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Legal Competences of the European Union in International Arms Control

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1. Introduction

While originally not a core business of the European Union, the development of the Common Foreign and Security Policy (CFSP) had led arms control to become a key policy in the Union's foreign policy toolbox.¹ The 2016 EU Global Strategy clearly phrases the commitments as follows:

“The EU will strongly support the expanding membership, universalisation, full implementation and enforcement of multilateral disarmament, non-proliferation and arms control treaties and regimes. We will use every means at our disposal to assist in resolving proliferation crises, as we successfully did on the Iranian nuclear programme. The EU will actively participate in export control regimes, strengthen common rules governing Member States' export policies of military – including dual-use – equipment and technologies, and support export control authorities in third countries and technical bodies that sustain arms control regimes.”²

The policies of the European Union in this regard are believed to cover three broad areas: *weapons of mass destruction (WMD)*, *conventional weapons*, and *security and sustainability in outer space*.³ As the present contribution will reveal, the EU has indeed been active in all these areas, albeit in different stages of development. One reason is simply that, in arms control, WMD issues are the oldest, followed by conventional weapons, with space policies added only recently.

The role of the EU in relation to the 2015 Iran nuclear deal is not singled-out in the Global Strategy for no reason. The role of the EU – and in particular of the then High Representative for Foreign and Security Policy, Federica Mogherini – in the conclusion of the Joint

* The author wishes to thank Dr. Clara Portela (EU Institute for Security Studies, Paris) for her valuable comments and suggestions. Any errors remain my own.

¹ See for recent, more general, accounts of CFSP: G. Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations* (Hart Publishing, 2019); or R.A. Wessel, 'Common Foreign, Security and Defence Policy', in R.A. Wessel and J. Larik (Eds.), *EU External Relations Law: Text, Cases and Materials* (2nd edition), Oxford: Hart Publishing, 2020.

² Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy, European Union, June 2016; https://eeas.europa.eu/sites/eeas/files/eugs_review_web_0.pdf

³ See https://eeas.europa.eu/topics/disarmament-non-proliferation-and-arms-export-control/427/disarmament-non-proliferation-and-arms-export-control_en.

Comprehensive Plan of Action (JCPOA)⁴ is believed to have been essential.⁵ At the same time, the JCPOA exemplifies a change in the multilateral system in which the United States in particular increasingly seems to opt for a US-only approach and left the EU to decide to continue nevertheless.⁶ Together with, *inter alia*, the decision of the US to pull out of the Intermediate-Range Nuclear Forces (INF) Treaty⁷ and to suspend the so-called New START treaty with Russia on strategic arms reduction,⁸ this leads to new challenges for the EU to reach the objectives it has set itself in this area.

The three policy areas referred to above return in the EU's quite developed rules on arms export control, which – internally – has become the area in which international arms control is linked to the EU's own internal market rules on free trade. Indeed, in the context of the development of the Common Security and Defence Policy (CSDP),⁹ a stronger European arms policy and closer cooperation between EU Member States was seen as essential¹⁰ and regulated in relation to, for instance, public procurement¹¹ or the enhancement of EU military capabilities (largely coordinated by the European Defence Agency).¹² These internal developments largely fall outside of the scope of the present paper. At the same time, a number of internal EU rules – such as those on arms exports or arms embargoes – have a clear international impact and will be addressed. These rules have been said to constitute “the most advanced regime for the control of the conventional arms trade existing in international society”.¹³

Arms control will not be the first policy that comes to mind when asked about the European Union's main objectives, despite the fact that its very creation resulted from the idea to control arms production of France and Germany after the 2nd World War. The main aim of the present contribution is to assess the role the European Union can and does play in *international* arms control. It starts by analysing the competences of the EU in this area (section 2). This is followed by a brief analysis of the policies of the EU in relation to the key arms control and disarmament

⁴ http://eeas.europa.eu/archives/docs/statements-eeas/docs/iran_agreement/iran_joint-comprehensive-plan-of-action_en.pdf. The ‘Deal’ was reached between Iran and China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the EU Representative acting on behalf of the Union.

⁵ See S. Blockmans and A. Viaud, ‘EU Diplomacy and the Iran Nuclear Deal: Staying Power?’, *CEPS Policy Brief*, July 2017.

⁶ A. Giesberts, ‘The Iran Nuclear Deal and the EU: A Strategic Awakening?’, *Clingendael Spectator*, 1 November 2018.

⁷ <https://www.state.gov/u-s-withdrawal-from-the-inf-treaty-on-august-2-2019/>.

⁸ <https://www.nytimes.com/2019/02/01/us/politics/trump-inf-nuclear-treaty.html>.

⁹ See more in general on CSDP: P. Koutrakos, *The EU Common Security and Defence Policy*, Oxford University Press, 2013; as well as Wessel (2020), *op.cit.*

¹⁰ A. Georgopoulos, ‘The European Armaments Policy: A *conditio sine qua non* for the European Security and Defence Policy?’, in M. Trybus and N.D. White, *European Security Law*, Oxford University Press, 2007, pp. 189-222.

¹¹ M. Trybus, ‘The New EU Defence Procurement Regime’, in Bovis, C. (ed.), *Research Handbook on EU Public Procurement Law*, Cheltenham: Edward Elgar, p. 523-547.

¹² On the EDA see for example N. Karampekios and I. Oikonomou, *The European Defence Agency: Arming Europe*, Routledge, 2015.

¹³ I. Marrero Rocha, ‘The European Union's Arms Trade Control and European Civil Society’, in P. Eeckhout, M. Lopez-Escudero (Eds.), *The European Union's External Action in Times of Crisis*, Hart Publishing, 2016, pp. 547-571, at 547.

treaties and its role and position in international forums (section 3). The actual arms control policies and decisions adopted by the EU will be addressed in section 4. Section 5, finally, will conclude this paper. As the scope of this contribution does not allow for extensive analyses of the various sub-topics, the paper's aim is merely to serve as an introduction into the main aspects of the role of the EU in international arms control.

2. Objectives and competences of the European Union in arms control

Arms control as such is not among the objectives of the European Union. The treaties do refer to 'arms' occasionally, but mainly in an internal context. Thus, 'illicit arms trafficking', is mentioned in the provisions on criminal cooperation (Article 83(1) TFEU) and Article 17(3) TEU provides that the European Defence Agency "shall participate in defining a European capabilities and armaments policy".¹⁴ Most importantly perhaps, 'arms' are mentioned in Article 346 TFEU, which aims to carve-out "essential security interests" from the general rules on internal market cooperation. The provision has been part of the EU's legal regime from the outset and was meant to allow states to keep their military security issues outside of the European economic integration. Apart from underlining that EU Member States do not have an obligation to "to supply information the disclosure of which it considers contrary to the essential interests of its security" (par. 1), Article 346 continues by, *prima facie*, allowing Member States almost complete freedom in keeping issues related to the production of or trade in arms to themselves (par. 2):

"any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes."

Over the years, the Court of Justice of the European Union has nuanced this general exception, thus seriously limiting to freedom of Member States to specific situations.¹⁵ And indeed, the further cooperation between the EU Member States in the area of military defence, partly turns Article 346 into a relic of the past as further integration rather than isolation is needed to reach the objectives related to a common security and defence policy.¹⁶ As held by one observer,

¹⁴ Before the changes brought about by the 2007 Treaty of Lisbon, Article 17 TEU was more clear and listed "cooperation in the field of armaments" as part of the "progressive framing of a common defence policy".

¹⁵ V. Randazzo, 'Article 346 and the qualified application of EU law to defence', *EU ISS Brief*, 2014; https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_22_Article_346.pdf; P. Koutrakos, 'The Role of Law in Common Security and Defence Policy: Functions, Limitations, and perceptions', in P. Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives*; as well as Trybus, *op.cit.* In the early Case 222/84 (*Johnston v. Chief Constable of the RUC*) the Court of Justice already gave a restrictive interpretation of Article 346, denying that it implies an across the board 'public security' exemption.

¹⁶ See further for instance S. Bockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?', 55 *CMLR*, 2018, 1785-1826.

“since the ending of the Cold War, arms sales are no longer state monopolies or even state-dominated, but have increasingly come to resemble contemporary commercial enterprises [...]. They thus look much more like the sort of commercial activity normally subject to controls as a matter of Union-wide common commercial policy.”¹⁷

Furthermore, it has been argued that the original interests of EU states in the trade in arms have undergone a change to due pressure by the European civil society.¹⁸ This is not to say that these interests have completely disappeared; the EU is still among those hosting the largest weapons producers in the world.¹⁹

Despite specific objectives and competences for the EU to be engaged in international arms control being absent in the Treaties, policies in this area do seem to be covered by what the EU aims to establish in more general terms. Thus, the Preamble to the TEU already lists the intention “to promote peace, security and progress in Europe *and in the world*.”²⁰ Further indications are to be found in the objectives to “contribute to peace, security [...] as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter” (Art. 3(5) TEU) and to “preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris” (Art. 21(2)(c) TEU). More generally, the Union aims to “promote an international system based on stronger multilateral cooperation and good global governance” (Art. 21(2)(h) TEU).

These objectives are reflected in some general competences for the EU to act. The Common Foreign and Security Policy has a broad scope and covers “*all* areas of foreign policy and all questions relating to the Union’s security” (Art. 24(1) TEU)²¹ and allows the Union to become a party to international agreements in this area (Art. 37 TEU). The military and civilian missions the Union can set up (Art. 42(1) TEU) may be used for a variety of reasons, including “joint disarmament operations” (Art. 43(1) TEU). Finally, as we have seen, an extensive system on arms export controls has been established on the basis of Article 29 TEU,²² and the competences in relation to sanctions allow for arms embargoes against third states (Art. 215 TFEU).

¹⁷ L. Lustgarten, ‘The EU, the Member States, and the Arms Trade: A Study in Law and Policy’, *European Law Review* 38(4), 2013, pp. 521-541.

¹⁸ Marrero Rocha, *op.cit.*, at 548.

¹⁹ According to the *SIPRI Top 100 arms-producing and military services companies* (December 2018), the EU ranks after the US and Russia with combined arms sales of the 24 companies in Western Europe listed in the Top 100, which accounted for 23.8 per cent of the Top 100 total. Things may change after Brexit as the UK remained the largest arms producer in the region with seven companies listed in the Top 100. Available at <https://www.sipri.org/publications/2018/sipri-fact-sheets/sipri-top-100-arms-producing-and-military-services-companies-2017>.

²⁰ Emphasis added.

²¹ Emphasis added.

²² Art. 29 TEU: “The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the

It is clear that the European Union moved far beyond its initial function as a regulator of the relations between its own Member States and has turned into a global actor with very concrete global security interests.²³ The following sections will assess to what extent the Union has made use of these competences in the area of arms control.

3. EU coordination on arms control treaties and fora

One of the aims of the Union's foreign and security policy is to act as a cohesive force in international relations and to try and speak with one voice in international organizations and at international conferences. The EU is an active participant in international organizations and other fora;²⁴ yet, as it often cannot join itself, it may have to rely on its Member States to represent the Union position.²⁵

The EU aims to uphold and strengthen all relevant international arms control agreements and various cooperation frameworks, including in particular the Nuclear Non-Proliferation Treaty (NPT), the Chemical Weapons Convention (CWC), the Biological & Toxin Weapons Conventions (BTWC), the Missile Technology Control Regime (MTCR), The Hague Code of Conduct against missile proliferation (HCoC), the Anti-Personnel Mine Ban Convention (APMBC), the UN Programme of Action on Small Arms (PoA), UN Security Council Resolution 1540 (UNSCR 1540; on non-proliferation²⁶), the Proliferation Security Initiative (PSI), the Global Initiative to Combat Nuclear Terrorism (GICNT), and the Arms trade treaty (ATT). The latter forms an example of a treaty that was modelled after the EU rules on arms export control.²⁷

Union positions.” The Common Position on the exports control mentioned below was based on its predecessor, Art. 15 TEU.

²³ Among the many studies on this topic, see for instance Authors: C. Kaunert and K. Zwolski, *The EU as a Global Security Actor: A Comprehensive Analysis beyond CFSP and JHA*, Palgrave, 2013; P. Koutrakos, ‘The European Union in the Global Security Architecture’ in B. Van Vooren, S. Blockmans, and J. Wouters (Eds.), *The EU's Role in Global Governance: The Legal Dimension*, Oxford University Press, 2013

²⁴ R.A. Wessel and J. Odermatt (Eds.), *Research Handbook on the European Union and International Organisations*, Edward Elgar Publishing, 2019.

²⁵ See Art. 34 TEU: “Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the Union's positions in such forums. The High Representative of the Union for Foreign Affairs and Security Policy shall organise this coordination.

In international organisations and at international conferences where not all the Member States participate, those which do take part shall uphold the Union's positions.”

²⁶ In resolution 1540 (2004), the Security Council decided that all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes. The resolution requires all States to adopt and enforce appropriate laws to this effect as well as other effective measures to prevent the proliferation of these weapons and their means of delivery to non-State actors, in particular for terrorist purposes.

²⁷ Marrero Rocha, *op.cit.*, at 547. See also https://eeas.europa.eu/topics/disarmament-non-proliferation-and-arms-export-control/427/disarmament-non-proliferation-and-arms-export-control_en

The main objective is to increase the coordination of EU positions in the connected international fora. Apart from the essential coordination by the European External Actions Service (EEAS, the ‘European Ministry for Foreign Affairs’),²⁸ this preparation is largely done through the Council’s working parties, which in all areas of EU activity function as the vehicles for EU Member States to reach consensus at early stages. Working parties are typically composed of representatives from the Permanent Representations of the EU Member States in Brussels and from national ministries. While the list of working parties may change over the years, the following ones have contributed to a certain degree of institutionalisation of arms control issues within the EU’s decision-making machinery: Working Party on Non-Proliferation (CONOP), Working Party on Conventional Arms Exports (COARM), Working Party on Global Disarmament and Arms Control (CODUN), Working Party on Dual-Use Goods, and the Politico-Military Group (PMG).²⁹ Delegates need to have security clearance to be able to participate in these Working Parties.

The EU participates in most international fora related to arms control, albeit mostly not as an official full member due to its non-state nature. Apart from the specific treaty based organs and conferences of states parties linked to the various treaties, these fora include the Nuclear Suppliers’ Group (on nuclear exports and nuclear-related exports), the Zanger Committee (related to the implementation of the NPT; with the EU as a permanent observer), the Missile Technology Control Regime (aiming to limit the spread of ballistic missiles and other unmanned delivery systems that could be used for chemical, biological, and nuclear attacks), the Australia Group (a multilateral export control regime (MECR) in which the European Commission represents the EU) and the Wassenaar Arrangement (aiming to promote transparency and responsibility in transfers of conventional arms and dual-use goods and technologies). Many of these issues indeed clearly fall under Member State competences, and the EU then aims to exert influence by aligning the positions of the Member States into a common position. The International Atomic Energy Agency (IAEA) forms a special case. Not being a state, the EU could not become a member of the IAEA, despite its ambitions to that end.³⁰ Yet, given the extensive competences of Euratom (the European Atomic Energy Community, which is related to the EU) in the field of nuclear energy, that organization has

²⁸ See in general on the EEAS: M. Gatti, *European External Action Service: Promoting Coherence through Autonomy and Coordination* (Brill/Nijhoff 2016); and for an early assessment of its role in arms control K. Zwolski, ‘The External Dimension of the EU’s Non-proliferation Policy: Overcoming Inter-institutional Competition’, 16 *European Foreign Affairs Review*, 325–340, 2011.

²⁹ See the List of Council preparatory bodies, General Secretariat of the Council, Brussels, 13 December 2018 (OR. en) 15131/18. Overall, more than 150 specialised working parties and committees function as ‘Council preparatory bodies’.

³⁰ J. Wouters, J. Odermatt and T. Ramopoulos, ‘The EU in the World of International Organisations: Diplomatic Aspirations, Legal Hurdles, and Political Realities’, in M. Smith, S. Keukeleire, S. Vanhoonacker, *The EU in the World of International Organizations: Diplomatic Aspirations, Legal Hurdles and Political Realities* (Routledge/Taylor & Francis, 2015), at 105-6.

been granted observer status in the IAEA.³¹ For the purpose of the present contribution, it is important to note that EU-IAEA cooperation is not only related to nuclear energy, but extends to non-proliferation issues. In that respect it is interesting that two of the EU's Member States are nuclear weapon states. The EU-IAEA agreement is a mixed agreement where the Member States are parties alongside the EU and the IAEA,³² yet in this case excluding France and the UK (which countries have concluded separate agreements with Euratom and the IAEA).³³ The EU-IAEA Agreements aims to streamline the somewhat different approaches for inspections between the two organizations.

4. EU arms control policies

4.1 Non-proliferation policies

a. Weapons of mass destruction (WMDs)

With the adoption in 2003 of the Strategy against Proliferation of Weapons of Mass Destruction,³⁴ the EU took an important step to further enhance and institutionalise its efforts in the fight against the non-proliferation of WMDs.³⁵ The strategy identified a number of priorities, including: the implementation and universalization of existing disarmament and non-proliferation agreements; reinforcement of compliance with multilateral arms control treaties; the establishment of additional international verification instruments; and the expansion of cooperative threat reduction activities and assistance. As held by one observer, “The EU is now a prominent player in all the major multilateral frameworks relating to non-proliferation and WMD arms control, as well as a leading provider of financial and technical assistance in support of non-proliferation.”³⁶ A Principal Adviser and Special Envoy for Disarmament and Non-proliferation was appointed by the EU's High Representative for Foreign and Security Policy to specifically coordinate this policy area. Furthermore, since 2006 the EU WMD non-

³¹ A. Södersten, ‘International Atomic Energy Agency (IAEA): The EU's role in international nuclear energy policy’, in R.A. Wessel and J. Odermatt (Eds.), *Research Handbook on the European Union and International Organisations*, Edward Elgar Publishing, 2019, pp. 240-254.

³² Agreement between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the European Atomic Energy Community and the International Atomic Energy Agency in Implementation of Article III, (1) and (4) of the Treaty on the Non-Proliferation of Nuclear Weapons, 14 September 1973, INFCIRC/193. See also Agreement between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the European Atomic Energy Community and the International Atomic Energy Agency in implementation of Article III (1) and (4) of the Treaty on the non-proliferation of nuclear weapons (78/164/Euratom), OJ 1978 No L51, 22 February 1978, p. 1.

³³ Södersten, *op.cit.*, at 251.

³⁴ See https://eeas.europa.eu/sites/eeas/files/st_15708_2003_init_en.pdf.

³⁵ See for an overview of policies: S. Blavoukos, D. Bourantonis and C. Portela (Eds.), *The EU and the non-proliferation of nuclear weapons: strategies, policies, actions*, Basingstoke: Palgrave Macmillan, 2015.

³⁶ A. Cottey, ‘The EU's Non-proliferation Strategy Ten Years On’, *European Foreign Affairs Review* 19, no. 1 (2014), pp. 45–64, at 45.

proliferation Strategy is supported by a European network of independent non-proliferation and disarmament think tanks.³⁷

The EU's non-proliferation policies use two types of instruments: exercising influence in the various global non-proliferation and arms fora through the adoption of common positions,³⁸ and providing financial and technical assistance to support arms control, disarmament and non-proliferation. These efforts concentrated on various frameworks, including the International Atomic Energy Agency (IAEA), the Comprehensive Test Ban Treaty (CTBT), the Chemical Weapons Convention (CWC), and the Biological and Toxin Weapons Convention (BTWC), as well as proposals for a Fissile Material Cut-off Treaty (FMCT).

Results of the EU's non-proliferation policies in relation to WMDs, and in particular its ability to influence global negotiation processes remain mixed. Over the years the EU received good reviews on its performance in international negotiations and it is largely acknowledged that the EU is not too blame for the generally decreased enthusiasm for multilateralism these days. At the same time, it is also not always able to build consensus internally, in particular in relation to nuclear issues. In relation to the EU's role on the 2015 NPT Review Conference, it has for instance been observed that "its influence as a distinct actor in the NPT context remains very limited, and the EU's common position is in greater disarray than ever before."³⁹ Given the different interests of the EU Member States in this dossier, it should not come as a surprise that consensus-building is difficult. France and the UK are NWS recognized by the treaty; Belgium, Germany, Italy and the Netherlands host US tactical nuclear weapons on their territory; and 16 more NATO states are covered by the alliance's extended nuclear deterrence pledges; and finally Finland and Sweden use nuclear plants for energy production and Austria, Cyprus, Ireland and Malta have rejected even the civilian use of nuclear energy.⁴⁰ The different views of the Member States clearly returned with the 'Humanitarian Pledge', issued by the Austrian Government in 2015 in the framework of the so-called Humanitarian Initiative, a global group of states aiming at overcoming the problems to take further steps in nuclear disarmament. While one EU Member State – Austria – was leading in this initiative, another one – France – was actively undermining many of the aspects of the 'Pledge'.⁴¹ Case like these underline the difficulties the EU faces in reaching common positions on issues related to WMDs.

³⁷ See for a recent decision on the network, Council Decision (CFSP) 2018/299 of 26 February 2018 promoting the European network of independent non-proliferation and disarmament think tanks in support of the implementation of the EU Strategy against proliferation of weapons of mass destruction, OJ L 56, 28.2.2018, p. 46-59.

³⁸ See for example Council Decision 2014/913/CFSP of 15 December 2014 in support of the Hague Code of Conduct and ballistic missile non-proliferation in the framework of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction, OJ L 360, 17.12.2014, p. 44–52

³⁹ Stuck on disarmament: M. Smetana, 'The European Union and the 2015 NPT Review Conference', *International Affairs* 92: 1 (2016) 137–152, at 138.

⁴⁰ *Ibid.* 141.

⁴¹ *Ibid.*, as well as M. Dee, 'The EU's Performance in the 2015 NPT Review Conference: What Went Wrong', *European Foreign Affairs Review*, 4 (2016), pp. 591-608.

While nuclear non-proliferation has clearly been at the top of the agenda, the EU is also engaged in the fight against chemical weapons. Apart from its (financial) support to the Organisation for the Prohibition of Chemical Weapons (OPCW),⁴² a case in point is formed by the restrictive measures against the Syrian regime and individuals related to it.⁴³ Furthermore, Russian and Syrian individuals have been included on a sanctions list that targets those accused of chemical weapons attacks, with the so-called ‘Salisbury incident’ – the poisoning of Sergei Skripal with a deadly nerve agent – as the trigger.⁴⁴ Finally, over the past years the EU has become more active in ensuring security in outer space.⁴⁵ The key policy tool is the 2014 EU proposal for an international Space Code of Conduct that aims to enhance safety, security and sustainability in space.⁴⁶

b. Conventional weapons (including small arms/light weapons)

In contrast to the extensive non-proliferation policies and activities in relation to WMDs, the EU has struggled more on major conventional disarmament issues.⁴⁷ NATO’s role in this area – including the Conventional Forces in Europe (CFE) negotiations – was often seen as the main reason.⁴⁸ This is not to say that the EU has been passive in the field of conventional weapons. The 2018 EU Strategy Against Illicit Firearms, Small Arms & Light Weapons & Their Ammunition⁴⁹ may be seen as a comprehensive policy document with the aim “to guide integrated, collective and coordinated European action to prevent and curb illicit SALW and their ammunition by terrorists, criminals and other unauthorised actors, and to promote accountability and responsibility with regard to the legal arms trade.”

Over the years, the EU has in fact been quite active in the fight against the proliferation of small arms and light weapons. The legal basis for these actions formed the cause of some controversy among the EU Institutions on whether they were part of the Union’s development policy (allowing for a more intensive role of the Commission and the Parliament) or of the EU security and defence policy (leaving the lead in the hands of the Council). The questions were answered by the Court in the famous *ECOWAS* case, which was about financial support of the EU to the West-African organisation ECOWAS in the fight against the proliferation of small arms and

⁴² See recently ‘EU continues its support to OPCW to make the world safe from chemical weapons’, https://eeas.europa.eu/topics/disarmament-non-proliferation-and-arms-export-control/60693/eu-continues-its-support-opcw-make-world-safe-chemical-weapons_en.

⁴³ See Council Implementing Decision (CFSP) 2017/1341 of 17 July 2017 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria, OJ L 185, 18.7.2017, p. 56-59.

⁴⁴ Council Decision (CFSP) 2019/86 of 21 January 2019 amending Decision (CFSP) 2018/1544 concerning restrictive measures against the proliferation and use of chemical weapons, OJ L 18, 21.1.2019.

⁴⁵ See for early developments M.M. Mutschler and C. Venet, ‘The European Union as an emerging actor in space security?’, 28 *Space Policy* (2012), pp. 118-124.

⁴⁶ See https://eeas.europa.eu/topics/disarmament-non-proliferation-and-arms-export-control/14715_en

⁴⁷ A.J.K. Bailes, ‘The EU, Arms Control and Armaments’, 12 *European Foreign Affairs Review*, 2007, 1-6.

⁴⁸ *Ibid.*

⁴⁹ European Commission, Joint Communication to the European Parliament and the Council, Elements towards an EU Strategy against illicit Firearms, Small Arms & Light Weapons and their Ammunition, "Securing Arms, Protecting Citizens", JOIN(2018) 17 final. This Strategy can be seen as a follow-up of the 2005 EU strategy to combat illicit accumulation and trafficking of SALW and their ammunition (Council 5319/06 <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205319%202006%20INIT>).

light weapons.⁵⁰ In this judgment the Court underlined that arms control initiatives may indeed be closely linked to development policies, but that the Treaties foresee different procedures to deal with these policy issues. Recent examples include EU decisions supporting similar initiatives in Africa and Latin America.⁵¹ The ‘specific rules and procedures’ (Art. 24(1) TEU) for foreign, security and defence policies partly continue to stand in the way of an integrated external relations policy of the Union, despite the clear interlinkage between, for instance, trade, development and security.⁵²

4.2 Export control policies

The EU’s export control policies are one of its key instruments to contribute to diminishing arms sales to conflict areas. In 1998 the EU adopted a Code of Conduct to guide decisions taken by Member State on arms exports.⁵³ In doing so, the European Union became the first entity to accept a regional Code of Conduct. This code gradually led to the adoption in 2008 of the Council Common Position on common rules governing control of exports of military technology and equipment, which replaced the Code and currently still is the leading document in this policy area.⁵⁴ This Common Position provides eight criteria for Member States to assess the export licence applications made to them for items on the so-called EU Common Military List.⁵⁵ The 2015 User’s Guide assists Member States in how to apply the export criteria in the Common Position.⁵⁶ Despite the quite detailed nature of these documents, Member States’ freedom to decide on which goods would be subject to an export licence was not completely removed as the Common Position states that “The EU Common Military List shall act as a reference point for Member States’ national military technology and equipment lists, but shall

⁵⁰ See for instance C. Hillion and R.A. Wessel, ‘Competence Distribution in EU External Relations after *ECOWAS*: Clarification or Continued Fuzziness?’, *Common Market Law Review*, 2009, pp. 551-586.

⁵¹ Council Decision (CFSP) 2019/1298 of 31 July 2019 in support of an Africa-China-Europe dialogue and cooperation on preventing the diversion of arms and ammunition in Africa, OJ L 204, 2.8.2019, p. 37–43; and Council Decision (CFSP) 2018/2010 of 17 December 2018 in support of countering illicit proliferation and trafficking of small arms, light weapons (SALW) and ammunition and their impact in Latin America and the Caribbean in the framework of the EU Strategy against Illicit Firearms, Small Arms & Light Weapons and their Ammunition ‘Securing Arms, Protecting Citizens’, OJ L 322, 18.12.2018.

⁵² See more extensively on the links between external policies: R.A. Wessel, ‘Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis’, in Claire Kilpatrick and Joanne Scott (Eds.) *Contemporary Challenges to EU Legality* (Collected Courses of the Academy of European Law), Oxford University Press, 2020.

⁵³ See for the original text: <https://fas.org/asmp/campaigns/code/eucodetext.htm>; and for an early assessment of its effects: M. Bromley and M. Brzoska, ‘Towards a Common, Restrictive EU Arms Export Policy? The Impact of the EU Code of Conduct on Major Conventional Arms Exports’, 13 *European Foreign Affairs Review*, pp. 333–356, 2008

⁵⁴ Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

⁵⁵ See for an analysis of the criteria Lustgarten, *op.cit.*

⁵⁶ User's Guide to Council Common Position 2008/944/CFSP

defining common rules governing the control of exports of military technology and equipment, Brussels, 20 July 2015 (OR. en) 10858/15; <http://data.consilium.europa.eu/doc/document/ST-10858-2015-INIT/en/pdf>.

not directly replace them.”⁵⁷ And, indeed, the text of the Common Position is sometimes strict (requiring Member States to forbid arms sales in certain circumstances), while in other case it provides some leeway (requiring member States ‘to take into account’ certain circumstances). Yet, despite the legally binding nature of most of the elements, enforcement remains difficult. The role of the Court of Justice of the European Union (CJEU) in relation to foreign, security and defence issues is limited and it would not be easy to bring a case against a Member States which clearly violated the rules laid down in the Common Position.⁵⁸ In any case, a denial of an export licence would typically end up before a national (administrative) court, which will have to deal with the interpretation of the EU rules in this matter.⁵⁹ While preliminary references by national courts to the CJEU are not excluded in the area of foreign and security policy,⁶⁰ these seem restricted to sanctions and it remains questionable whether the CJEU would be allowed to interpret the EU arms control rules upon a request by a national court.

The Common Military List with goods is updated regularly.⁶¹ In 2018 the Council adopted a Decision on the promotion of effective arms export controls.⁶² This Decision aims to ensure coordination between the EU’s arms export control activities on export controls of dual-use goods.

Over the years, the EU’s export control system has been further developed. One of its characteristics is its transparency. Arms exports by EU Member States are checked against the criteria, export licences are in the public domain and annual reports reveal the statistics on licences and exports of conventional arms from EU Member States.⁶³ This internal EU export control mechanism was also promoted globally.⁶⁴ As indicated above, the EU was one of the largest promoters of the Arms Trade Treaty (ATT) and it encouraged all UN Member States to sign and ratify the treaty.⁶⁵ In addition, it funded training seminars and provided consulting and

⁵⁷ Ibid. Art. 12.

⁵⁸ See on the role of the Court in CFSP (and for further references): C. Hillion and R.A. Wessel, ‘The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP’, in S. Blockmans and P. Koutrakos (Eds.), *Research Handbook in EU Common Foreign and Security Policy*, Cheltenham/Northampton: Edward Elgar Publishing, 2018, pp. 65-87.

⁵⁹ Examples include *Case R (on the application of Hasan) v. SoS for Trade and Industry*, [2009] 3 All E.R. 539 and *R. (Aguswandi) v. SoS for Trade and Industry* [2004] EWHC 1146 (Admin). (both in the UK). See Lustgarten, *op.cit.*

⁶⁰ Ibid.

⁶¹ The most recent version is to be found in ‘Common Military List of the European Union’, adopted by the Council on 18 February 2019 (equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment) (CFSP) (2019/C 95/01).

⁶² Council Decision (CFSP) 2018/101 of 22 January 2018 on the promotion of effective arms export controls.

⁶³ See, for instance, the Twentieth Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, (2018/C 453/01).

⁶⁴ Cf. Council Decision (CFSP) 2018/101 of 22 January 2018 on the promotion of effective arms export controls, OJ L 17, 23.1.2018.

⁶⁵ See Council Decision 2013/768/CFSP of December 2013 on continued Union activities in support of the Arms Trade Treaty negotiations, in the framework of the European Security Strategy as well as, more recently, Council Decision (CFSP) 2017/915 of 29 May 2017 on Union outreach activities in support of the implementation of the

technical services to assist countries in setting-up expert control mechanisms.⁶⁶ While the EU used its own rules and experience to influence global law-making in this respect, the EU's own regime remains more stringent and also goes beyond the ATT.⁶⁷ This is not to say that the system works perfectly. Despite the fact that it was (and is) agreed upon by the EU Member States, frictions remain in relation to the interpretation of the rules and the related freedom Member States (and national companies) still may wish to seek in relation to their trade with other partners.⁶⁸

4.3 Arms embargoes

Restrictive measure against third countries or individuals are among the CFSP decisions that are adopted most frequently.⁶⁹ Quite often these sanctions take the shape of an arms embargo. Since 1986 the EU has imposed 38 arms embargoes.⁷⁰ Despite the increased intensity of the EU's regulatory framework, national policy considerations often influence the outcomes of the internal decision-making process. This is not different in other policy areas, but restrictive measures may only be imposed once a 'political' decision has been taken under CFSP (Article 215 TFEU), implying unanimity and thus the possibility for each and every individual Member State to block decisions. In contrast to other sanctions, arms embargoes do not need to be followed-up by a Council Regulation dealing with the economic implications. This implies that also in a later stage, decisions are not taken by qualified majority voting.⁷¹ However, the separation between arms embargoes and other types of sanction becomes increasingly blurred as different forms of sanctions may be adopted on the basis of one single Decision. A recent example is the Decision of the Council on restrictive measure against Venezuela, which combines restrictions on "The sale, supply, transfer or export of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary

Arms Trade Treaty Cf. also the Statement on Behalf of the European Union at the Preparatory Committee for the Arms Trade Treaty, New York, 12 July 2011. I Romanyshyn, 'The European Union and the Arms Trade Treaty: An Analysis of the EU's Effectiveness in Multilateral Security Governance', *Bruges Regional Integration & Global Governance Papers*, 3/2013; S. Depouw, 'The European Union's Involvement in Negotiating an Arms Trade Treaty', *Non-Proliferation Papers* (EU Non-Proliferation Consortium), No. 23, December 2012.

⁶⁶ Marrero Rocha, *op. cit.*, at 551-552.

⁶⁷ *Ibid.* at 557.

⁶⁸ Cf. S.T. Hansen, 'Taking ambiguity seriously: Explaining the indeterminacy of the European Union conventional arms export control regime', *European Journal of International Relations* 2016, Vol. 22(1) 192-216.

⁶⁹ See in general on the legal rules governing the EU's sanctions policy for instance P.J. Cardwell, P.J., 'The Legalisation of European Union Foreign Policy and the Use of Sanctions' (2015) 17 *Cambridge Yearbook of European Legal Studies*, 287; and C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, 2009); and C. Portela, *European Union Sanctions and Foreign Policy. When and Why do they Work?*, Routledge, 2010.

⁷⁰ See the SIPRI Arms embargo archive: <https://www.sipri.org/databases/embargoes>

⁷¹ This is not to say that arms embargoes may never lead to Council Regulations, in particular in cases where arms embargoes are violated. See for example Council Implementing Regulation (EU) 2018/1931 of 10 December 2018 implementing Article 9 of Regulation (EC) No 1183/2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo, OJ L 314, 11.12.2018, p. 1–7.

equipment and spare parts” with other restrictive measures, including visa bans and a freezing of funds.⁷² In all these areas, however, it is up to the EU member States to implement the sanctions directly on the basis of these decisions, given the absence of further implementing legislation by the Union.⁷³

Imposing arms embargoes obviously has consequences for the involved companies in the Member States and it should not come as a surprise that it is not always easy for Member States to balance these national interests with the global values that are also enshrined in the EU Treaty. Kranz described the dual identity of arms embargoes as follows: “they are comprehensive in that they include all arms and related materials that could undermine the spirit of the arms embargo. Furthermore, they are easy to interpret and to implement, and thus prevent loopholes. Conversely, arms embargo operation is poor when member states – driven by divergent interests – dilute embargoes, design them in ways that allow for ambiguity, or permit exceptions in implementation that run counter to their spirit.”⁷⁴

4.4 Arms control as a condition in EU agreements

Along the lines set out in the 2003 EU strategy against proliferation of Weapons of Mass Destruction,⁷⁵ the EU adopted a policy on “Mainstreaming non-proliferation policies into the EU’s wider relations with third countries [...] inter alia by introducing the non-proliferation clause in agreements with third countries”. This clause in international agreements entails that the EU and third parties agree “to co-operate and to contribute to countering the proliferation of WMD and their means of delivery through full compliance with and national implementation of their existing obligations under international disarmament and non-proliferation treaties and agreements and other relevant international obligations”, and that they take “steps to sign, ratify, or accede to, as appropriate, and fully implement all other relevant international instruments” and establish “an effective system of national export controls”. In cases of non-compliance “intensive consultations between the parties would take place” and “suspension of the agreement would remain the last resort”.⁷⁶ The WMD clause was modelled on the EU

⁷² Council Decision (CFSP) 2017/2074 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela.

⁷³ Portela points to an arms embargo that even lacks any basis in a Council Decision: “The [1989] arms embargo on China remains the only EU sanctions regime which has survived two decades after the introduction of the CFSP without having been transformed into a common position. It is the only sanctions regime whose legal basis remains a Presidency statement. The advantages of the lack of formalization are manifold: While EU arms embargoes are routinely accompanied by an interruption of military links, military cooperation between EU Member States and China co-exists with the embargo”. C. Portela, ‘Member States Resistance to EU Foreign Policy Sanctions’, 20 *European Foreign Affairs Review*, Special Issue (2015), pp. 39–62 at 47.

⁷⁴ K. Kranz (2016), ‘European Union arms embargoes: the relationship between institutional design and norms’, 29 *Cambridge Review of International Affairs*, 970-996, at 971. Cf. also Portela, *op.cit.*

⁷⁵ Fight Against the Proliferation of Weapons of Mass Destruction – Mainstreaming Non-Proliferation Policies into the EU’s Wider Relations with Third Countries, 14997/03, (Brussels, Council of the European Union, 19 Nov. 2003; https://www.hcoc.at/documents/WMD_STRATEGY_EN.pdf

⁷⁶ *Ibid.* Annex.

human rights clause introduced by the EU in the 1990s for inclusion in its agreements with third countries. Since 2003, the clause has been used in agreements concluded between the EU (and its Member States) and third states,⁷⁷ and the EU claims that “all the EU’s agreements with partners include a non-proliferation clause”.⁷⁸ Moreover, the clause is not hidden in the small print of international agreements, but often features among the first key provisions.⁷⁹

The Annual Progress Reports on non-proliferation policies keep track of the use of the clause.⁸⁰ The fact that the EU may threaten to withhold enhanced political and economic relations with the Union from states that refuse to accept the WMD clause or suspending relations with states deemed to have violated the clause turns it into an important instrument.⁸¹ At the same time, to the best knowledge of the present author, the clauses have so far never been invoked.

5. Conclusion

Originally designed as an international organization to integrate the economic policies of its own Member States, the European Union developed into an entity that is much more looking outwards, with objectives that include the contribution to global peace and security and the strict observance and the development of international law. Competences related to the EU’s foreign, security and defence policy have allowed the Union to develop international arms control policies and to become an – occasional – leader in that area.

Two policy areas stand out in that respect. First of all – and despite the natural tendency of Member States to keep control – the EU’s export control regime is quite developed and has led the EU Member States to partly put their traditional “essential security interests” into perspective by showing a willingness to assess their arms exports against EU criteria. The EU’s export control regime has served as an example for other global, regional and national initiatives. Secondly, the EU has shown to be able to become a key player in the non-proliferation of WMDs, in particular in relation to the NPT. Indeed, “the EU has to some extent become a primary driver of these negotiations. The EU’s financial and technical assistance has

⁷⁷ Cf. L. Grip, ‘The European Union’s Weapons of Mass Destruction Non-Proliferation Clause: A 10-Year Assessment’, *Non-Proliferation Papers*, No. 40, 2014.

⁷⁸ Remark by Jacek Bylica, EEAS Principal Adviser and Special Envoy for Non-proliferation and Disarmament at the Seventh European Union Non-Proliferation and Disarmament Conference Brussels, 18 - 19 December 2018; https://www.nonproliferation.eu/wp-content/uploads/2019/03/Five-language-report_ENG.pdf

⁷⁹ See for instance Art. 3 of the 2013 Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part.

⁸⁰ Thus the 2018 Report mentions: “[...] the EU continued to work on the mainstreaming of WMD non-proliferation commitments in agreements with third countries. Hence, negotiations were finalised in 2018 with Mercosur on a WMD clause in the new Agreements with this group of countries. Furthermore, negotiations continued on a WMD clause for new Agreements with Azerbaijan, Chile and Kirgizstan.” Annual Progress Report on the implementation of the European Union Strategy against the proliferation of weapons of mass destruction (2018) (2019/C 202/01).

⁸¹ Cottey, *op.cit.*, at

also helped to buttress the IAEA, the CWC, the BTWC and the Comprehensive Test Ban Treaty Organization (CTBTO) Preparatory Commission.”⁸²

Multilateralism is under strain, which makes it difficult for the EU continue to play its role in the relevant fora.⁸³ Yet, the many ongoing and planned activities of the EU in international arms control and the clear objectives it has set out in both the Treaties and in strategic policy documents seem to indicate that we are still at the beginning of a development, rather than at the end.

⁸² Cottey, *op.cit.*, at 52.

⁸³ Cf. J. Odermatt and R.A. Wessel, ‘The Challenges of Engaging with International Institutions: The EU and Multilateralism under Strain’, in Wessel and Odermatt, 2019, *op.cit.*