures were tailored to the EU's constitutional foundations. Revisiting and re-evaluating those choices may prove essential to the future of EU arms controls regulations, as these foundations determine not just the formal scope of EU-regulatory action but also affect its content in substantive terms.

B. Reconstituting arms controls: a foundational approach

The EU's constitution is formed by the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). These Treaties are characterised by purpose-driven functionalism: they grant the Union the means to act in the form of functionally described competences, while simultaneously dictating which objectives it must attain using these competences.[12] Those objectives are strongly normative in nature, in the sense that they represent a moral claim regarding the virtues which the EU must aspire to.[13] They give a prominent position to the EU's central values, which include respect for human dignity, the rule of law, and human rights.[14] Reasoning from the EU's constitutional foundations, we can thus construct an image of its main roles and responsibilities in mediating trade, security, and ethics in arms controls. To that end this article examines the EU arms control system from three main perspectives: competence delineation, regulatory consistency, and compliance with international humanitarian law.[15]

First perspective: competence delineation

The choice of competence for EU action is a matter of constitutional significance,[16] especially because different competences are subject to different decision-making procedures. Arms controls on shipments to non-EU states are presently regulated from a markedly different functional perspective compared to controls on shipments to other Member States. Arms controls within the Union are treated as a trade issue and are regulated through the internal market,[17] while controls on shipments to non-EU states are approached as a security issue and are regulated through the Common Foreign and Security Policy (CFSP).[18] This means that such controls are not regulated through the Common Commercial Policy (CCP) which ordinarily dictates trade relations between the EU and third states. This is significant because in contrast to the internal market and CCP, the CFSP is far more politicised in nature. That is to say that its implementation is determined primarily by political discretion, rather than by legal norms. The core reasons for this are that the EU Treaties task the Member State-controlled European Council with developing and implementing the CFSP, while simultaneously barring the enactment of legislation and largely excluding the CFSP from review by the Court of Justice of

[11]Art 346(1)(b) TFEU.

[12]K Lenaerts and JA Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' 9 (2013) EUI Working Paper, 13.

[13]D Copp, *Morality, Normativity, & Society* (Oxford University Press 1995) 3–4.

[14]Arts 3(1) and 2 TEU. Their legal relevance for arms controls, as well as the relevance of other core EU values and objectives contained therein such as peace promotion, will be discussed further in Section 5 of this article.

[15]The relevance of, and choice for, these particular perspectives is explained below and in Sections 3, 4, and 5.

[16]Case C-2/00 *Opinion on the Cartagena Protocol* ECLI:EU:C:2001:664, para 5.

[17]Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community, OJ L 146/1.

[18]Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, OJ L 335/99.

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the European Union (CJEU).[19] Were it possible to regulate arms controls through the CCP instead of the CFSP, then this could enable the EU to introduce comparatively more detailed, uniform, and justiciable rules for the trade in arms.

Second perspective: regulatory consistency

Consistency and coherence, which are often used in the same breath,[20] play an essential role under the EU's constitution. The Treaties have established consistency as a legal principle amenable to judicial review.[21] When arms controls are placed in a broader trade-security perspective, seemingly inexplicable differences can be observed between its legal structure and the structure of other EU regimes for regulating trade security issues.[22] This raises questions about the consistency of the EU's arms control regime with its other trade security regulations.

Third perspective: international humanitarian law compliance

Armaments have the capacity to maim and kill indiscriminately, with potentially devastating effects on civilians. During armed conflict the life and wellbeing of non-combatants is safeguarded primarily by international humanitarian law (IHL). Though (international) human rights law may apply concurrently, it is IHL which provides specific protection to those who find themselves in a situation of armed conflict.[23] IHL accomplishes this by banning certain actions such as indiscriminate attacks against civilians.[24] IHL also requires states to observe due diligence and deny others who would perpetrate IHL violations the means to conduct them.[25] Yet the EU's current regulations leave significant opportunities for Member States to shirk their humanitarian responsibilities. Since the EU's values commit it to the strict observance and development of international law,[26] one could question whether the EU is constitutionally obliged to 'do more' in support of IHL.

Research question

In light of the foregoing, this article focuses on answering the following research question: how should EU arms controls be (re)structured in light of its internal division of competences, and considering its constitutional commitments to regulatory consistency and compliance with international humanitarian law?

C. Structure of the article

The article begins with a general introduction on the legal structure and functioning of EU arms controls (Section 2). Next, those controls are evaluated from the three aforementioned

[19]Art 24(1) TEU. See L Lonardo, *EU Common Foreign and Security Policy After Lisbon* (Springer 2023) 47–69 for a full overview of the CFSP's particularities.

[20]ER Manunza, 'Public Procurement Law as an Expression of the Rule of Law: On How the Legislature and the Courts Create a Layered Dynamic Legal System Based on Legal Principles' 32 (2023) Public Procurement Law Review 319, 323–25.

[21]SEM Herlin-Karnell and T Konstadinides, 'The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration' 15 (2013) Cambridge Yearbook of European Legal Studies 142.

[22]Such as Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union, OJ LI 79/1.

[23]See for a comparison between human rights law and IHL: United Nations Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflict* (United Nations Publication 2011).

[24]M Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019).

[25]Ibid., 528–32.

[26]Arts 3(5) and 21(2)(b) TEU; B Vroege, 'Exporting Arms Over Values: The Humanitarian Cost of the European Defence Fund' 6 (2021) European Papers 1575, 1589–90.

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perspectives of competence delineation (Section 3), consistency (Section 4), and IHL compliance (Section 5). This evaluation reveals that the current arms control system is partly unconstitutional and ought to be amended (Section 6). The final part concludes (Section 7).

2. A general introduction to EU arms controls

This Section describes how arms controls are regulated in the EU. First the legal structure of EU arms controls is introduced (subsection A). This is followed by a synthesis of policy evaluations and literature on the (dys)functionality of arms controls in achieving their objectives of regulating trade security and promoting IHL compliance (subsection B).

A. The legal structure of EU arms controls

EU Member States conduct arms controls on the basis of national control systems, which are guided in part by EU norms. Controls apply to exports of *armaments*. These are military-specific products,[27] such as fighter jets and torpedoes, which have no civil applications. There are also products which have the capacity to be used for both military and civilian purposes. Known as dual-use goods, these include a variety of products ranging from compounds that could be used for chemical weapons to computer components that could be incorporated into advanced targeting systems. Dual-use goods are also subject to export controls. Though this article will refer to dual-use goods as a relevant regulatory precedent, the focus of the analysis is on armaments. Firstly because the EU's recent policy initiatives that provided inspiration for this article focus on armaments. Secondly because the civil-military nature of dual-use goods gives rise to differences in regulatory challenges compared to armaments. And finally because there are (EU–) legal differences in the regulation of armaments and dual-use products,[28] which cannot be covered at the necessary level of detail within the confines of this article.

When exporting armaments to non-EU states, Member States must comply with the *EU Common Position on Arms Exports* (hereafter: the Common Position).[29] This was adopted by the European Council in 2008 under the CFSP. The Common Position sets out the basic process for licensing,[30] and includes eight common substantive assessment criteria. These require exports to be assessed e.g. on the basis of their security consequences (including for other Member States),[31] their compliance with international sanctions,[32] and the situation in the country of destination in terms of IHL compliance.[33]

When exporting armaments within the Union, Member States must comply with the *Intra-Community Transfers Directive* (hereafter: the Transfers Directive).[34] Adopted in 2009 under the internal market, this directive was intended to streamline intra-EU arms controls and thereby further open the internal market for defence products. The Transfers Directive is purely process-oriented: it does not include common assessment criteria. Instead it focuses on streamlining licensing procedures so that fewer intra-EU arms shipments are subjected to individual checks. Firstly, by introducing licensing exemptions for certain (categories of) shipments. Secondly by

[27]As defined in the Common Military List, see European Council Document 6441/22, 22 February 2022.

[28]EU primary law, for instance, contains a specific derogation for armaments (art 346(1)(b) TFEU).

[29]Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, OJ L 335/99.

[30]Arts 1 and 4–9 of the Common Position.

[31]Art 2(5) of the Common Position.

[32]Art 2(1) of the Common Position.

[33]Art 2(2) of the Common Position.

[34]Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community, OJ L 146/1.

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allowing companies to be certified so as to qualify for licences granting permission for a range of shipments at once.[35]

B. The (dys)functionality of arms controls: on sovereignty and interdependence

Though Member States' arms controls are guided by EU norms, the *locus* of sovereignty remains in many respects at national level. Crucial decisions on matters such as the scope of arms controls (to which goods do they apply?) and substantive assessment (what are relevant risks, and how must they be weighed?) are still predominantly taken nationally.[36]

For the intra-EU trade, the absence of harmonised assessment criteria is an important source of divergence. National practices differ significantly. Where certain Member States (such as Germany and Sweden) apply a principle of immediate approval for allied states, including for all EU states, others (such as France and the Netherlands) assess transfer licences using the same criteria as they do for extra-EU exports.[37]

Though the criteria for the extra-EU trade are harmonised, the legal structure of the current regulatory system significantly dampens their harmonising effect. The Common Position's assessment criteria are open in nature. Combined with the absence of centralised CJEU review, this leaves room for Member States to grant licences even when this would 'flagrantly breach international law'.[38] As such, there is no truly common position on IHL compliance.[39] Similarly, Member States may fundamentally disagree on the security implications of arms shipments. This became clear recently when several Member States wanted to supply Leopard tanks to Ukraine. As producer of the Leopard tank, Germany can use re-export controls[40] to block shipments by other states because of security concerns. Though Poland claimed that it could have delivered Leopards without German approval,[41] such an action would not have been without diplomatic consequences. Furthermore, Germany could have then blocked exports of spare parts and munitions. As such, Germany's national perception of the geopolitical situation was ultimately the deciding factor for other countries to be able to ship their Leopards out.

The Leopard example demonstrates well how lack of agreement on the extra-EU arms trade bleeds through into the intra-EU trade.[42] Though the Transfers Directive attempted to eliminate individual shipment controls within the EU, it followed in the words of Trybus and Butler an 'ambivalent approach' to minimum harmonisation. This gave Member States room to not or only partly implement mechanisms that are essential for the directive's functioning.[43] Member States could therefore maintain individual controls for most intra-EU arms transfers, and did so mainly to retain influence over future foreign (re)sales.[44] As a result intra-EU arms transfers continue to be subjected to costly and time-consuming procedures. This, even though the rate of denial of intra-EU licences is estimated not to surpass 0,01 per cent per year compared to 2 per cent for extra-EU licences.[45]

This dynamic creates challenges for the EU's recent defence-industrial initiatives, which focus on increasing cross-border integration. In 2021 the European Defence Fund (EDF)

[35]Arts 4(2–3), 5, 6, and 9 of the Transfers Directive.
[36]Cops et al (n 7), 70–149.
[37]Cops et al (n 7), 125–6.
[38]L Ferro, 'Western Gunrunners, (Middle-)Eastern Casualties: Unlawfully Trading Arms with States Engulfed in Yemeni Civil War?' 24 (2019) Journal of Conflict & Security Law 503, 533–5.
[39]Wizotzki and Mutschler (n 7).
[40]Arts 4(6) and 10 of the Transfers Directive.
[41]'Ramstein summit fails to agree Leopard tanks deal for Ukraine' (*Reuters*, 20 January 2023).
[42]Cops et al (n 7), 125–6 and 190.
[43]See for a detailed discussion of the Transfers Directive's approach to harmonisation Trybus and Butler (n 7).
[44]Cops et al (n 7), 190.
[45]Ioannides (n 7), 78–9.

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Regulation[46] was adopted, which made available over €7 billion in EU funding for joint defence research and development. Following the outbreak of the Ukraine war the EU announced additional initiatives to (i) further expand the EDF, (ii) waive Value-Added Tax obligations for collaboratively developed equipment, and (iii) facilitate joint procurement through new financing solutions.[47] Such initiatives are intended to contribute to 'the independence of Member States as the end-users of [defence] products.'[48] And while joint development and production may indeed enhance Member States' independence in relation to *non*-EU states, it also makes them more in*ter*dependent on each other.

As evidenced by the West's support to Ukraine, the ability to arm one's allies is a powerful tool. Divergences in arms controls may jeopardise Member States' freedom to use this tool as they become more interdependent. If more incidents occur such as the one between Germany and Poland, Member States may decide that the potential benefits of cooperation do not outweigh the strategic risks resulting from interdependence. As such, Member States' insistence to maintain their autonomy in one area (arms controls) could paradoxically end up harming their attempt to become more autonomous in another (industrial policy).

C. Interim conclusion

In light of the foregoing, it can be concluded that the current system of EU arms controls struggles to achieve its central objectives of mediating trade and security and promoting humanitarian responsibility. From a trade security perspective, there are inherent tensions in the regulatory system between Member States' desire to maintain foreign-political independence over arms controls and their push for more interdependence in industrial terms. Furthermore, the regulatory system has failed to establish effective common standards in particular as regards IHL compliance.

As shall become clear from the next Sections, the dysfunctionality of the EU's arms control system runs deeper than the contents of the relevant regulatory instruments. It is strongly related to its legal structure, which is misaligned with the EU's constitutional foundations. This becomes clear when that system is assessed against the EU's competence delineation principles.

3. Competence delineation: choosing the right legal basis for arms controls

This Section evaluates the EU's arms control system on the basis of the core principles of conferral, proportionality, and subsidiarity, which prescribe the Union's constitutional scope of action. These principles are first introduced (subsection A) and then applied to the Common Position and the Transfers Directive (subsection B). This reveals that the Common Position was based in part on an improper legal basis (subsection C).

A. EU competence and the principles of conferral, proportionality, and subsidiarity

The EU may only act insofar as its actions fit under one of the functional competences that were conferred on it. This principle of conferral – laid down in Articles 4(1) and 5 TEU – is a central characteristic of the juridical constitution of EU law, which positions that law in relation to other legal systems.[49] The conferral principle is operationalised primarily through the CJEU's 'centre of

[46]Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092, Official Journal L 170/149.

[47]European Council (n 1), 38.

[48]Recital 6 of the EDF Regulation.

[49]K Tuori, *European Constitutionalism* (Cambridge University Press 2015) 46.

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gravity'-test. This test focuses on analysing to what extent a measure's aim and content match the objectives and instruments of the different competences available.[50]

Establishing that the EU possesses an appropriate competence for a particular form of action is in itself insufficient justification for the EU to be able to *exercise* that competence. That is because the EU's competences were conferred upon it under an explicitly purposive premise.[51] The EU exists to attain the objectives set out in Article 3(1) TEU, being to promote peace, its values enumerated in Article 2 TEU, and the wellbeing of its peoples. These objectives are elaborated on through competence-specific objectives, to which actions on the basis of that competence must contribute.[52] The importance of these objectives is emphasised through the principle of proportionality, which requires the Union to ensure that the content and form of its action do not exceed what is necessary to achieve its objectives (Article 5(4) TEU). It is also emphasised through the principle of subsidiarity, which requires the Union to act only when its objectives cannot be sufficiently achieved by the Member States (Article 5(3) TEU).[53] This latter principle only applies to competences which are not exclusive to the EU. Those are in this case the CFSP and the internal market; the CCP is an exclusive competence.[54]

In this Section, the focus of the analysis will be on the principles of conferral and proportionality. The subsidiarity of EU regulatory action can be presumed, since the issue at hand has a clear cross-border dimension and prior attempts by the Member States to achieve convergence have not succeeded.

B. Delineating the EU's arms control competences

Since security remains in principle a national prerogative,[55] it is informative for our understanding of the constitutional interrelation between the CFSP and other EU policies to recall first how national security measures and EU law relate to one another more generally. This will be used as a stepping stone for analysing how arms controls ought to be positioned between the CFSP and the EU's trade competences based on the principles of conferral and proportionality.

The interaction between national security and EU law

The CJEU has clarified through a long line of jurisprudence, tracing back to judgements such as *Johnston*, that there is no general exception excluding all national security measures from the scope of Union law.[56] According to the CJEU the only articles in which the Treaties expressly provide for derogations from Union law for reasons of security are Articles 36, 45, 52, 65, 72, 346, and 347 TFEU, which deal with exceptional and clearly defined cases.[57] Thus, if a national security measure affects one of the competences of the Union, this measure must be justified on a case-by-case basis under one of those specific derogations. This also goes for measures connected with the trade in arms, as the CJEU has clarified in relation to the armaments-specific derogation of Article 346(1)(b) TFEU.[58]

[50]Eg Case C-300/89 *Titanium Dioxide* ECLI:EU:C:1991:244, para 10-16; A Engel, *The Choice of Legal Basis for Acts of the European Union* (Springer 2018) 13–16 and 19–31.

[51]Art 5(2) TEU.

[52]Eg Art 21 TEU, which defines the objectives of the EU's external action.

[53]G De Baere, 'Subsidiarity as a Structural Principle Governing the Use of EU External Competences' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing 2017) 93, 103.

[54]Arts 4–6 TFEU.

[55]Art 4(2) TEU.

[56]Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* ECLI:EU:C:1986:206, para 26.

[57]Eg Joint Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary & Czech Republic* ECLI:EU:C:2020:257, para 143.

[58]Case C-414/97 *Commission v Spain* ECLI:EU:C:1999:417. See N Meershoek, *Sovereignty and Interdependence in EU Military Procurement Regulation* (Ridderprint 2023) 129–145 for an in-depth analysis of the Court's jurisprudence on security derogations.

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The proportionality principle plays an important role in the application of these exemptions by the CJEU, enabling it to mediate conflicts between national security policy and EU law. For a measure to be proportionate it must be both suitable and necessary to achieve its aims.[59] Provided that a Member State demonstrates the existence of a real, specific, and genuine security risk[60] which is not a front for economic protectionism,[61] the CJEU tends to evaluate the aim of a national security measure with a comparatively great degree of judicial deference.[62] That is because determining the existence and extent of international threats and tensions is an eminently political matter, which usually does not lend itself to judicial review.[63] This means that the CJEU is less well placed to review why and when a Member State considers its security to be at stake, unless it acts in an evidently unreasonable manner. But in light of the need to protect EU competence, the CJEU may review in particular the *means* through which a Member State has decided to secure itself so as to ensure that the EU's functional competences are not intruded upon more than is necessary. As such the proportionality principle may limit in particular how a Member State decides to implement its security policy, rather than why it acts in the first place.

The interaction between the CFSP and other EU competences

The maxim that the freedom to implement security policy measures is curbed by the need to protect non-security-focused EU competences which are *affected* by those measures, applies also in the context of the constitutional balance of powers between the CFSP and the rest of the EU acquis. This follows in particular from two key TEU provisions. The first is Article 13(2) TEU, which contains the principle of inter-institutional balance.[64] The second is Article 40 TEU, also known as the 'mutual non-affection clause'. This stipulates that CFSP decisions may not impinge upon the EU's other competences and vice versa. This is meant to protect Member State political discretion under the CFSP from the more legalised and constitutionalised TFEU methods, while simultaneously insulating those TFEU methods from political intrusion through the CFSP.[65]

Read in conjunction, these provisions demonstrate in my view that security measures which fall within the functional ambit of non-CFSP EU competences cannot *exclusively* be regulated through the CFSP, just as they cannot be entirely removed from the ambit of those competences if the measures in question were taken at national level. Any other reading would threaten the *effet utile* of the relevant EU competences and risk compromising the systematisation of EU power as foreseen in the Treaties.[66] This proposition is confirmed when we apply the aforementioned 'centre of gravity'-test to arms controls. As was explained above, this test requires assessing the aim and content of a particular measure against the instruments and objectives of the relevant competences available.[67]

Arms controls at the nexus of the CFSP, CCP, and internal market

As mentioned in the introduction, the main aims of arms controls are to safeguard a polity's security and to uphold its moral convictions. These aims are implemented through trade-restricting measures in the form of *ex ante* checks and, if necessary, prohibitions on the cross-border movement of military goods.

[59]Case C-390/99 *Canal Satélite Digital SL v Administracíon General del Estado* ECLI:EU:C:2002:34, para 33.
[60]Case C-423/98 *Albore* ECLI:EU:C:2000:401, para 22.
[61]P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2008) 550–1.
[62]M Trybus, *Buying Defence and Security in Europe* (Cambridge University Press 2014) 110–13.
[63]See also the Opinion of AG Jacobs in Case C-120/94 *Commission v Greece* ECLI:EU:C:1995:109, para 50.
[64]Lenaerts and Gutiérrez-Fons (n 12), 3.
[65]C Eckes, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' 22 (2016) European Law Journal 492, 500.
[66]Lenaerts and Gutiérrez-Fons (n 12), 13–14.
[67]Subsection 3A.

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The CFSP, which is found in Title V TEU, enables joint action in 'all areas of foreign policy and all questions relating to the Union's security'.[68] The specific objectives to be pursued through CFSP action are outlined in Articles 3(5) and 21(2) TEU. These objectives are both numerous and broadly formulated, and include safeguarding the EU's security, its values, and its fundamental interests. To implement the CFSP the EU has a flexible toolbox available to it, which enables adopting legally binding decisions that define the Union's 'positions' and 'actions' and which may include 'arrangements' for their implementation.[69] This includes sanctions against third countries (also called 'restrictive measures' in EU Treaty parlance).[70]

The inclusion of sanctions in Title V TEU indicates that trade interventions are a legitimate instrument for implementing the CFSP. As such, based on both their aim and content, arms controls could at first sight legitimately be adopted under the CFSP. Yet the matter is not as simple as it may seem. That is due to the existence of *functional-purposive overlap* between the CFSP on the one hand and the CCP on the other.

The CCP is found in Part 5, Title II TFEU. It serves to regulate the EU's trade with non-EU states, and is implemented according to Article 207 TFEU through a variety of market access instruments such as export policy, tariff and trade agreements, and anti-dumping measures. Since arms controls objectively serve to regulate the exportation of goods, those controls would – based on their content – *also* fit within the toolbox of the CCP.[71] What is more, the CCP and CFSP share the exact same objectives. This follows from Articles 205 and 207(1) TFEU, which stipulate that the CCP be conducted in accordance with the EU's general external action objectives of Chapter 1 of Title V TEU. As such, the (broad) objectives of Article 21 TEU also apply to the CCP. This interlinking of CFSP and CCP objectives enables the EU to pursue a politicised trade policy.[72] As such, the fact that arms controls are implemented with a security aim in mind in principle does not give rise to a preference for regulating them through the CFSP rather than the CCP. Therefore, applying the centre of gravity-test to arms controls does not seem to tip the balance in favour of either of these two competences.

Turning next to the issue of competence over intra-EU arms shipments, we can note that the interrelation between the CFSP and the internal market is shrouded in similar ambiguities. This has to do with the inherent capacity of the internal market to introduce legislation in pursuit of common non-economic objectives.

The internal market is located in Part 3 of the TFEU. Article 26(2) TFEU states that the objective of the internal market is to create an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaties.[73] In light of this objective, the EU can take action under Article 114 TFEU if the measure's aim and content are to eliminate disparities between national laws which hinder free movement or distort competition.[74] Yet in spite of its focus on market liberalisation, Article 114 TFEU measures may also introduce common rules and standards in pursuit of *non*-economic objectives. The main reason for this is that internal market legislation is, as De Witte puts it, almost always also 'about something else'.[75] Trade barriers and competitive distortions rarely exist for reasons of trade alone: they are generally the result of (differences in) action taken in another

[68]Art 24(1), first paragraph, TEU.

[69]Arts 25 and 29 TEU.

[70]Art 215 TFEU.

[71]Compare Case C-83/94 *Peter Leifer and others* ECLI:EU:C:1995:329, para 7–13.

[72]A Ott and G Van der Loo, 'The Nexus Between the CCP and the CFSP: Achieving Foreign Policy Goals Through Trade Restrictions and Market Access' in S Blockmans and P Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar Publishing 2018) 230–53, 233.

[73]Art 26(2) TFEU.

[74]See eg Case C-300/89 *Titanium Dioxide* ECLI:EU:C:1991:244, para 12.

[75]B De Witte, 'A Competence to Protect' in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 25–46, 36.

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area of public policy. This affords the EU a certain room under the internal market to enact legislation in pursuit of other public policy aims, provided that the legislation in question is legitimately aimed at eliminating the market barriers and distortions these policies give rise to.[76] Since arms controls objectively limit the free movement of goods as enshrined in Articles 34 and 35 TFEU, regulating those controls could at first sight also legitimately serve to eliminate market barriers and competitive distortions.

The need for a bifurcated approach to arms controls regulation

Based on the foregoing, application of the centre of gravity test appears to leave us with three legitimate claims to competence for regulating arms controls. In such situations of competence overlap the CJEU has ruled in the past that a measure may also, exceptionally, be adopted on the basis of multiple legal bases at once.[77] However, this does require that the decision-making procedures which those legal bases are subject to are compatible with one another. Due to the unique nature of the CFSP, which puts governance almost entirely in the hands of the Council, its decision-making cannot be reconciled with the ordinary legislative procedure to which the CCP and internal market are subject.[78] As such, the only solution would be to split arms controls regulation up into distinct functional components which are to be implemented through separate acts that each have their own legal basis.[79]

In my view, the functional competence logic underpinning the EU Treaties dictates that this split be made at implementation level. Such an approach would be in line with the manner in which the proportionality principle mediates conflicts between national security measures and EU law, as discussed earlier in this subsection. It would also fit with the manner in which other issues at the nexus of trade and security are regulated, as shall be explained below.[80] This would mean that any regulatory measures which serve to determine *when* and *why* the trade in arms is to be restricted ought to be adopted under the CFSP, while measures which regulate *how* that restriction must be applied by economic operators ought to be adopted under the CCP and the internal market.[81] In essence this would shift the procedural side of arms controls from the CFSP to the CCP, enabling the enactment of more detailed and justiciable rules in that area. Though each Member State would maintain its security-substantive discretion to grant or deny export permission, the EU could use its procedural authority to both foster cooperation among control authorities and bolster humanitarian protection.[82]

In relation to the CCP, support for such a division can be found in Article 22(1) TEU. According to this provision it is the Council which identifies the strategic interests and objectives of the Union relating to '. . . the common foreign and security policy *and to other areas of the external action of the Union*.' This indicates that the (political) power to decide on the why of EU external action in a broad sense has been reserved to the Council. Seen from this perspective, the scope of CCP action is inherently limited to determining how the objectives that were set by the Council should be implemented in a trade policy setting. This seems to be affirmed also by Article 207(1), first sentence, TFEU, which limits the CCP to '. . . *the commercial aspects of* intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, *export policy* and measures to protect trade such as those to be taken in the event of dumping or subsidies.'

[76]Case C-376/98 *Tobacco Advertising* ECLI:EU:C:2000:544, para 86.
[77]Eg Case C-211/01 *Commission v Council* ECLI:EU:C:2003:452, paras 39–40.
[78]Art 294 TFEU.
[79]Compare Opinion of A-G Wahl in Case C-455/14 P *H v Council* ECLI:EU:C:2016:212, para 70.
[80]See Section 4.
[81]In analogy to the Opinion of A-G Hogan in Case C-134/19 P *Bank Refah* ECLI:EU:C:2020:396, para 39.
[82]As shall be set out in more detail in Section 6.

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In relation to the internal market, support for this division can be found in the manner in which the CJEU construes the EU's regulatory powers in relation to non-economic objectives. Though Article 114 TFEU allows the EU to pursue such objectives through its internal market legislation, this can of course not be understood as an unlimited legislative competence. In addition to the measure's aim and content having to fit with the internal market, the EU may only pursue ancillary objectives that are *common* to the Member States.[83] Military security cannot be construed as such a common objective, as is confirmed also by the prevalence of substantive disagreements on the security implications attached to arms shipments. This means that Article 114 TFEU empowers the EU only to introduce legislation aimed at harmonising how Member States effectuate their security competences in a trade context – but not *why* they do so in the first place.[84]

The legal bases of the Transfers Directive and Common Position evaluated

Based on the foregoing, I conclude that the Transfers Directive was correctly adopted on what is now Article 114 TFEU,[85] while the Common Position was incorrectly adopted on the basis of what is now Article 29 TEU.[86]

As was explained above, the Transfers Directive is purely process-oriented. Though it harmonises the 'rules and procedures' applicable to intra-EU transfers,[87] it leaves Member State discretion on core political-substantive matters untouched. The scope of application of the licensing system, for example, is determined by the EU Common Military List (CML)[88] but Member States may use 'catch-all clauses' to extend controls also to other products.[89] Furthermore, the Transfers Directive does not touch upon the substantive criteria by which the Member States must assess intra-EU arms shipments. Interestingly, there is also no instrument under the CFSP which harmonises the criteria for the intra-EU trade. Though this is not a constitutional competence issue as such – after all, it is in principle the norm for security matters to be regulated nationally – this does leave a regulatory gap.

The Common Position does, however, exceed the boundaries of the legal basis under which it was adopted. While the CFSP is the right legal basis to regulate matters concerning the why and when of arms controls, the how of their implementation in commercial practice should have been regulated under the CCP. Thus, insofar as the Common Position contains provisions on the process of *implementing* arms controls, it is unconstitutional. If challenged before the CJEU, this would form grounds to declare those parts of the Common Position void.[90]

C. Interim conclusion

The division of competences between the CFSP on the one hand, and the internal market and CCP on the other, has important implications for the manner in which arms controls can be regulated at EU level. In order to protect the distinct nature and *effet utile* of these competences, arms controls must be regulated in a manner which combines both security competence-based and trade competence-based interventions. Whereas the security-political core of arms controls must be regulated through the CFSP, their implementation in commercial practice must be regulated through the internal market and the CCP. Though the Transfers Directive complies with this

[83]De Witte (n 75), 35–7.
[84]See also Trybus (n 62), 61–84.
[85]Previously Art 95 of the Treaty establishing the European Community.
[86]Previously Art 15 of the Treaty on European Union.
[87]Art 1(1) Transfers Directive.
[88]The latest update took place on 22 February 2022 (European Council Document 6441/22, 22 February 2022).
[89]Cops et al (n 7), 83–8.
[90]Arts 263 and 264 TFEU.

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division, the Common Position does not. By regulating also the process of arms controls, the Common Position has exceeded the competence boundaries of the CFSP and entered into the exclusive domain of the CCP.

These findings are confirmed when we compare the regulatory system for arms controls to other trade-security regulatory systems, as shall be done in the next Section.

4. Regulatory consistency: ensuring a cohesive approach to trade security regulation

This Section first introduces the principle of consistency (subsection A) and then applies this principle to the EU's arms control system (subsection B). This reveals that other forms of EU regulation at the nexus of trade and security are regulated in a bifurcated CFSP-CCP manner, providing further evidence for the proposition that the Common Position was incorrectly adopted under the CFSP alone (subsection C).

A. Consistency in EU constitutional law

Though the EU's competences are delineated and separated from one another based on their function, it is imperative for the EU to ensure that its competences are exercised in a cohesive manner. Therefore, the EU Treaties explicitly require different regulatory interventions to be coordinated with one another.[91] This requirement is codified in the shape of the principle of consistency. This is embedded in the EU's institutional framework,[92] is included among the 'mainstreaming clauses' of Title II TFEU that apply to all EU policies,[93] and is reiterated in Title V TEU in the form of an obligation to ensure consistency between the different areas of EU external action and between those and its other policies.[94]

By virtue of its explicit and repeated inclusion in the EU Treaties, consistency serves as a core constitutional notion which is meant to ensure that the EU's aims are implemented in a harmonious fashion throughout its legal order. This is achieved in particular through the consistent application of core EU-legal principles in different regulatory areas.[95] In light of this it is important to ensure that the regulation of arms controls follows a structural logic which is consistent with that of other regulatory instruments which serve a similar function of guaranteeing security in a trade context.

B. The (in)consistency of arms controls in perspective

Starting off close in terms of subject matter, the first sign of inconsistency can be found when we look at the conditions under which EU Member States were permitted to accede to the Arms Trade Treaty (ATT).

The ATT is an international arms controls treaty greatly inspired by – and closely modelled after – the Common Position.[96] Based on the contents of the ATT, the European Commission concluded that part of it falls within the sphere of the EU's competences under the TFEU. Hence, when the time came to sign the ATT, the Commission invoked Article 2(1) TFEU which requires Member States to obtain prior authorisation before signing a treaty that affects EU competences.

[91]ER Manunza, 'Een drietal beschouwingen over het nieuwe Europese regelgevende pakket overheidsopdrachten', 1 (2012) The Europa Institute Working Papers, <www.uu.nl/europainstituut>.

[92]Art 13(1) TFEU.

[93]Art 7 TFEU.

[94]Art 21(3) TEU.

[95]Manunza (n 20), 323–5.

[96]S Depauw, 'The European Union's Involvement in Negotiating an Arms Trade Treaty' (SIPRI Non-Proliferation Papers No. 23 2012) <https://www.sipri.org/publications/2012/eu-non-proliferation-papers/european-unions-involvement-negotiating-arms-trade-treaty> accessed 24 February 2023.

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In Council Decision 2013/269/CFSP the Council followed the Commission's view, since 'some of the provisions' of the ATT fall within the EU's CCP and internal market competences.[97] Accordingly, for those parts, the Commission and Council authorised the Member States to sign the ATT.[98] Considering the great overlap between the ATT and the Common Position, the aforementioned Council Decision forms evidence in support of the conclusion that the Common Position too should have been based in part on the CCP.

Such support can also be found in regulations covering other subjects at the nexus of external trade and security. The most prominent EU initiatives in this area concern its regimes for sanctions, dual-use goods, and foreign direct investments. As shall be set out below all of these topics are regulated in a joint CFSP-CCP manner, in contrast to the CFSP-only approach followed in relation to arms controls.

Beginning with sanctions, it can be noted that the EU Treaties contain since the 2009 Lisbon Treaty an explicit regime arranging their joint CFSP-CCP-based regulation.[99] However, this does not mean that such an explicit arrangement is a *requirement* for CCP-based regulatory involvement in the area of sanctions. Support for this can be found in the *Centro-com* case, which concerned (the implementation of) sanctions at a time when there was no separate legal basis for them. The Court confirmed in its judgement that the Member States could – 'in the exercise of their national competence in matters of foreign and security policy' – have recourse to a CCP measure based on Article 113 (old) of the Treaty to lay down the necessary measures for their implementation.[100]

Further support for the conclusion that the implementation of trade-security interventions must be regulated through the CCP can be found in the Dual-Use Regulation,[101] which creates a regime for controlling the intra- and extra-EU export of dual-use goods, and in the FDI Regulation,[102] which creates a regime for controlling foreign direct investments into the EU by non-EU investors. Both of these regulations were adopted on the basis of Article 207(2) TFEU and not on the basis of Article 29 TEU. Since these regulations may provide inspiration for redesigning EU arms controls, it is useful to examine how they were designed to operate.

To ensure that Member States' substantive security-political prerogatives are respected in relation to dual-use exports and foreign direct investments, while at the same time promoting uniformity as required by Article 207(1) TFEU, both regulations focus on procedural harmonisation. Those procedures are specifically designed to foster mutual consultation and information exchange so as to promote common understanding regarding trade-security issues. In this context both regulations prescribe in more (dual-use) or less (foreign direct investments) detail the steps that Member States must take to determine the scope of the regulatory regime, to assess activities falling within their scope, and – ultimately – to prohibit trade activities they consider to pose an unacceptable threat. In all three steps of the process the regulations foresee (in a degree of) procedural uniformity, while preserving the essential aspects of national security–political discretion:

Scoping

- The Dual-Use Regulation requires Member States to impose prior authorisation requirements in relation to exports of products listed in Annexes I and IV of the regulation. These

[97]Recital 4 of Council Decision 2013/269/CFSP of 27 May 2013 authorising Member States to sign, in the interests of the European Union, the Arms Trade Treaty, OJ L 155/9.

[98]Art 1 of Council Decision 2013/269/CFSP.

[99]Art 215 TFEU.

[100]Case C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* ECLI:EU:C:1997:8, paras 28 and 46.

[101]Regulation (EU) 2021/821 of the European Parliament and of the Council setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), OJ L 206/1.

[102]Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union, OJ LI 79/1.

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annexes are set by the Commission, but under the ultimate control of the Council and Parliament which each have the power to oppose proposed adaptations.[103] Furthermore, if an individual Member State determines that there are non-listed products exportation of which may pose a threat to its security, it can decide to adopt a national list as well. Uniformity is preserved by disseminating such lists to all Member States and by requiring exports of products listed by one Member State to be subjected to authorisation by other Member States too.[104]

- The FDI Regulation defines what a 'foreign direct investment' is in a broad manner, allowing individual Member States to determine which investments require screening.[105] However, if there is a (planned) investment in a Member State which is not required to be screened under its national criteria, both other Member States and the Commission may ask that State to nevertheless conduct a screening in case of public security or public order concerns.[106]

Assessment

- Under the Dual-Use Regulation, Member States assessing a request for export authorisation must take into account 'all relevant considerations'. The only specific factors that must be considered are those which a Member State would (need to) consider anyway, such as compliance with international law and national foreign and security policy.[107] For the rest, it is up to the controlling Member State to decide which considerations are 'relevant'. But assessment does not take place in a national vacuum: the regulation ensures that the interests of other Member States are taken into account by obliging the assessing state to examine relevant prior authorisation denials by others and by enabling those others to request the assessing State not to grant an export authorisation.[108]
- The FDI Regulation functions in a similar way. It lists a number of factors which may be taken into consideration as part of the assessment, such as third-country control over the investor,[109] but again respects Member States' discretion in determining what factors are relevant to their security. An exchange of viewpoints between Member States as part of the screening process is facilitated by allowing other Member States and the Commission to provide information and comments to the screening State.[110]

Prohibition

- The decision whether or not to refuse authorisation for exporting a dual-use product is up to the authorising state.[111] But even after an export has been authorised, another Member State may request annulment, suspension, modification, or revocation of that authorisation if the export might prejudice its essential security interests. This triggers a short term (10 working days) non-binding consultation procedure between the Member States involved.[112]
- Similarly, the authority to authorise or prohibit foreign direct investments rests with the screening state.[113] In taking its decision, that authority must give due consideration to any comments from other Member States and any opinions from the Commission.[114]

[103]Arts 17–19 Dual-Use Regulation.
[104]Arts 9 and 10 Dual-Use Regulation.
[105]Art 2(1) FDI Regulation.
[106]Art 7 FDI Regulation.
[107]Art 15(1) Dual-Use Regulation.
[108]Arts 16(5) and 14(2) Dual-Use Regulation.
[109]Art 4 FDI Regulation.
[110]Art 6 FDI Regulation.
[111]Art 16(1) Dual-Use Regulation.
[112]Art 14(2) Dual-Use Regulation.
[113]Art 3(1) FDI Regulation.
[114]Arts 6(9) and 7(9) of the FDI Regulation.

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On top of this, both Regulations contain a slew of other provisions and mechanisms facilitating information exchange such as reporting requirements,[115] coordination groups,[116] points of contact,[117] and transparency and evaluation mechanisms.[118]

While this article is not the place for an evaluation of the effectiveness of the regulations discussed above, the available information indicates that their focus on procedure, consultation, and information exchange has promise. EU dual-use legislation has been around for nigh on 30 years now.[119] While the design of the Dual-Use Regulation has been noted to engender a certain level of incoherence in the regulatory system by preserving substantive national discretion, which may enable companies eg to strategically 'shop' for export permission in more permissive Member States,[120] it has largely succeeded in eliminating intra-EU trade barriers.[121] The FDI Regulation, in turn, is relatively novel and it is therefore premature to draw conclusions on its impact. Nevertheless, the Commission's first two annual screening reports show a strong uptake and positive initial results.[122] In the words of one Member State, the cooperation mechanism is particularly useful '. . . as it challenges Member States (MS) to consider the implications for itself of investment operations in other MS, which has the effect of increasing the awareness of the implications for the other MS of the FDI operations happening on its own backyard.'[123] This demonstrates well how institutionalising trade security within the context of the CCP may foster convergence and dispute resolution between Member States, while simultaneously respecting their political discretion in foreign and security policy.

C. Interim conclusion

The Common Position is structured in a manner that is inconsistent with other EU-regulatory activities at the interface of trade and security. Trade security is not a CFSP-exclusive matter, as is evidenced by the Council's position in relation to the ATT and by the EU's approach to sanctions, dual-use goods, and foreign direct investments. In these other areas of trade security regulation, the implementation of regulatory measures is conducted through CCP-based legislation. Such legislation is presently lacking in the area of arms controls.

5. IHL compliance: promoting humanitarian due diligence throughout the Union

As mentioned at the beginning of this article, arms trading has a clear moral dimension due to the capacity of armaments to maim and kill indiscriminately. This Section will first outline why and how the EU Treaties cause the Union to be under a legal obligation, rather than a mere moral or political imperative, to ensure that recipients of EU armaments adhere to certain minimum standards protecting the life and wellbeing of civilians in times of armed conflict (subsection A). This legal obligation extends beyond the CFSP (subsection B), and has implications for the contents of any future CCP-based arms controls legislation which the EU may adopt (subsection C).

[115]Arts 16(1) –(3) and 23 Dual-Use Regulation; Arts 3(7)–(8) and 5–10 FDI Regulation.

[116]Art 24 Dual-Use Regulation.

[117]Art 11 FDI Regulation.

[118]Art 26 Dual-Use Regulation; Art 15 FDI Regulation.

[119]Beginning with Council Regulation (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods, OJ L 367.

[120]KL Meissner and K Urbanski, 'Feeble rules: one dual-use sanctions regime, multiple ways of implementation and application?' (31–2) (2022) European Security 222–41.

[121]Trybus (n 62), 159–60.

[122]European Commission, 'First Annual Report on the screening of foreign direct investments into the Union' (COM(2021) 714 final, 23 November 2021); European Commission, 'Second Annual Report on the screening of foreign direct investments into the Union' (COM(2022) 433 final, 1 September 2022).

[123]Ibid., 15.

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A. The interests of the 'other' in EU arms controls: an obligation to protect

Though arms controls originated as a national security instrument, it is by now widely acknowledged that they also serve a strong moral purpose. As explained by Christensen, regulators can place three main moral limits on the arms trade: limits on what can be sold, limits on who can buy, and limits on what can be sold to certain buyers.[124] The first type of limitation means ensuring that certain arms never make it to the market by banning their production.[125] Arms controls are the primary means to implement the second and third type of limitation, which is done by ensuring compliance with (international) sanctions and by conducting due diligence in relation to arms trades for which no such blanket prohibition applies.

In my view, ensuring protection of the interests of the 'other' through sanctions compliance and arms control due diligence is a constitutional obligation for the EU. This follows from one of its three central objectives, which may serve as a source of legal obligations by virtue of their operationalisation through the rule of law.[126]

Contrary to what one might expect, the EU's first objective – peace promotion – does not give rise to a constitutional duty to abstain from violence or to remain neutral in times of conflict. This sets the EU apart from several of its Member States, whose constitutional traditions may be more strictly pacifist and/or non-interventionist.[127] Though the objective of peace promotion would obviously bar the EU from engaging in wars of aggression,[128] it must be understood in conjunction with Articles 42(1) and 43 TEU. These CSDP provisions enable the EU to use force to conduct various military tasks abroad. These tasks include not just peace-keeping but also peace-*making*, which implies a competence for the EU to reinstate peace through force. But the EU may also choose to intervene in conflicts in a more indirect manner, including by transferring the means of self-defence to other states – which it presently does at scale by providing arms support to Ukraine. In this context a potential exacerbation of conflict in the short run may be justified by the perspective of deterring aggression in the long run.[129] As such, the EU's objective of peace promotion does not give rise to a general duty for it to refrain from exporting arms – even to states presently engaged in armed conflict.

The EU's third constitutional objective, promoting the wellbeing of its peoples, may serve as a source of obligations in particular through political elaboration.[130] However, this objective is internally focused and thus excludes the interests of the 'other' outside of the EU. But its second objective – value promotion – has an explicitly external dimension. This follows from Articles 3(5) and 21(2) TEU, which serve as a constitutional 'missionary principle'[131] committing the EU to uphold and promote its values in its relations with the wider world.

The exportation of armaments has an EU-constitutional value dimension since recipients of armaments can use them in a manner jeopardising peoples' lives and wellbeing in contravention of the EU's commitments to human dignity, human rights, and the rule of law.[132] This latter commitment extends also to the *international* rule of law, as follows from Articles 3(5) and

[124]Christensen (n 6), 117.

[125]Eg Convention on Cluster Munitions, Dublin, Ireland, 30 May 2008.

[126]Manunza (n 20).

[127]Such as Austria, which must maintain permanent neutrality according to Article 9a of its constitution.

[128]The initiation of which in any case constitutes an international crime, see International Military Tribunal (Nuremberg), judgement of 1 October 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (22 August 1946 to 1 October 1946), 421.

[129]TFB Hamilton, 'Defending Ukraine with EU Weapons: Arms Control Law in Times of Crisis' 1 (2022) European Law Open 635.

[130]Manunza (n 20), 325.

[131]MP Broberg, 'Don't Mess with the Missionary Man! On the Principle of Coherence, the Missionary Principle and the European Union's Development Policy', in PJ Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (Asser 2012), 181–98.

[132]Art 2 TEU. Armed aggression could certainly also jeopardise the EU's other values, but this will usually only be the case after a breakdown of the rule of law.

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21(2)(b) TEU. These provisions constitutionally oblige the EU to use its influence to stimulate international law compliance by others.[133]

There are two specific protective regimes, that are both firmly rooted in the premise of protecting human dignity,[134] of which the fulfilment may be promoted through arms controls due diligence: international humanitarian law (IHL) and (international) human rights law. Out of these two, IHL in particular gives rise to a clear constitutional obligation for the EU to promote due diligence in arms controls. There are two main reasons for this: firstly the comparatively broader positive legal obligations to which IHL gives rise, and secondly the comparatively closer factual connexity between arms exports and IHL violations.

As mentioned in the introduction, IHL exists to protect the life and wellbeing of non-combatants during times of armed conflict by regulating the conduct of hostilities. It is one of the most fundamental areas of international law, codified early on in universally-accepted treaties such as the 1949 Geneva Conventions.[135] Most norms of IHL qualify as peremptory norms of international law,[136] meaning that they are non-derogable and binding for all states.[137] This peremptory core of IHL – which includes eg its prohibition of war crimes – must be actively upheld,[138] giving rise to a positive and extraterritorial obligation to ensure respect for the relevant norms by others. This means that IHL addressees, including international organisations like the EU, are under a due diligence obligation which requires them to cease arms exports if they know or should know that those arms will be used in serious IHL violations.[139] In contrast, human rights law – which has in principle a wider scope of application and applies also outside of armed conflict – does not give rise to such a clear obligation. Though human rights law impels states to refrain from human rights violations also outside of their borders (negative obligation), their responsibility to help secure or ensure human rights in the actions of others (positive obligation) does not apply extraterritorially.[140] This is no different for the EU: its human rights commitments regulate its *own* conduct, but not the conduct of third parties outside of its territory.[141]

The foregoing does not mean that arms export controls have no role to play in relation to human rights; quite the contrary. Arms export bans may be used to bolster human rights abroad, if only by using them to exert diplomatic pressure.[142] Yet such pressure can also be exerted through other means. As such, imposing an arms embargo for human rights purposes is often a matter of political choice rather than legal obligation. This can be illustrated also on the basis of the Common Position, which presently requires Member States to consider the risk of arms being used for internal repression. Especially for exports of major weapons systems[143] it can prove hard to establish causality between their exportation and human rights violations.[144] On top of this, once violence escalates to the use of systems such as fighter planes and warships it is likely to

[133]Vroege (n 26), 1589–90.

[134]International Criminal Tribunal for the former Yugoslavia Judgement/Sentence by Trial Chamber II of 10 December 1998 IT-95-17 *Prosecutor v Anto Furundžija*, para 183.

[135]See for a complete overview of the sources of IHL Sassòli (n 24), chapter 4.

[136]International Criminal Tribunal for the former Yugoslavia Judgement/Sentence by Trial Chamber II of 14 January 2000 IT-95-16 *Prosecutor v Kupreskic et al* para 520.

[137]Sassòli (n 24), 47.

[138]Pursuant to Common Article 1 of the Geneva Conventions.

[139]Vroege (n 26), 1584–5, 1588–90 and sources cited there.

[140]M Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011) 263.

[141]L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' 25 (2014) European Journal of International Law 1071.

[142]Eg 'Germany halts arms exports to Saudi Arabia after Khashoggi's death' (*Financial Times*, 22 October 2018).

[143]Which form the focus of the EU's defence-industrial policy; see eg European Parliament, 'The EU's Defence Technological and Industrial Base' (2020) PE 603.483, 4–5.

[144]A certain involvement of Egyptian naval elements in human rights violations in North Sinai was for instance insufficient to justify a ban on the exportation of components for naval frigates. See the High Court of The Hague, 17 May 2022, ECLI:NL:GDHA:2022:834 (*PAX and others v the Netherlands*).

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qualify as a (non–)international conflict subject to IHL.[145] This means that all things considered, promoting IHL compliance is arguably the most fundamental ethically-informed objective of arms controls which has the most direct legal connection to the EU's constitutional objectives.

B. IHL due diligence: an obligation that transcends competences

By obliging Member State authorities to comply with sanctions and conduct IHL due diligence,[146] the Common Position in principle complies with the EU's obligations towards IHL. However, I would argue that including these obligations in the Common Position *alone* is insufficient. They should also be included in any new arms controls legislation which the EU may introduce on the basis of the CCP/internal market. There are two reasons for this.

The first reason is the qualification of IHL due diligence as peremptory and customary international law, which is of great relevance for its EU-constitutional status. As argued by Lenaerts and Gutiérrez-Fons, customary international law forms 'part and parcel of the EU legal order' and would in principle not even require conversion through secondary EU legislation to apply.[147] This emphasises its fundamental importance within the EU.

The second reason is that the CFSP and CCP both require the EU to strive to consolidate and support the principles of international law.[148] Just like sanctions, IHL obligations are imperative in nature and cannot be countermanded eg on the basis of security interests. If sanctions are in place, or if the conditions for IHL's obligation to protect are met, the relevant arms shipments are illegal *per se*. This means that there is no security–political discretion remaining – either on the part of the Council, or on the part of a Member State – on the basis of which such shipments could nevertheless be given the OK. This means that IHL due diligence cannot be construed as a matter of 'pure' security policy, which would have to be safeguarded from CCP-based intrusion in view of either Article 40 TEU or Article 346 TFEU.

C. Interim conclusion

The EU is under a constitutional obligation to both respect and ensure respect for IHL. This gives rise to a duty to enact IHL due diligence in its regulations in the area of arms controls. That duty applies not just to the CFSP, but also to the CCP. This means that if the EU were to adopt CCP-based arms control legislation – which it should, in light of the conclusions drawn in Sections 3 and 4 above – then that legislation must include IHL due diligence norms.

6. The way forward: reconstituting the EU arms control system

Based on the foregoing I conclude that EU arms controls must be fundamentally reworked. Rather than treating intra-EU controls as an internal market issue and extra-EU controls as a CFSP issue, the EU should regulate both forms of controls in a bifurcated manner combining security competence-based and trade competence-based measures. In terms of regulatory content this system ought to be consistent with the EU's other regulations at the nexus of trade and security. It also ought to include clear IHL due diligence obligations.

In this Section I first briefly cover the EU's latest proposals to reform EU arms controls and explain why those fail to address the EU-constitutional issues identified in this article (subsection

[145] As is for instance currently the case in the Gaza strip. See the High Court of The Hague, 12 February 2024, ECLI:NL:GHDHA:2024:191 (*Oxfam and others v the Netherlands*).

[146] Arts 2(1) and (2)(c) of the Common Position.

[147] Lenaerts and Gutiérrez-Fons (n 12), 31.

[148] Art 21(2)(b) TEU.

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A). Next, I set out what ought to be done instead, which is to amend the Common Position (subsection B) and enact a new Armaments Export Regulation (subsection C).[149]

A. The Commission's and Council's reform proposals: insufficiently far-reaching

Following the outbreak of the Russo-Ukraine war, both the Council and the Commission have brought out communications on the future of EU armaments policy.[150] The institutions propose two main points of action in relation to arms controls, neither of which would solve the competence and consistency issues identified in Sections 3 and 4.

The first proposal would be to foster voluntary convergence by the Member States within the current legal framework.[151] As such, this would not involve the sort of structural change that would be required to align arms controls with the EU's division of competences.[152]

The second proposal would be for the Member States to '. . . seek an approach according to which, in principle, they would respectively not restrain each other from exporting to a third country any military equipment and technology developed in cooperation.'[153] Though the Council did not suggest concrete ways in which this could be done, the Commission proposed that *de minimis* thresholds could be applied.[154] This would essentially entail implementing partial mutual recognition of export licensing decisions based on the share of components that a Member State contributes to the final product.[155] Since the Commission calls on *the Member States* to take action, it seems to envision either a CFSP-based initiative or a (number of) intergovernmental agreement(s) concluded outside of the bounds of the EU entirely.[156] Since arms controls would thus remain regulated within the domain of the CFSP and national security policy, such an approach would fail to remedy the violation of the conferral principle outlined in Section 3.

In addition, a control system predicated on *de minimis* thresholds would – regardless of competence – violate the proportionality principle. As mentioned under subsection 3B, this principle requires a measure to be both suitable and necessary to achieve its aims. But *de minimis* thresholds are not suitable to identify problematic exports. There are no objective factors tying the need to protect a state's military power to a percentage of components included in a final system. If a state desires to maintain its edge over rivals, it should focus on the nature of the relevant components and on (the reliability of) the end user of the system – not on the components' relative value. Furthermore, to ensure compliance with IHL states must – as is required also by the Arms Trade Treaty – apply the relevant criteria and assess whether the goods in question have a clear risk of being used in the commission of serious IHL violations. This responsibility also applies to individual components,[157] and there are no objective arguments to connect its

[149]A suggestion made also by Trybus, though in different form (Trybus (n 62), 165–6).

[150]European Commission (n 2); European Council (n 1).

[151]European Commission (n 2), 5.

[152]Voluntary convergence has also not had much success in the past, see D Cops and N Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (Flemish Peace Institute Policy Brief, December 2019) <https://vlaamsvredesinstituut.eu/wp-content/uploads/2019/12/VI_policy-brief_EU_arms_export_2019web.pdf> accessed 24 February 2023; Ioannides (n 7).

[153]European Commission (n 2), p 10; European Council (n 1), 33.

[154]Ibid, 10.

[155]Inspired by Décret n° 2019-1168 du 13 novembre 2019 portant publication de l'accord sous forme d'échange de lettres entre le Gouvernement de la République française et le Gouvernement de la République fédérale d'Allemagne relatif au contrôle des exportations en matière de défense (ensemble une annexe), signées à Paris le 23 octobre 2019.

[156]Another option could be to establish a form of enhanced cooperation as meant in Art 20 TEU.

[157]The CML, which determines the Common Position's scope of application, also covers military-specific components. See for instance category ML1: 'Smooth-bore weapons with a calibre of less than 20 mm (. . .) and specially designed components therefor.' The ATT also applies to military components, as follows from Arts 6 and 7 of the ATT, read in conjunction with Art 4 thereof.

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applicability to the circumstance that components represent a certain percentage of the value of the finished product.

In light of the foregoing the proposals put forward by the Council and Commission must be disregarded, principally because they fail to remedy the violation of the conferral principle caused by the structure of the present regulatory system. This violation can only be remedied by amending the Common Position and enacting a new Armaments Export Regulation, which would subsequently open pathways to creating a regulatory system that is consistent with the EU's other trade-security initiatives and compliant with its IHL obligations.

B. Step 1: amend the Common Position

In light of the need to ensure respect for the security-political prerogatives of the Member States and the Council, formulating substantive arms control norms remains in principle a matter for the CFSP-based Common Position (see subsection 3B).

The present Common Position contains no assessment criteria for the intra-EU arms trade. Revising the Common Position would create an opportunity to make explicit what is already practical reality, namely that Member States will in principle not prohibit the transfer of armaments to one another. Especially in light of the enactment of a new Armaments Exports Regulation, and considering the regulatory changes that are suggested in that context (see subsection 6C below), it is likely to become increasingly difficult for Member States to maintain that blanket individual licence obligations are a proportionate measure to safeguard their national security in the intra-EU trade. Simultaneously it is important to acknowledge that Member States will always have the right to block arms shipments on a truly case-by-case basis if necessitated by the essential interests of their security (Article 346 TFEU). For this reason, it may be advisable to supplement the Common Position through one or more CFSP measures that are designed to reduce the need to resort to that exemption, for instance by developing equitable distribution mechanisms for munitions and spare parts in times of crisis.[158]

In relation to the extra-EU trade, the Common Position should continue to focus on setting common assessment criteria that are to be applied by national control authorities. However, a distinction should be made here between criteria that function as imperative denial grounds and criteria that function as non-imperative denial grounds. As explained in Section 5 above IHL may oblige states to refrain from exporting military equipment, thereby barring them from engaging in a further balancing of interests. Therefore, such criteria should be included not just in the CFSP-based Common Position but also in the new CCP-based Armaments Export Regulation. This means that Criterion 1 (denial to comply with sanctions), Criterion 2(a) (denial in case of a clear risk of internal repression), and Criterion 2(c) (denial in case of a clear risk of serious IHL violations) ought to be included in the new Armaments Export Regulation as well.[159]

If an export does not qualify for denial based on these imperative criteria, its permissibility ought to be assessed further according to the remaining criteria listed in the current Common Position. Though some of these criteria appear at first sight to be formulated imperatively as well, they effectively centre on determining the existence and extent of international threats and tensions which is – as explained in Section 3 – an eminently foreign policy-political matter. Take Criterion 3, which states that 'Member States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts'. As explained by Hamilton, this prohibition is far more nuanced than it appears at first reading.[160] First, because the Common

[158]Compare the European Commission's Guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak (2020/C 116 I/01), OJ CI 116/1.

[159]Art 2(a) of the Common Position on internal repression, mentioned briefly in Section 5, could also be qualified as imperative in its present formulation.

[160]Hamilton (n 129), 653–5.

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Position acknowledges that Member States have a right to transfer the means of self-defence consistent with the right of individual and collective self-defence recognised by the United Nations Charter.[161] This implies that sending arms to a state engaged in armed conflict is not per se prohibited. Second, because assessing whether sending arms in such a situation threatens to provoke or prolong conflict as opposed to *mitigating*, it is a matter of military strategy. As such, assessing arms shipments on the basis of these criteria belongs in the realm of the CFSP and national security policy – not the CCP.

While the Member States could – and should – continue to work together in the context of the CFSP to ensure as much as possible a shared interpretation of these criteria, differences in national foreign policy postures will inevitably leave room for different outcomes. This is not a bug, but a feature of the constitutional system which preserves national political autonomy in foreign and security policy. These differences must be acknowledged and accommodated for within the regulatory framework, while simultaneously limiting their adverse impact on trade as much as possible by creating avenues for Member States to negotiate their interdependence as part of the export control process.

C. Step 2: enact a new Armaments Export Regulation

The implementation of arms controls in commercial practice belongs, as explained in Section 3, in the realm of the EU's trade competences. Since the intra- and extra-EU trade in arms are intimately connected, the EU should in my view introduce legislation which allows for an integrated approach to both. Therefore, I argue that the Transfers Directive and the procedural elements of the Common Position should be replaced by a single Armaments Export Regulation.

In light of the objectives of the internal market and the CCP, the central aim of this regulation should be to introduce a common procedural framework intended to *i.* eliminate intra-EU trade barriers for armaments which result from the disparate design and application of national control systems and *ii.* achieve uniformity in the commercial aspects of armaments export policy. Since neither of these objectives should be regarded as incidental to the other, and since both Article 114(1) TFEU and Article 207(2) TFEU operate according to the ordinary legislative procedure, the EU should rely on both of these legal bases combined. Because the intent of the legislation would be to fully harmonise the process of arms controls, enacting it in the form of a regulation would be most appropriate. A directive would not be suitable as this focuses on the result that is to be achieved, while leaving the choice of form and methods open to the national authorities.[162]

The new regulation should first determine the scope of arms controls. One could argue that this is actually a matter for the revised Common Position, as determining the relevant objects of protection is a security-political question that belongs – in light of Article 40 TEU – in the realm of the CFSP. In line with this, the Common Military List (CML) of products subject to arms controls is presently set by the Council under the CFSP. Yet Article 40 TEU also requires protecting the internal market/CCP, the *effet utile* of which could be threatened by the Council pulling products into the realm of security policy without involvement on the part of the Commission. As such it may be most appropriate to follow the balanced approach of the Dual-Use Regulation, which functions on the basis of product lists that are *part of* a CCP-based regulation but are ultimately *controlled by* the Council and Member States. The CML could be added as an annex to the new Armaments Export Regulation, and the Council could be given the right to propose amendments to it that are to be implemented by the Commission. This would allow the Commission the opportunity to object if the Council would propose including products that are not of an exclusively military nature.

[161]Recital 12 of the Common Position.

[162]Art 288 TFEU. See also Craig and de Búrca (n 61), 83–5.

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To ensure that the system is responsive to political and technological developments it would be appropriate to make the CML both uniform and dynamic. This could be done by giving individual Member States the right to supplement it through national lists of products which must be subjected to authorisation by other Member States as well, akin to the system used in the Dual-Use Regulation. This would be in line with Member States' rights under Article 346 TFEU, which allows them to protect their legitimate security interests on a case-by-case basis if EU legislation does not suffice.

Next, the Armaments Export Regulation should enact arms control procedures that are proportionate to the security interests of the Member States. As there are significant differences in denial rates of intra-EU licences compared to extra-EU licences, it is safe to conclude that Member States' threat perceptions in relation to intra-EU transfers are significantly lower when compared to their threat perceptions regarding extra-EU exports. As such, it would be disproportionate to subject intra-EU transfers to the same scrutiny as extra-EU exports.

In line with the revised Common Position, the Armaments Export Regulation should make free movement of armaments within the EU the norm instead of the exception. This could be done in a secure manner by first requiring all arms traders to be certified to ensure their reliability. A system of certification is already included in the Transfers Directive and is thus in itself not novel. The main innovation would be to ensure that certified companies are actually freed from licensing requirements, whereas the Transfers Directive allows Member States to still impose such requirements on certified companies – defeating the purpose of certification altogether. Second, traders should be required to notify intra-EU transfers ahead of time via a secure and centralised EU database. By replacing licensing with mandatory notification, administrative burdens could be significantly reduced while still allowing Member States to monitor arms trade patterns for national security purposes. Such a database already exists for arms exports,[163] but is lacking at present for intra-EU arms transfers. This would also enable Member States to subject specific transfers to additional scrutiny on a truly individual basis, provided that concrete red flags are raised in light of the nature of the product and its intended end user. Cooperation mechanisms similar to the ones included in the Dual-Use and FDI Regulations should be included as well, so as to allow other Member States, and potentially also the Commission, to draw the originating state's attention to concerns regarding a transfer that has been notified or flagged for review.

For extra-EU arms shipments individual licensing must remain the norm, as is also required by the Arms Trade Treaty. To prevent and address conflicts which may arise between Member States from differences in interpreting and applying the Common Position's criteria, the regulation should foresee in mechanisms akin to the Dual-Use and FDI Regulations that allow other Member States to provide comments to the licensing authority if they consider their security interests to be jeopardised by a notified export.[164] This would amount to a significant expansion of the limited consultation obligation currently contained in Article 4 of the Common Position, which applies only to licence requests for which another Member State has already denied permission. To facilitate consultations, Member States ought to publish the export licence applications they receive in the aforementioned shared database. While the authority to grant or deny an export licence will remain with the licensing state, that state ought to give due consideration to any comments it receives in its decision.[165]

[163]Pursuant to Arts 7–8 of the Common Position.
[164]Compare Arts 6(2) and 8(1) of the FDI Regulation.
[165]Compare Art 6(9) of the FDI Regulation.

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7. Conclusion

This article sought to establish how EU arms controls should be (re)structured in light of its internal division of competences, and considering its constitutional commitments to regulatory consistency and compliance with international humanitarian law.

The article concludes that the current regulatory regime is partly unconstitutional. The Common Position on arms exports violates the principle of conferral, since it was adopted exclusively on the basis of the CFSP while part of it falls within the ambit of the CCP. This choice of legal basis weakens the EU's capacity to regulate arms controls because CFSP-based measures are by their nature far less detailed and binding than the type of harmonising legislation that can be adopted under the CCP. The Common Position's structure is also inconsistent with other forms of trade security regulation, which are enacted based on the CFSP and CCP combined. Finally, its structure limits the EU's capacity to protect the life and wellbeing of non-combatants in conflict areas abroad by hampering its ability to promote IHL compliance by foreign arms recipients.

The EU ought to address these issues by repealing the Transfers Directive and those parts of the Common Position that concern the implementation of arms controls, and enacting a new Armaments Export Regulation based on the CCP and internal market. As the EU is required to use its competences in pursuit of its values-based objectives, this would create room to strengthen the EU's humanitarian export norms by incorporating them also in legislation which – unlike the current Common Position – falls under the CJEU's full jurisdiction. It would also create room to implement a more detailed and uniform control process, which could include additional mechanisms facilitating an exchange of information and viewpoints between Member States as part of their national arms control processes. This could help reduce the chance of conflicting arms control decisions and foster mutual understanding among Member States for one another's policy priorities.

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