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WORKING PAPER

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CONTRIBUTION

From:	European External Action Service
To:	Working Party on Conventional Arms Exports
Subject:	Germany - comments - Non-paper on a draft Council Decision on EUCs for SALW exports (ref. WK 2549 2020)



DE comments

Non-paper on draft Council Decision on EUCs for SALW exports

Introduction

On 19 November 2018, the Council adopted Conclusions on the Adoption of an EU Strategy Against Illicit Firearms, Small Arms & Light Weapons and their Ammunition (EU SALW Strategy). These conclusions stipulate that 'The Council will consider a decision on end-user certificates for SALW exports, taking account of the OSCE's work in this regard'.

On 16 September 2019, the Council adopted Conclusions on the review of Council Common Position 2008/944/CFSP of 8 December 2008 on the control of arms exports. In these conclusions COARM was tasked, among other things, to 'consider a decision on end-user certificates for the export of small arms and light weapons and their ammunition'.

On 24 January 2020, COARM agreed to designate Romania as penholder for the paper on EUCs. In this capacity, Romania prepared this non-paper to boost the discussion on the topic.

Context

EUCs are referred to in article 5 of Council Common Position 2008/944/CFSP, stating "*Export licences shall be granted only on the basis of reliable prior knowledge of end use in the country of final destination. This will generally require a thoroughly checked end-user certificate or appropriate documentation and/or some form of official authorisation issued by the country of final destination*". They are also referred to in the User's Guide, which contains a section on Best practices in the area of end-use/r documentation that provides guidance to Member States on the elements that should be contained in the end-use documentation, when one is required by a Member State in relation to an export of items on the EU Common Military List (EUCML). It also provides guidance on elements which might be required by a Member State, at its discretion.

The rationale behind adopting a Council Decision (CD) on EUCs for SALW is to create the legal obligation for Member States to approve SALW exports only on the basis of EUCs which are in accordance with the commonly agreed standards enshrined in the CD. The principal aim is to reduce the risk of diversion and to ensure SALW only end up in the hands of legitimate end-users. This would also help to prevent unnecessary and potentially destabilizing accumulations of SALW.

The documents relevant to this discussion adopted at OSCE level are Decision no. 5/04 on Standard elements of end-user certificates and verification procedures for SALW exports and The Handbook of Best Practices on SALW. However, when drafting the CD, the existing body of good practices concerning end-use/r controls and end-use/r documentation adopted at international level, in particular the documents referred to in Section 1: *Best practices in the area of end-use/r documentation* of the revised User's Guide, shall be taken into account.

To guide the discussion on EUC, Romania proposes the **following elements**:

1. **Defining the scope**

While the EU SALW Strategy mandates the Council to consider a decision on EUCs for SALW exports, the Council Conclusions on the review of the Council Common Position 2008/944/CFSP mandate COARM to consider a decision on EUCs for the export of SALW and their ammunition.

According to the EU SALW Strategy (page 8), the term 'SALW' is used when focusing on military grade weapons and includes:

- (a) small arms: assault rifles; military grade semi-automatic rifles and carbines; military grade revolvers and self-loading pistols; light machine guns; sub-machine guns, including machine pistols;
- (b) light weapons: heavy machine guns; cannons, howitzers and mortars of less than 100 mm calibre; grenade launchers; recoilless guns; shoulder-fired rockets and other anti-tank and air defence systems that fire projectiles, including MANPADS, all on condition they are manor crew portable;
- (c) SALW parts;
- (d) SALW accessories (such as night scopes, sound suppressors etc.).

Although the term "military grade" is not defined at European level, it is understood that it refers to SALW included in the EUCML.

Against this background, Member States shall decide whether the scope of the CD will include only SALW or SALW and their ammunition.

Bearing in mind that the EU SALW Strategy applies also to ammunition, the more recent Council Conclusions, on the review of the Council Common Position 2008/944/CFSP, which were negotiated in COARM, include ammunition, and taking into account that the EU has constantly advocated for the inclusion of ammunition in the scope of the UN Program of Action on SALW, it is proposed that the CD should also focus on ammunition.

Commented [A1]: DE supports the inclusion of ammunition in the scope of this CD.

2. **Outlining the types of exports** that should be covered by the CD

Recognizing that simplified procedures may apply in some cases, such as temporary exports for verifiable lawful purposes (evaluation, exhibitions, repairs etc.), it is preferable that the CD applies only to permanent exports to non-EU countries, including government-to-government transfers.

3. **Unpacking the concept 'end-user certificate'**

Although the Council Conclusions use the term 'end-user certificate', considering the variety of existing end-use/r documents issued by States, in the lack of a commonly agreed template/title, Member States should exchange views on the appropriateness of unpacking the concept. Romania is of the opinion that an EUC should include any form of official authorization issued by the importing/receiving State, regardless of its title, e.g. End-Use/r Certificate, End-Use/r Assurances, End-Use/r Guarantees, End-User Undertakings, Non-Transfer and Use Certificate, End-Use/r Statement, International Import Certificate etc..

4. **Deciding on the standard elements** that should be contained in the EUCs

Irrespective of its title, our focus should be on the elements contained in the EUCs, such as:

- Exporter's details (at least name, address and business name);
- End-user's details (at least name, address and business name). In case of an export to a firm which resells the SALW (or their ammunition) to unknown end-users on the local market, the details of this firm shall be provided ~~will be regarded as the end-user;~~
- Country of final destination;
- A description (type, characteristics) of the SALW (or their ammunition), or reference to the contract number, or to the order number referenced in the contract, concluded with the authorities of the country of final destination;
- Quantity and/or, when available, value of the exported SALW (or their ammunition);
- Signature, name and title of the end-user;
- Where applicable, certification by the relevant government authorities, according to national practice. The certification must include the date, name, title and original signature of authorizing official;
- The date of issue of the EUC;
- A unique identifying number of the EUC, if issued by the government authorities;
- Indication of the end-use of the SALW (or their ammunition);
- Where appropriate, broker's details (at least name, address and business name);
- Where appropriate, an undertaking that the SALW (or their ammunition) being exported will not be used for purposes other than the declared use;
- *Where appropriate, an undertaking that the SALW (or their ammunition) will not be used in the development, production or use of chemical, biological or nuclear weapons or for missiles capable of delivering such weapons; [to decide if this clause is relevant for the export of SALW or their ammunition]*
- A clause restricting re-export of the SALW (or their ammunition) covered by the EUC. Such a clause could, among other things:
 - contain a pure and simple ban on re-export;
 - provide that re-export of imported SALW or their ammunition can take place only after receiving a written authorization from the exporting Member State, unless the Member State decides to transfer that authority to the authorities of the importing country;
 - allow for re-export without the prior authorization of the authorities of the exporting Member State to certain countries identified in the end-user certificate.
- Where appropriate, an undertaking of the final consignee's/end-user's that the exported SALW (or their ammunition) will not be retransferred to an unauthorized internal end-user;
- Other (to be discussed)

Commented [A2]: DE would prefer not giving the impression that a reseller is recognized as an end-user in the material sense of the word. However as that reseller is the "last known link in the chain" the details of this firm must be included in this section of the EUC. We therefore propose the marked amendments in the text.

Member States shall establish if the decision should focus also on other elements, such as verification of compliance of the end-user with the guarantees assumed in the EUC, the process of verification/authentication of EUCs, information exchange between Member States or record keeping, similar with the provisions of the OSCE Decision No. 5/04, as well as the prevention of unnecessary and potentially destabilizing accumulations of SALW, as described below. In any case, it should be highlighted that national EUCs for SALW may contain elements specific to national policy requirements.:-

5. Post-shipment control

Language on verification of compliance of the end-user with the guarantees included in the EUCs may also be envisaged. For instance, additional information, such as a clause on post-shipment control in the

form of a commitment by the final consignee/end-user to provide the exporting Member State a delivery verification certificate or provisions for post-delivery inspections could be included in the end-user documentation. On-site inspections could be undertaken by officials of the exporting Member State or third parties mandated by the exporting Member State, that both exporting and importing States are willing to accept, e.g. Conflict Armament Research, which is empowered to carry out such activities according to the Council Decision (CFSP) 2019/2191 of 19 December 2019.

Also, Member States could explore the idea of including in the EUC a clause on the obligation of the importing State to notify the exporting Member State if diversion occurs after the export/import, i.e. if the goods are stolen, lost etc., where appropriate.

Commented [A3]: DE supports these suggestions to facilitate the extended use of post-delivery inspections

6. The process of **verifying the authenticity** of the EUC

The CD may include a provision stating that Member States will, when deemed necessary, verify the authenticity of the EUC and the capacity of the signatory to make commitments on behalf of its government, for example through consular legalization or diplomatic channels.

7. **Exchanging information** between Member States

The CD may include a provision stating that Member States are determined/willing to exchange information relevant for diversion risk assessment purposes, including on fraudulent EUCs, in a timely manner, preferably using the COARM online system, taking into account its security level, or during the regular COARM meetings. The online system permits Member States to upload documents in connection with a denial or to provide additional information, thereby ensuring the providing a proper mechanism for this kind of information exchange.

Commented [A4]: DE would be interested to learn more about the anticipated scope of such information exchanges in order to assess whether the COARM online system is the suitable forum or whether direct exchanges during COARM meetings might be preferable.

8. **Record keeping on the EUCs**

The CD may include a provision stating that, with a view to improving the traceability of SALW, Member States will maintain the EUCs for at least 20 years and should make every effort, to the extent possible, to keep them indefinitely. This would be in line with paragraph 12 (b) of the International Tracing Instrument, which stipulates that all records, including records of import and export, should be kept for at least 20 years.

Commented [A5]: DE would like to suggest the CD reflect the fact that several Member States may work with electronic copies of EUCs rather than paper copies. Obligations with a view to maintaining those records must therefore be limited to the form provided to the competent authorities by the companies. National record keeping obligations with regards to exporting companies may be mentioned as well. The referenced International Tracing Instrument also addresses this issue.

9. **Prevention of unnecessary and potentially destabilizing accumulations of SALW**

The CD may include a provision stating that Member States may consider introducing elements in their EUCs which are aimed at the prevention of unnecessary and potentially destabilizing accumulations of SALW. The following elements are provided as examples:

- A confirmation by the recipient that the new goods will replace a specified set of old goods which will be destroyed, as well as a commitment to notify the exporting state of the destruction ("New for Old").
- A commitment by the recipient that any new goods will be destroyed after decommissioning and that the exporting state will be notified of this destruction ("New, destruction after decommissioning").

Commented [A6]: Such elements are included in the German EUCs for SALW in order to take into account the Principles of the German Federal governing the export of small arms and light weapons, corresponding ammunition and production equipment to third countries.
<https://www.bmwi.de/Redaktion/EN/Downloads/small-arms-export-principles-german-federal-government.pdf>