

ARTICLE 3(5) TEU AND ARMS EXPORT CONTROL: THE EU'S ROLE IN THE OBSERVANCE AND DEVELOPMENT OF INTERNATIONAL (HUMANITARIAN) LAW¹

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Abstract: Article 3(5) TEU affirms the EU's commitment to upholding international law, including humanitarian law (IHL). Recent efforts to boost Europe's defence raise doubts about whether arms export controls adequately reflect these obligations. This article employs doctrinal legal analysis combined with a review of recent policy documents and scholarly debates. It examines the balance between EU law, Member State discretion, and the Union's international obligations, highlighting key strengths and shortcomings. The analysis shows that, despite recent legislative changes, the EU's arms export control system remains marked by fragmented competences and limited enforcement. While recent revisions have broadened references to international commitments and sought greater harmonization, the effectiveness of these changes depends largely on the political will of Member States. Persistent gaps undermine the EU's credibility as a promoter of international law.

The article argues that the EU's current framework only partially fulfils its treaty-based commitments. To enhance coherence and legal certainty, future reforms should consider hybrid regulatory models that combine political consensus with binding legal mechanisms. Such an approach would better align Europe's pursuit of defence readiness with EU's stated objective of advancing peace and a rules-based international order.

Keywords: European Defence Readiness 2030, Arms Export Control, Common Foreign and Security Policy, International Humanitarian Law, Common Commercial Policy

Introduction

Article 3(5) of the Treaty on European Union (hereinafter referred to as "TEU") articulates the Union's objective to contribute "*to the strict observance and the*

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development of international law, in particular the principles of the United Nations Charter." This provision serves not only as a normative compass for the Union's external action but together with Article 21 TEU also as a legal basis for its engagement in promoting global stability and a rules-based international order. One of the most sensitive and at the same time most fundamental areas where this commitment is put into practice is the area of arms export control and compliance with international humanitarian law. Arms export control is "a tool" through which the international community seeks to prevent the escalation of conflicts, minimize the suffering of civilians, and strengthen the principles of international law at the global level. The European Union acts as a specific actor - as an international organization *sui generis*, it creates common foreign and security policy, which is, however, characterized by its specificity.³ Arms export controls are currently regulated under this policy, which prevents the Union as such from directly influencing this area.

In March 2025, EU Member States agreed within the European Council on the need for Europe to be more sovereign and more responsible for its own defence.⁴ The immediate action of the EU included various legislation amendments within the so-called *Defence Readiness Omnibus* and boosting or creating financial plans for defence, such as ReArm Europe Plan, €800 billion plan to finance a massive ramp-up of defence spending through various financial instruments.⁵ The European Union and its member states have thus committed themselves to increasing military spending, but this decision will not only result in an increase in Europe's defence readiness - it has a number of other implications that need to be examined from various perspectives. According to some studies, one of the effects of increased defence spending is a rise in arms exports.⁶ It is therefore an appropriate moment to revisit

³ WESSEL, Ramses A.: Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis. In: *Contemporary Challenges to EU Legality* (eds Claire Kilpatrick & Joanne Scott). Oxford: Oxford University Press, 2021, p. 74. DOI: 10.1093/oso/9780192898050.003.0004; or see: PETERSON, John – GOTTWALD, Marlene: The EU as a Global Actor. In: *The European Union: How Does It Work?* 4th ed., edited by Daniel Kenealy, John Peterson, Richard Corbett. Oxford: Oxford University Press, 2015, pp. 208-228. ISBN 978-0-19-968537-0.

⁴ European Council. European Council conclusions on European defence, 6 March 2025. Press release 06/03/2025 [online] [cit. 2025-09-20]. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2025/03/06/european-council-conclusions-on-european-defence/>.

⁵ See: Joint White Paper for European Defence Readiness 2030. Brussel: European Commission, 19 March 2025. [online] [cit. 20. September 2025]. pp. 16-19, Available at: https://defence-industry-space.ec.europa.eu/document/download/30b50d2c-49aa-4250-9ca6-27a0347cf009_en?filename=White%20Paper.pdf

⁶ See: TOCOIAN, O. The Home Market Effect in International Arms Trade. In *Economic Inquiry*, 2015, vol. 53(4), pp. 1751–1764 or BLUM, J. Arms production, national defense spending and arms trade: Examining supply and demand. In *European Journal of Political Economy*, 2019, vol. 60, 18 p.

the earlier ideas and arguments of authors who had highlighted shortcomings in arms export controls even before the EU's decisions of March 2025.⁷ It is therefore appropriate to return to the previous ideas and arguments of authors who pointed out shortcomings in arms export controls even before the March 2025 decisions and to subject the decisions taken by the Union or amendments to relevant legislation on arms export controls to scrutiny.

This article examines the current state of EU arms export controls and their compliance with the Union's obligations under Article 3(5) TEU and Article 21 TEU. The article presents an analysis of selected relevant areas of arms export control in order to answer the defined research questions and concludes with proposals *de lege ferenda* in the area of arms export control in the EU. The article is divided into 4 chapters (including the conclusions), with the following chapter defining the research questions and methodology of the article.

Research question(s) and methodology

As mentioned in the introduction to this article, increased military spending in the EU may have various variables - in the form of either positive or negative effects. Among the expected positive outcomes of increased spending are, above all, the enhancement of the defence capacities of the member states and a diminished reliance on third countries in the defence sector, most notably on the United States of America (USA).⁸ The idea behind the research presented in this article is based on the results of other studies that declare a link between increased defence spending

⁷ See: VROEGE, Bram: *Exporting Arms over Values: The Humanitarian Cost of the European Defence Fund*. In: **European Papers**, 2021, Vol. 6, No. 3, pp. 1575-1601, ISSN 2499-8249; FERRO, Luca: *Western Gunrunners, (Middle-)Eastern Casualties: Unlawfully Trading Arms with States Engulfed in Yemeni Civil War?* In: *Journal of Conflict & Security Law*, 2019, Vol. 24, No. 3, pp. 503-535. ISSN 1467-7954; VROEGE, Bram: *A Constitutional Perspective on EU Arms Controls: Mediating Trade, Security, and Humanitarian Responsibility*, In: *European Law Open*, 2024, Vol. 3, No. 2, pp. 312-335, ISSN 2753-8485; COPS, Diederik – DUQUET, Nils – GOURDIN, Gregory: *Towards Europeanised arms export controls? Comparing control systems in EU Member States*. Brussels: Flemish Peace Institute, 15 June 2017. 218 pp. ISBN 978-907886485; MARTINS, Bruno Oliveira – BACKHAUS, Benedikt: *Why and how the EU should act on armed drones*. In: *Global Affairs*, Vol. 1, No. 3 (2015), pp. 259-267. DOI 10.1080/23340460.2015.1080008.

⁸ According to a report published by Euronews (drawing on an analysis by the Bruegel think tank), the value of arms imports to Europe rose to approximately €7.9 billion in 2022–2024 (compared to around €3.1 billion in 2019-2021). According to the authors, this illustrates Europe's high vulnerability and significant dependence on the United States in the production of defence equipment. See: SOLER, Paula: *Europe remains 'highly vulnerable' and dependent on US defence production – report*. In: Euronews [online], 20 June 2025 [cit. 21. 09. 2025]. Available at: <https://www.euronews.com/my-europe/2025/06/20/europe-remains-highly-vulnerable-and-dependent-on-us-defence-production-report>.

and arms exports. Although there may be a dual effect of arms movements in the European Union (the transfer of arms between Member States or the export of arms to third countries) for the purposes of this article, I will assume a possible increase in both arms transfers and arms exports. However, this distinction is essentially negligible for the purposes of this article. Since the transfer of arms to another Member State may result in their subsequent re-export,⁹ it can be stated for the purposes of justifying the relevance of this research that a potential increase in arms exports to third countries has possible implications for the EU's obligations under public international law and international humanitarian law.

Several studies dealing with the effectiveness of arms export controls can be identified until 2025.¹⁰ It is thus appropriate to address and to examine the activities within the framework of European Defence Readiness 2030 in light of the conclusions of these identified studies and to follow up on the authors' criticism regarding the ineffectiveness of arms export controls in the EU.

In this sense, this article will seek to answer the main research question, and I will seek the answer to it through defined supporting research questions. In the light of foregoing, this article focuses on answering following research question: *To what extent is the current EU legal framework on arms export controls compatible with Article 3(5) of the EU Treaty and thus with the European Union's obligations under international humanitarian law (IHL)?*

To answer the main research question, relevant topics must be defined and analysed. In this regard, I define the following supporting research questions: (a) What is the current EU legal framework governing arms export controls? (b) What shortcomings or deficiencies have been identified in this framework to date? (c) To what extent do the measures adopted by the EU after March 2025 address and remedy these shortcomings? (d) What further steps could be taken to strengthen arms export controls in the EU?

In line with the above, in the first chapter I will focus on defining the relevant legal framework for arms exports in the EU and on the EU's international legal responsibility. In the second chapter, I will focus on identifying the shortcomings of the current legal framework for arms exports in the EU. In the third chapter, I will examine whether the EU, in the context of European Defence Readiness 2030, reflects the identified shortcomings in this

⁹ See: Arts. 4(6) and 10 of the 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.

¹⁰ See: (n 6).

area. And in the fourth chapter, I will focus on (not so) realistic solutions to the identified situation.

Reassessing the EU Arms Export Control Framework in Light of Article 3(5) TEU and the Union's International Responsibility

This chapter provides a description of EU arms (transfer and export) control framework, together with regard to the international obligations of Member States and the EU itself. I will also focus on describing the competence delineation issue therein.

A. The EU Framework

The movement of arms within and out of the EU is subject to dual regulation.¹¹ However, let us first begin with the legal classification of arms under EU law. Under EU law, goods are defined as "*products which can be valued in money, and which are capable of forming the subject of commercial transactions*".¹² Taking this definition into account, arms¹³ can be defined as goods for the purposes of Article 28 of the Treaty on the Functioning of the European Union (hereinafter also referred to as "TFEU") (EU Internal Market). This classification indicates that, provided the principle of subsidiarity is respected,¹⁴ arms may be subject to harmonization and that the EU therefore has scope to regulate these specific goods.¹⁵ This is partially true, as a harmonization of the transfer of arms between Member States exists and is regulated by a secondary legislative act in the form of the 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 (hereinafter also referred to as "Defence Transfers Directive"). The Defence Transfers Directive is based on Article 114 TFEU, it applies to all military materials listed in the

¹¹ As shall be explained and analysed further in this chapter.

¹² Judgment of 10 December 1968, *Commission v Italy* ("Art Treasures"), Case 7/68, ECLI:EU:C:1968:51, [1968] ECR 423, p. 428.

¹³ For the purposes of this article, I have chosen to use exclusively the term "arms. However, in this context, the terms "armaments" and "military equipment" can also be used. However, I believe that these terms are less specific and cover a broader military apparatus (ammunition, equipment, technology, and the entire process of armament), unlike the term "arms" which refers to individual weapons - i.e., means intended for attack or defence.

¹⁴ Art. 5(3) TEU.

¹⁵ TRYBUS, Martin: *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context*. Cambridge: Cambridge University Press, 2014, ISBN 978-0-511-75146-2, pp. 63 *et seq.*

Common Military List of the European Union¹⁶ and it regulates, in particular, the procedural rules for transfer licenses. The Defence Transfers Directive does not lay down common substantive assessment criteria for the denial of a transfer license. Moreover, Article 346(1)(b) TFEU comes into play here, which also bears the title “national defence privilege” since it safeguards Member States’ discretion over the production and trade of arms, munitions, and war material¹⁷ - this article thus serves as an exemption from treaties obligations.¹⁸ This article has also implications for the regulation of arms exports, since it has long led to the perception that arms trade belongs solely to the CFSP, and not to the CCP (an issue which will be discussed later in this article).¹⁹ The export of arms to third countries is therefore regulated differently from Directive 2009/43, namely by the Council Common Position 2008/944/CFSP (hereinafter also referred to as “the EU Common Position”),²⁰ adopted on the basis of Article 29 TEU. The EU Common Position was recently amended by the Council Decision (CFSP) 2025/779.²¹

In addition, there are also so-called dual-use goods, which are products intended for both civilian and military use. They are currently regulated under the Common Commercial Policy (hereinafter also referred to as “the CCP”) through Regulation (EU) 2021/821 of the European Parliament and of the Council,²² although they are not the subject of this research as such, the history of dual-use goods regulation will serve as a good analogous example later in this article.²³

¹⁶ The Common Military List of the European Union is the official catalogue of defence-related products subject to the EU’s arms transfer/export regime. It is updated annually by the Council, on the basis of Article 15 of Common Position 2008/944/CFSP.

¹⁷ KELLERBAUER, Manuel – KLAMERT, Marcus – TOMKIN, Jonathan (eds.): *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. Oxford: Oxford University Press, 2019, ISBN 978-0198794561., p. 2051.

¹⁸ The CJEU has, however, interpreted this article rather narrowly, see: TRYBUS, Martin: *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context*. Cambridge: Cambridge University Press, 2014, pp. 73 *et seq.*

¹⁹ PERISIN, Tamara – KOPLEWICZ, Sam: The nexus between the Chinese Communist Party and the Common Foreign and Security Policy. In: *Law and Practice of the Common Commercial Policy*, Brill Nijhoff, 2020, ISBN 978-9004393417, p. 407.

²⁰ Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

²¹ Council Decision (CFSP) 2025/779 of 14 April 2025 amending Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment.

²² Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items.

²³ PERISIN, Tamara – KOPLEWICZ, Sam: The nexus between the Chinese Communist Party and the Common Foreign and Security Policy. In: *Law and Practice of the Common Commercial Policy*, Brill Nijhoff, 2020, ISBN 978-9004393417, p. 404.

B. Public International Law obligations

The issue of arms exports to third countries is closely linked to international legal obligations, both of Member States and of the European Union. This article does not address the obligations of Member States but examines the possibilities and limitations of the EU in the field of arms exports, including in the context of its own international legal obligations. In this regard, it is necessary to point out the international legal instruments that directly affect the regulation of EU arms exports and to clarify the extent to which the EU, as an international organization, is responsible for any violations of international legal obligations when exporting arms to third countries.

As regards international documents relevant to EU arms export regulation (from the general to the specific) we will mainly focus on international humanitarian law (hereinafter also referred to as "IHL") and the United Nations Arms Trade Treaty of 2013 (hereinafter also referred to as "ATT").²⁴ As regards the ATT, it aims to regulate the international trade in conventional arms to promote peace and security and it was fully addressed by the EU within its obligation thereto.²⁵ Since its negotiation, arms trade has also been linked besides the CFSP to both the CCP and the EU internal market. The ATT, adopted as a UN Resolution and open to states (not the EU) for signature, covers areas under EU exclusive competence.²⁶ Member States therefore needed Council authorization, based on a Commission proposal, to conclude it. The Council's decision thus explicitly highlights this overlap, confirming that arms trade in fact embodies the link between commerce and security and that there is in fact a possibility to somehow legislate export of arms within some regime under the CCP.²⁷ We shall discuss this issue later in this article.

As regards the impact of IHL on EU arms export control, this topic could fill an entire article, so I will limit myself to a few factual observations: From a legal effect perspective, most IHL norms are peremptory norms of international law, meaning that there is no possibility of derogating from the obligations arising from them.²⁸

²⁴ United Nations. Arms Trade Treaty. New York, 2 April 2013. Entered into force 24 December 2014.

²⁵ United Nations. *The Arms Trade Treaty*, 2014 [online] [cit. 21 September 2025] United Nations Audiovisual Library of International Law. Available at: https://legal.un.org/avl/pdf/ha/att/att_e.pdf.

²⁶ Article 3(2) TFEU.

²⁷ See: Proposal for a Council Decision authorising Member States to sign, in the interests of the European Union, the Arms Trade Treaty [online]. COM/2013/0273 final - 2013/0146 (NLE), European Union. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013PC0273>. See also: PERISIN, Tamara – KOPLEWICZ, Sam, (n 22), p. 407.

²⁸ VROEGE, Bram: A Constitutional Perspective on EU Arms Controls: Mediating Trade, Security, and Humanitarian Responsibility, In: *European Law Open*, 2024, Vol. 3, No. 2, pp. 312-335, ISSN 2753-8485, p.18.

The Geneva Conventions²⁹ are such example, with the EU Common Position essentially implementing violation thereof as one of the substantive criteria for prohibiting arms exports by the Member States.³⁰ From this perspective, it can be said, that the EU Common Position *de jure* reflects international humanitarian obligations within the substantive criteria for the prohibition of arms exports: However, compliance with which, still depends on a Member State, hence it shall be analysed later in this article whether the EU Common Position reflects international humanitarian obligation *de facto* as well. In addition, it should not be overlooked that compliance with IHL equally extends to international organizations, which are likewise required to exercise due diligence in this regard.^{31,32} From the EU's perspective, this raises questions of whether, the current state of EU framework complies with its obligations under Article 3(5) TEU and international humanitarian obligations, and if not, where are the gaps in the current legislation that the EU should actively address in order to comply with the aforementioned commitments?

Shortcomings in EU arms export control framework – limits of the EU Common Position

The EU's arms export controls suffer from significant shortcomings, which have been extensively documented by many scholars.³³ Accordingly, this chapter does not intend to reinvent the wheel, rather, it will address what I regard as the most critical deficiency - one that directly undermines the EU's obligations under IHL. The analysis will focus on the weaknesses inherent in the EU Common Position and will illustrate them through the case of export of arms to Saudi Arabia.

This analysis begins with the well-known fact that the issue of arms export control starts with a competence question. As previously emphasized, arms are goods for the purposes of the EU internal market and could also be subject to the Common Commercial Policy, although they are not. Although Article 207 TFEU provides a legal basis for the EU to regulate trade with non-EU states through various instruments, such as export policy or trade and tariff agreements, it stands in clear contrast with Article 346 TFEU. In the context of arms exports to third countries (an area that is

²⁹ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War.

³⁰ See: Art. 2(1) or Art. 2 (2) c) of the EU Common Position.

³¹ See: VROEGE, Bram: A Constitutional Perspective on EU Arms Controls: Mediating Trade, Security, and Humanitarian Responsibility, In: *European Law Open*, 2024, Vol. 3, No. 2, pp. 312-335, ISSN 2753-8485, pp. 18-19.

³² In this regard, however, it is necessary to point out the non-binding nature of DARIO and its criticism pointing to the limits of competence of individual international organizations. See: GAETA, Paola – VIÑUALES, Jorge E. – ZAPPALÀ, Salvatore: *Cassese's International Law*. 3rd ed. Oxford: Oxford University Press, 2020. 556 pp. ISBN 978-0199231287, pp. 154-155.

³³ See: (n 6).

undeniably sensitive) it is therefore unsurprising that Member States have sought to retain control. This explains the reliance on Article 29 TEU as the legal basis, thereby avoiding any overlap with the Common Commercial Policy framework. At the same time, this choice places the EU framework for arms export controls entirely within the competence of the Member States, which are nevertheless formally required to follow the EU Common Position, yet the extent to which they do so in practice is contested.

The EU Common Position establishes eight substantive criteria that require Member States to apply uniform benchmarks when assessing license applications for arms exports and briefly regulates certain procedural steps. These substantive criteria encompass, *inter alia*, compliance with international obligations such as sanctions and treaties, the human rights and IHL record of the recipient state, the risk of internal or regional conflict, and the potential implications for regional peace, security, and stability.³⁴ In order to enhance consistency, Member States rely on systems of information exchange and are expected to consult with one another in cases where a license is sought for an export previously refused by another state.³⁵ Nonetheless, the decision to grant or deny arms export licenses remains a matter of national competence, and the EU lacks any formal enforcement mechanism to ensure that the Common Position is consistently applied.

This enforcement gap is illustrated by the continued export of arms to states within the Saudi-led military coalition engaged in the conflict in Yemen since 2015. Criticism stems from the fact that the situation was addressed at the UN level, where violations of IHL were identified³⁶ and in the European Parliament, which called for the imposition of an arms embargo.³⁷ Nevertheless, specific statistics showed that several Member States continued to supply weapons to the parties involved, thereby *de facto* violating Article 2 of the EU Common Position without any legal consequences.³⁸

³⁴ See: Art. 2 of the EU Common Position.

³⁵ See: Art. 4 of the EU Common Position.

³⁶ United Nations, Office of the High Commissioner for Human Rights: Situation of human rights in Yemen, including violations and abuses since September 2014 [report], 2019 [online]. [cit. 20. 09. 2025]. Available at: <https://www.ohchr.org/en/documents/country-reports/ahrc3633-situation-human-rights-yemen-including-violations-and-abuses>.

³⁷ European Parliament: Resolution of 30 November 2017 on the situation in Yemen (P8_TA(2017)0473) [online]. Brussels: European Parliament, 2017 [cit. 20. 09. 2025]. Available at: https://www.europarl.europa.eu/doceo/document/TA-8-2017-0473_EN.html?redirect.

³⁸ Namely, France, Italy, and the United Kingdom (which was still an EU Member State at the time) continued to supply arms, see: BROMLEY, Mark – MALETTA, Giovanna: The conflict in Yemen and EU's arms export controls: Highlighting the flaws in the current regime. In: SIPRI Commentary

The continued exports in this context have underscored a fundamental weakness of the Common Position: the divergent procedures and assessments applied at the national level, coupled with the near-total absence of Member State accountability towards the Union.

What's new in EU arms export control framework after March 2025?

Against the background of the foregoing, I shall now proceed to analyze the Union's activities after March 2025, in which it calls for an increase in the Union's defence readiness. Given that the EU Common Position remains the most sensitive element of the EU arms export control framework, the discussion will focus on recent developments concerning this instrument and related documents. Attention now turns to Council Decision (CFSP) 2025/779 of April 2025 (hereinafter also referred to as "Council Decision (CFSP) 2025/779"),³⁹ which amended the EU Common Position – both in substantive criteria and procedural provisions. At the same time, amendments were made to the User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment (hereinafter also referred to as "User's Guide"), an important document for the harmonization of arms export procedures.

A. The EU Common Position (as amended by Council Decision (CFSP) 2025/779)

Starting with changes in the substantive criteria, the most significant changes occurred mainly in criteria one to three. The structure of the *criterion one* has been significantly expanded. What in previous version was a short four-point list has become a comprehensive catalogue of eight obligations and commitments. Sub-paragraphs a) and b) dealt with obligations relating to arms embargoes and to the main disarmament treaties, namely the Nuclear Non-Proliferation Treaty (NPT), the Biological and Toxin Weapons Convention (BTWC), and the Chemical Weapons Convention (CWC). These two provisions have remained essentially unchanged in the amended version. The original paragraph c), which in previous version simply required Member States not to export anti-personnel landmines, has been reformulated and shifted to paragraph e). In the amended version, it is anchored in the legally binding framework of the Ottawa Convention, thus strengthening the normative basis of this prohibition. Moreover, entirely new obligations have been introduced. Paragraph c) of the 2025 Guide refers to the Convention on Certain Conventional Weapons (CCW) and its annexed protocols, thereby extending the

[online], 16 March 2018 [cit. 22. 09. 2025]. Available at: <https://www.sipri.org/commentary/essay/2018/conflict-yemen-and-eus-arms-export-controls-highlighting-flaws-current-regime>.

³⁹ Council Decision (CFSP) 2025/779 of 14 April 2025 amending Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment.

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scope of the prohibition beyond landmines to include other categories such as incendiary weapons, blinding laser weapons, and explosive remnants of war. Similarly, paragraph d) introduces a reference to the ATT, which had not been explicitly mentioned in the previous text. Further novelties appear in paragraphs f) and g). The former incorporates the commitments arising from the United Nations Programme of Action on Small Arms and Light Weapons (PoA), reflecting the EU's growing emphasis on addressing illicit trafficking in small arms. The latter points to the Global Framework for Through-life Conventional Ammunition Management, a relatively new international initiative focusing on responsible stockpile management of ammunition throughout its lifecycle. Finally, the original paragraph d), which covered commitments under the international export control regimes (the Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement, and the Hague Code of Conduct), has been retained but moved to sub-paragraph h).

Overall, the 2025 revision transforms *criterion one* from a relatively narrow set of obligations into a much broader and more detailed framework. It preserves the earlier provisions on arms embargoes and the core disarmament treaties but substantially widens the range of binding and political commitments that Member States must take into account. This evolution reflects the EU's intention to embed its export control practice more firmly in the full spectrum of contemporary international arms control and disarmament instruments.

Regarding the *second criterion*, the revised text represents a clear expansion of scope thereof, specifically in its sub-paragraphs a) and c). It introduces explicit references to gender-based violence and to the protection of women and children, thereby moving beyond a generic concern for human rights toward a more group-specific and victim-centered approach. It also broadens state responsibility through the concept of facilitation, requiring denial of licenses not only where equipment is likely to be directly used in abuses but also where it might enable such.⁴⁰ In my view, the amendments introduced to the first and second criteria deserve a positive evaluation, given that they significantly broaden their scope of application. In my assessment, these criteria have been, and remain, framed in imperative terms, which distinguishes them from the other criteria and underscores the importance attached

⁴⁰ Art. 2(2) a) of the EU Common Position: „Deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used to commit or facilitate internal repression, serious acts of gender-based violence or serious acts of violence against women, children, or other serious violations of human rights“ and Art. 2(2) c) of the EU Common Position: “Deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used to commit or facilitate serious violations of international humanitarian law, including against protected groups under international humanitarian law, such as women and children”.

to their content. On this basis, I would argue that a breach of these criteria by a Member State could reasonably be regarded as a violation of Article 4(3) TEU, which requires Member States to facilitate the Union's tasks and to refrain from measures that could endanger the attainment of its objectives. As I see it, the *third criterion* was also drafted in imperative terms, however, in its revised form, the modification introduced at the end of the provision appears, in my view, to have altered (if not weakened) its imperative character.⁴¹ The clause "*without prejudice to the legitimate and lawful security and defence of that country*", substantially alters its practical implications. The previously imperative prohibition (requiring denial of an export license whenever there is a risk of provoking or prolonging a conflict) is diluted, as Member States may now invoke the importing state's right of legitimate self-defence under the UN Charter, a right firmly recognized in international law. In situations of clear aggression, this addition provides a solid legal basis for authorizing arms exports, even where such exports objectively contribute to the continuation of hostilities. In more ambiguous contexts, however, the clause could potentially create scope for politically motivated interpretations. An earlier example of Yemen can be used, where it could be argued that ongoing military operations and the corresponding demand for arms (or armaments) constitute part of the "*legitimate and lawful defence*" of the Yemeni government. In effect, the amendment enables the justification of exports that would otherwise evidently exacerbate the conflict and deteriorate the internal situation of the recipient state - however no further guidance on how to evaluate a situation is provided.⁴²

Criteria four and *five* have been adjusted primarily to reinforce the centrality of international law and international humanitarian law. The amended text explicitly references Article 51 of the United Nations Charter, thereby situating the assessment of lawful use of force within the framework of the Charter, and it further strengthens the obligation to ensure compliance with international humanitarian law. These refinements seem to serve to clarify the legal boundaries of legitimate national defence while reaffirming the primacy of international legal obligations. *Criterion six* has been broadened in scope by extending its application to both "*buyer or recipient countries*" and by linking compliance obligations to a wider set of international arms

⁴¹ Art. 2(3) of the EU Common Position now reads as follows: „Member States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or armed conflicts within the country of final destination, *without prejudice to the legitimate and lawful security and defence of that country*”.

⁴² See: Council of the European Union: User's Guide to Council Common Position 2008/1944/CFSP defining common rules governing the control of exports of military technology and equipment (as amended by Council Decision (CFSP) 2025/779), pp. 63-66. Whereas the only commentary on this amendment is in point 3.4. (p. 66): "[T]he judgment should be rendered *without prejudice to the legitimate and lawful security and defence needs of the country concerned*”.

control and disarmament instruments, beyond the narrower references in the earlier text. *Criterion seven* has undergone significant expansion as well. In addition to the original factors, the amended text now requires consideration of the recipient's ability to protect equipment, the potential incorporation of exported goods into products for onward export, and the risk of circumventing restrictive measures adopted by the United Nations or the European Union. Furthermore, it highlights the destabilizing effects of small arms and light weapons, explicitly recognizing their role in fuelling conflict and illicit activities.⁴³ *Criterion eight* has not been substantially altered; it merely clarifies terminology by referring to the "country of final destination" while retaining its focus on sustainable development considerations.

B. Guide to Council Common Position 2008/944/CFSP (as amended by Council Decision (CFSP) 2025/779)

As regards the Guide, which has also been amended, I have just a few observations. The explanations of the individual criteria have been significantly expanded, but in my opinion, they are still not sufficient to constitute a comprehensive document that leaves no room for vague interpretation by Member States. As an example, I refer to the amendment to the third criterion, which I have already addressed above in Section A. In my view, this change undermines the original imperative nature of the provision by introducing an exception to the export ban. Yet this exception is not further elaborated upon in the Guide. The authors merely state that: "[T]he judgment should be made without prejudice to the legitimate and lawful security and defense needs of that country." In my opinion, to address the concerns identified above, the Guide should be expanded to include at least minimum standards for assessing what constitutes "legitimate and lawful security and defense" and, above all, the point at which such *defence* ceases to qualify as legitimate and proportionate - with a view to maintaining the essence of the criterion of not prolonging or aggravating the existing conflict in the country.

A bit of a reinforcement of the commitment to international law and IHL can be seen in the expanded text of the User's Guide concerning the procedures for so-called ex-post control.⁴⁴ For now, only time will tell how the use of the amended User's Guide will develop and what weaknesses will be revealed.

⁴³ See: Art. 2(7) c), g) and h) of the EU Common Position.

⁴⁴ See: Council of the European Union: User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment (as amended by Council Decision (CFSP) 2025/779), Section 3, p. 11.

Conclusions: change needed in EU arms export controls or where a realistic proposal *de lege ferenda* lies.

The principal objective of this article was to address the central research question: *To what extent is the current EU legal framework on arms export control compatible with Article 3(5) TEU, and thus with the European Union's obligations under international humanitarian law (IHL)?* This question was explored by examining the supporting sub-questions. With regard to sub-question (a): the EU framework on arms export control proves to be complex. Analysis of the applicable legislation shows that, apart from international legal obligations (arising at least from IHL and the ATT), arms exports to third countries are governed directly by the EU Common Position, adopted on the legal basis of the Common Foreign and Security Policy (CFSP) under Article 29 TEU. The rationale for placing arms export control wholly within the CFSP can be traced primarily to Article 346(1)(b) TFEU. This (although narrowly framed) exception has had (and continues to have) the effect of excluding EU influence in this area, in particular legislative initiative and judicial review by the CJEU. As regards shortcomings in the EU legal framework, the most significant deficiency lies in its reliance solely on the Common Position and thus on the CFSP as its only legal basis. The EU Common Position, while legally effective as an instrument, remains unenforceable. The issue of unenforceability merits closer attention. Before turning to potential reforms, it is important to recall that the CFSP rests on political dialogue and consensus. While Member States' obligations under the Common Position cannot be enforced through mechanisms such as Article 258 TFEU, this does not mean that they are devoid of enforceability altogether. As argued in this article, the first three criteria of the Common Position can be understood as imperative norms. They prohibit exports to destinations where such transfers would contribute to violations of international law, human rights, or IHL. In such cases, two possible avenues of enforcement could be envisaged. First, compliance may be pursued through diplomatic channels and political pressure. Such methods of contesting Member State conduct have already been visible in analogous contexts involving national security and interests—for example, during the adoption of EU sanctions packages against the Russian.⁴⁵ A similar approach, in my view,

⁴⁵ During the negotiations on renewing sanctions against Russia, Slovakia and Hungary face threats of losing financial exemptions and political isolation if they veto the sanctions package. See: ZSIROS, Sandor: Hungary and Slovakia under pressure as US and EU target Russia with energy sanctions. In: Euronews [online], 11 September 2025 [cit. 22. 09. 2025]. Available at: <https://www.euronews.com/my-europe/2025/09/11/hungary-slovakia-under-pressure-as-us-and-eu-target-russia-with-energy-sanctions>; or see: SKOVE, Sam: How the EU Could Push Hungary and Slovakia to Quit Russian Oil. In: Foreign Policy [online], 24 September 2025 [cit. 25. 09. 2025]. Available at: <https://foreignpolicy.com/2025/09/24/eu-hungary-slovakia-russia-oil-ukraine-war-trump-sanctions/>.

should have been considered in the case of Yemen. Yet the question remains: which Member State would assume such political responsibility, especially when the largest EU states are themselves implicated?

Second, in cases of breach of imperative criteria, one might contemplate recourse to Article 258 TFEU for violation of Article 4(3) TEU. The latter provision obliges Member States not to undermine the Union's objectives, which include the commitment in Article 3(5) TEU to uphold international law. If a Member State knowingly exports arms to a destination where IHL violations, confirmed by UN bodies, are occurring, does this not undercut the Union's objectives, particularly given the EU's aspiration to speak with a *common foreign policy voice*? In theory, such an approach could be pursued, but in the political reality of the Union, it is hardly conceivable - depending, of course, on the Member State concerned.

Hence, does any realistic solution to the current situation exist? In light of the recent revision of the Common Position and the accompanying User's Guide, it seems prudent to await their practical application. Yet one must not lose sight of the fact that these instruments remain legally unenforceable, aside from the speculative reflections set out above. Nevertheless, the above analysis of the EU arms export control framework reveals effective harmonisation of Dual-Use Goods. The Dual-Use Goods Regulation adopted on the basis of Article 207 TFEU provides a comprehensive and legally binding framework for transfers and exports of such items. The history of Dual-Use Goods legislation, in my view, offers instructive analogies for the possible development of EU influence within arms export controls. One option might be to follow a dual-track model, similar to that adopted for dual-use goods back in 1994, where both the Regulation⁴⁶ and the Council Decision⁴⁷ operated simultaneously: the Decision setting substantive content (*what* is to be controlled), and the Regulation ensuring legally effective implementation (*how* it is controlled). A comparable model, grounded in Article 207 TFEU and Article 29 TEU, could preserve Member States' prerogatives in national security while at the same time strengthening procedural guarantees in arms export control.

The final answer to the central research question is therefore as follows: The European Union aspires to act as a *global player*, as reflected in its objectives in Article 3 TEU, particularly paragraph 5. The current EU legal framework on arms export control is far from perfect, and the Union's ability to intervene in this field remains minimal due to the absence of competences. If the current EU arms export control

⁴⁶ 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 1994, L 367/ 1) (not in force).

⁴⁷ Council Decision 94/942/CFSP of 19 December 1994 on the joint action adopted by the Council of the basis of Article J.3 of the Treaty on European Union concerning the control of exports of dual-use goods (not in force).

framework is understood as representing the Union as a whole, the recent amendments to the EU Common Position may be seen as positive steps towards strengthening the Union's commitments under international (humanitarian) law. The more pressing question, however, is whether the Union follows these commitments in areas where it enjoys fully defined competences. Although such competences do not directly regulate arms exports to third countries, they remain closely connected to the arms export.⁴⁸ Looking ahead, it will be essential to carefully observe the Union's and Member States' actions on their path to 2030 Defence Readiness, ensuring that aspirations for a stronger European defence do not eclipse the Union's declared ambition to advance peace on the global stage

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⁴⁸ For example, European Defence Fund: see VROEGE, Bram: *Exporting Arms over Values: The Humanitarian Cost of the European Defence Fund*. In: *European Papers*, 2021, Vol. 6, No. 3, pp. 1575-1601, ISSN 2499-8249.

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