# Convergence around what?

# Europeanisation, domestic change and the transposition of the EU Directive 2009/43 into national arms exports control legislation

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# Abstract

Although armaments touch on essential elements of sovereignty, a Europeanisation of this field has been occurring since the late 1980s. This process led to the approval of EU Directives in 1990 regulating respectively arms procurements and arms intra-Community transfers. This “Defence Package” has attracted scholarly attention because it contains the first supranational acts in this core state power and represents a departure from the standard understanding of CSDP as an intergovernmental policy area. However, academics have only focused on the decision-making process which led to the approval of these Directives.

This thesis addresses this gap by investigating domestic policy and institutional changes, as consequences of this Europeanisation process.

Using Europeanisation literature as an analytical lens, and focusing on a top-down understanding of this process, the thesis operationalises EU Directive 2009/43/EC, creating an internal arms market as the independent variable, and the national transposition regulations in three case studies (UK, Italy and Hungary) as the dependent variables.

In order to assess the direction and intensity of change, the thesis analyses the two main ideas for regulating arms exports: the “pro-industry” model and the “restrictive model”. Each model is identified along eight dimensions. The thesis investigates the direction and intensity of domestic change in each case study and compares them in order to verify whether there is convergence and if so, around which model.

Providing new insight into the domestic changes to arms transfer legislation, the study finds that, even in the traditional intergovernmental field of arms transfers and production, the direction of the Europeanisation process is unbalanced in each dimension and overall favours a pro-industry model as opposed to an ethically and politically regulated one.

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# Abbreviations

AECMA European Association of Aerospace Industries

AIAD *Federazione Aziende Italiane per l'Aerospazio, la Difesa e la Sicurezza*

ANPAM National Association of Sporting and Civil Weapons and Ammunition Manufacturers

*ASAS* Association for Space-*based* ICT Technologies*,* Applications *and* Services

ASD AeroSpace and Defence Industries Association of Europe

ASD Aerospace and Defence, Industries Association of Europe

ATT Arms Trade Treaty

BF Border Force (UK)

BIS Department for Business, Innovation and Skills

BNL *Banca Nazionale del Lavoro*

CAAT Campaign Against Arms Trade

CAEC Committees of Arms Export Controls

CCW Convention on Certain Conventional Weapons

CEES Central and Eastern European States

CFSP Common Foreign and Security Policy

CIPE *Comitato Interministeriale per la Programmazione Economica*

CISD *Comitato Interministeriale per gli Scambi di Materiale della Difesa*

CME Coordinated Market Economy

CML Common Military List

COARM EU Council Working Party on Conventional Arms Exports

COCOM Coordinating Committee on Multilateral Export Controls

CFSP Common Foreign and Security Policy

CPS Crown Prosecution Service

CSDP Common Security and Defense Policy

DESO Defence Export Service Organization

DG Directorate General

DIT Department for International Trade

DME Dependent Market Economy

DOS U.S. Department of State

DVD Delivery Verification Certificate

EADS European Aeronautic Defence and Space Company

ECA Export Control Act

ECJ European Court of Justice

ECO Export Control Order

ECOWAS Economic Community of West African States

EDA European Defence Agency

EDC European Defense Community

EDEM European Defence Equipment Market

EDF European Defence Fund

EDTIB European Defence technological and Industrial Base

EDIG European Defence Industries Group

EEAS European External Action Service

ENAAT European Network Against Arms Trade

ESDP European Security and Defense Policy

ESPRIT European Strategic Programme for Research and Development in Information Technologies

ESRP European Security Research Programme

ESS European Security Strategy

EU European Union

EUC End-user certificate

FA Framework Agreement

FCO Foreign and Commonwealth Office

GDP Gross Domestic Product

GRIP (*Groupe de Recherche et d'Information sur la Paix et la Securité*)

HMRC Her Majesty's Revenue and Customs

HRW Human Rights Watch

IAI *Istituto Affari Internazionali*

IANSA International Action Network on Small Arms

ICBL International Campaign to Ban Landmines

ICT Intra-Community transfer

IIC International Import Certificate

IRI Institute for Industrial Reconstruction

JDT Joint Decision Trap

LME Liberal Market Economy

LOI Letter of Intent concerning "Measures to Facilitate the Restructuring of European Defence Industry"

MCW Major Conventional Weapons

MOD Ministry of Defence

MS Member State (of the EU)

NATO North Atlantic Treaty Organization

NGO Non-governmental organisation

NISAT Norwegian Initiative on Small Arms Transfers

OAS Organization of American States

OCCAR Organisation for Joint Armament Co-operation

OGEL Open General Export Licence

OIEL pen Individual Export Licence

OSCE Organization for Security and Cooperation in Europe

R&D Research & Development

R&T Research &Technology

RID Rete Italiana per il Disarmo

SALW Small Arms and Light Weapons

SIEL Standard Individual Export Licence

SIPRI Stockholm International Peace Research Institute

SME Small and Medium-Sized Enterprise

TAI Turkish Aerospace Industries

TEU Treaty on European Union

TFEU Treaty on the Functioning of the European Union

TIV Trend-Indicator Value

TNC Transnational companies

UAMA *Unità per le Autorizzazioni di Materiali di Armamento*

UN United Nations

VoC Varieties of Capitalism

WEAO Western European Armaments Organization

WEU Western European Union

# Chapter 1. Introduction

## 1. Aims of the dissertation and research questions

### *1.1 Aims of the dissertation*

The dissertation is focused on the impact of EC Directive 2009/43/EC (which aims at facilitating the circulation of defence-related products within EU boundaries) on national laws regarding arms exports.[1] This Directive is intended to remove obstacles to the free circulation of defence-related products within the EU market, by reducing administrative burdens and by simplifying terms and conditions for obtaining arms export licences. The main changes revolve around two new types of licences, general licences and global licences, to be used for arms transfers within European borders, and a new certification system for companies, aimed at establishing trustworthy relations among European partners and among governments dealing with certified companies, thus considered "reliable" ones. Though the Directive was meant to regulate only the intra-European exchanges, its outcomes might have a relevant impact not only on the restructuring of European industries and on the internal arms market, but also on arms export control and transparency.

The aim of the dissertation is threefold:

The first aim is to assess the intensity and direction of domestic change in the three case studies (Italy, Hungary and the UK) as a consequence of the transposition of Directive 2009/43/EC. The domestic change is articulated through eight dimensions which concern transparency and responsibility in the arms export control system, but also the interrelation between institutions. Empirically, I would like to assess the presence or absence of the transformative power of European integration. Normatively, I would like to appraise the legitimacy, transparency and accountability,

1 European Union (2009).Directive *2009/43/EC of the European Parliament and the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community* [2009] *O.J. L146/1,* called also intra-Community transfer Directive, hereinafter Directive 2009/43 or ICT Directive or simply Directive.

responsibility and outcomes of Europeanisation in the arms export control field at the domestic level.

The second aim is to compare direction and intensity of domestic change in these three countries, using the same eight dimensions and the same taxonomies.

The third aim is to discover whether MS are converging or not, and around what. Overall, I would like to identify the direction and trajectory of the Europeanisation process in the arms transfers control field.

### *1.2. Contribution of the dissertation and why it matters*

With this thesis I want to fill a lack in the academic literature because there are currently no in-depth studies concerning arms export control regulation at the domestic level and the Europeanisation process. These legal instruments represent useful tools in the hands of MS and the EU, besides the use of force, in order to maintain peace, prevent conflicts and protect human rights, but they are often neglected in the literature. It is extremely difficult to find any in-depth information on regulation for two of the case studies in particular, Italy and to an even greater extent, Hungary.

Secondly, I would like to explain how Europeanisation works in practice in this delicate field, by investigating the variety of transposition and implementation of Directive 2009/43/EC. In this way I will fill a gap in academic literature which is mostly focused on the Brussels-based process and less on the concrete dynamics of Europeanisation.

Thirdly, I would like to assess the impact not just on the arms export control regimes but also on the relationships between institutions, transparency and accountability.

Lastly, I would like to offer empirical findings which can reveal the overall direction of the Europeanisation process in the arms export control field. In fact, although armaments and their trade touch on essential elements of sovereignty, since the late 1980s a process of Europeanising arms export control and transparency regulation has developed. However, the direction of this process is unclear and sometimes the output risks being inefficient or inconsistent with other EU actions and policies in the field of the Common Security and Defense Policy (CSDP.) Being aware of the trajectory of EU arms export control policies is the first step in assessing the degree of

coherence and consistency with other EU initiatives in the CSDP and in the Common Foreign and Security Policy (CFSP).

### *1.3 Research questions*

The thesis revolves around the following fundamental questions:

1) As a consequence of the transposition of EC Directive 2009/43/EC what and how much has changed domestically in Italy, the UK and Hungary?
2) Do MS converge, and if so, what do they converge around?
3) What is the direction of the Europeanisation process in the arms export control field? Is the Europeanisation process making the arms export control field more or less restrictive?

In order to assess the direction and intensity of change, the thesis analyses the two main ideas for the regulation of arms exports: the “pro-industry” model and the “restrictive model”. Each model is identified along eight dimensions: (a) balance between political strategic variables and economic-industrial variables; (b) balance between legislative and executive power in regulating arms exports; (c) balance between primary law and secondary law in regulating arms exports; (d) balance between transparency and opacity in arms transfers data; (e) balance between national responsibility for the final destination of co-produced goods and mutual recognition principle/delegation to partner country; (f) balance between centralisation and checks and balances in authorisation and control procedures; (g) balance between the role and weight of the state with respect to the role of the companies; and (h) balance between common standards and fragmentation in arms export control rules. In order to measure the *direction of change* more precisely as well as the intensity of change at the domestic level, I use a scale of intensity, a synoptic scheme which indicates the direction and degree of change for each of the eight dimensions. Overall lower values are associated with a pro-industry model of European arms exports whereas higher values are associated with a restrictive model, where ethical and political values prevail.

The thesis investigates the direction and intensity of domestic change in each case study and compares them in order to verify whether there is convergence and if so, around which model.

My hypothesis is that the Europeanisation process - in the period starting from 2007 until mid-2015 - is unbalanced towards lower values of each dimension, and overall that MS are converging around a pro-industry model rather than a restrictive model.

Table 1.1 Boundaries of the research

| | WHAT IS CORE | WHAT IS NOT |
|---|---|---|
| **Object of the thesis** | National arms export control regulations in three case studies *before and after* the transposition of the Directive on Intra community transfer | |
| **Kind of arms** | Conventional arms | Non conventional arms (nuclear, chemical, biological weapons) and dual use material, small arms for civil use. |
| **Precise aspect of arms covered by the thesis** | Arms transfer regulation at the national level | Military expenditures, Defence Economics in peace and war, military production, arms production, conversion, arms transfers and export, army, military service and forces, military personnel. |
| **Period covered** | 2007-2013 | 1990-2007 and 2014-2020 (Brexit, rising populism, de-Europeanisation and disintegration) |
| **Main disciplinary perspective** | European Integration Theories (Politics) | Political Economy, Economics of Defence (and its peculiarities with respect to political economics), Comparative Political Economy, Varieties of Capitalism, International Relations. |
| **Theoretical framework** | Europeanisaton | Big European integration theories (functionalism, neo functionalism, post functionalism, liberal intergovermentalism, and so on) |
| **Level** | Domestic level: domestic change as a consequence of the Directive transposition | International level, EU level, role, preferences, behaviour and interactions of EU bodies and institution, CFSP, CDSP. |
| **Dimension of Europeanisation analysed** | Top-down (downloading) from EU to MS | Bottom up (uploading) from MS- and other non-state actors- to the EU: the process that led to the approval of the ITC Directive, the role and weight of different actors and their interactions is not the core of the thesis. |
| **Methods** | Case study analysis based on the comparison of national arms export control laws along eight dimensions and two models. | Quantitative methods based on arms export practices and data, qualitative methods based on interviews, focus groups, process tracing and so on. |

## 2. The context

"Arms control refers to restrictions upon the development, production, stockpiling, proliferation, transfer and testing and usage of weapons (small arms, conventional weapons and weapons of mass destruction)". [2]

The period that immediately preceded the Europeanisation process of arms export control regulation was particularly favourable for arms control. In fact, between the mid-Eighties and the early Nineties, international arms transfers and military expenditures started to decrease sharply. These years were characterised by the signing of disarmament agreements between the East and West, such as the Intermediate-Range Nuclear forces Treaty signed by Reagan and Gorbachev on 8 December 1987 to eliminate long-range nuclear and conventional missiles. Germany and other European allies were critically important in encouraging both the United States and the USSR to discuss and sign the agreement.

This agreement had symbolic value. Whereas during the Cold War strong scepticism towards arms control instruments had prevailed, this treaty was perceived as the beginning of a new era of peaceful understanding, and a period of hope for possible arms control measures to overcome the Cold War and to effectively contribute to peace and security.

In this favourable atmosphere the General Assembly of the United Nations started to deal with the important question of transparency as a measure to increase confidence between the states, and as a means to encourage restraint in arms transfers and production, with two important resolutions asking states to examine methods to increase publicity and transparency.[3] In 1991 a third resolution established the UN Register of Conventional Arms, according to which governments provided information and data on their transfers of major conventional weapons.[4] Confidence-building measures were intended as a means to replace the so-called security dilemma, which

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2 S. Bauer (2010). "Post-Cold War Control of conventional arms". In A. Tan (Ed.), *The Global Arms Trade A Handbook* London: Routledge, p. 309.

3 UN General Assembly (1988). *Bilateral nuclear-arms negotiations* (UN General Assembly Resolution A/RES/43/75 7 December 1988). New York: United Nations; UN General Assembly (1989). *General and complete disarmament: a prohibition of the development, production, stockpiling and use of radiological weapons* (UN General Assembly Resolution A/RES/44/116 15 December 1989). New York: United Nations.

4 UN General Assembly (1991). *Transparency in Armament* (UN General Assembly Resolution A/RES/44/36 December 1991). New York: United Nations.

explained the arms race from a realist perspective as a consequence of lack of knowledge and confidence between state actors in an anarchic international system. [5] Focusing on conventional arms transfer control, for big arms exporting and producing states, a debate on introducing a responsible export policy began, which was consistent with foreign policy and aimed at conflict prevention, human rights defence, cooperation and development. They also discussed transparency measures and the opportunity to introduce ways of reporting to the Parliament on arms exports. In Italy for example, a new law was approved in 1990 which introduced the principle of responsibility on arms exports and a number of bans to arms exports concerning human rights, conflict prevention, development and cooperation, and required sending a mandatory detailed report to Parliament. Data revealed that after this law entered into force, Italian arms exports to countries in conflicts decreased from 43% to 19% of total Italian exports; arms exports to countries whose governments were responsible for gross violation of human rights decreased from 49% to 7% and to developing countries from 90% to 23%.[6]

This nourished faith and hope that national, regional and international arms legislation could be really effective and could become tools at the disposal of states to tackle threats to peace and international security, to promote human rights, and together with diplomacy, aid development and conflict prevention.

The Europeanisation process of arms export control regulation started in this favourable period. The event that triggered the debate was the data on the list of European companies that had supplied Saddam Hussein's Iraq regime, the very same European countries that had taken part in military action in 1990 against Iraq in operation "Desert Storm". The inconsistency of arms export policies of several EU countries with their foreign policy emerged clearly. As a consequence, a political debate started aimed at improving arms export control and introducing ethical criteria to arms export control regulation at the national and European levels.

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5 L. Bozzo (1991). *Exporting conflicts: international transfers of conventional arms*. Florence: F Cultura nuova; Bauer (2010), p. 309.

6 Data and analysis of the Italian Observatory on Arms Trade on the basis of various reports over time produced by the Italian Parliament: Italian Parliament (n.d.). *Report on the operations authorized and carried out for checks on the export, import and transit of war material,* Parliamentary Acts, Doc. CVIII, Rome: Chamber of Deputies and Senate of the Republic; US ACDA (United States Arms Control and Disarmament Agency) (n.d.). *World military expenditures and arms transfers.* Washington, DC: US Government Printing Office; and the *Oscar Report* n. 15 (1998) May-June, Trento: Publistampa, p. 8.

## 3. Brief overview of the Europeanisation process

### *3.1 Article 346 of the Treaty on the Functioning of the European Union and national regulation*

It is known that Article 223 of the Treaty of Rome (then Article 296 of the Treaty of the European Union and now Article 346 of the Treaty on the Functioning of the European Union) exempted defence matters from any common regulatory regime. As a consequence, the MS of the European Union were free to maintain national legislation on matters of control and transparency in arms exports. National legislation is strongly influenced by different perceptions on issues that lie at the heart of the nation state, national security and national interest, as well as by national commitment to principles of international law (protection of human rights, peace and development); it is also influenced by economic factors, such as the weight of the national arms industry within the national economy and its influence on national exports policies and by the weight of different state and non-governmental actors (non-governmental organisations for peace and disarmament and of course companies). As a result, national laws on arms trade varied strongly across countries. Profound differences existed between a more restrictive legislation, adopted, for instance, by Italy, Germany and Sweden, and a more flexible one, adopted, for instance, by the United Kingdom. Differences involved three main aspects of national regulation: principles and bans, transparency and controls.

### *3.2 Europeanisation processes*

Despite the wording of Article 223 of the Treaty of Rome, since the early Nineties the Europeanisation process has followed two main channels: a political/ethical pathway and an economic/industrial one.

The political channel originated after the Second Gulf War from the debate on harmonising European arms exports policies: the publication of those European companies that exported arms to Saddam Hussein's regime revealed, to political leaders and public opinion, the incoherence between arms exports policies and the foreign policy of several EU governments. As a consequence, a political harmonisation

process started within the context of the EU Council. The main outcome of this process was the Code of Conduct on European arms exports (1998), which became Council Common Position 2008/944/CFSP (8 December 2008) defining the common and legally binding rules governing the control of exports of military technology and equipment. The Code was part of the Common Foreign and Security Policy (CFSP) and was negotiated by a traditional intergovernmental approach. The principle of unanimity and the limits of Article 346 led inevitably to vagueness and compromise based on the lowest common denominator.[7]

The second economic-industrial channel originated as a consequence of the progressive integration of European defence companies. In order to find ways to tackle the decrease in arms demand after the end of the Cold War, defence companies began a transnational merger process both at the European and international levels and asked the political authorities to adapt their regulatory frameworks to this changing interdependent context. This process of integrating key arms industries found its first natural institutional partner in the EU Commission. In this case, the main outcome was the so-called Defence Package and in particular EU Directive 2009/43/EC of the European Parliament and of the Council of May 6th 2009, which simplified terms and conditions for the transfer of defence-related products within the Community, and which is the core of this research project.

The political channel has been hampered by differing MS positions, and the output was first judged too weak and soft and then too generic in its formulation, leaving MS a wide margin of choice in maintaining their arms export policies. The economic industrial channel was deemed more effective, as a real powerful driving force, able to circumvent traditional intergovernmental opposition and stalemates and to reach effective and concrete results in forms of binding EU acts (albeit in the form of a Directive). The thesis focuses on the output of this second channel, and in particular on the impact of Directive 2009/43/EC on three national case studies.

7 B. Schmitt, (2001). “A Common European Export Policy for Defence and Dual Use Items?”. *EUIIS Occasional Paper (25)*, Paris: European Union Institute for Security Studies (EUISS).13. Available online at http://www.iss-eu.org/occasion/occ25.pdf (last accessed 19 December 2018).

## 4. Directive 2009/43/EC on intra-Community transfers: how did it come about?

As previously explained, the Directive 2009/43/EC that this thesis is going to analyse is not the result of a traditional intergovernmental process, but of a process characterised by the participation of different non-state actors. Firstly, societal actors, in this case defence companies which asked for further integration and harmonisation and non-governmental organisations working for peace and disarmament. There is a natural contraposition between these two groups of non-state actors, because NGOs aspire to restrictive arms export policies, with some representatives who strive for complete disarmament. On the contrary, representatives of defence companies aim primarily to increase company profits, thus expanding exports, enlarging third markets and/or increasing internal procurement and military expenditures. With this in mind, in the introductory part of each case study I briefly explain the context and role of these two fundamental societal actors beyond the position of the governments and bureaucracies.

There are also other actors involved in the armaments field, such as trade unions. However they are not directly involved in arms exports regulation which is addressed in the dissertation. Rather, they are active in arms production and reconversion issues. For example, they didn't undertake any action on arms trade in the UK, but campaigned to keep factories open when closure was threatened. An example is the BAE Systems factory in East Yorkshire, which was threatened with the cut of 1300 positions and closure.[8] Similarly in Italy, albeit participating in the Italian Network of Disarmament, trade unions are involved mainly in production, restructuring and conversion issues. However in Italy there are few cases of trade union representatives having collaborated with NGOs, or having investigated illegal arms trade, such as the case of Elio Pagani, an employee of Aermacchi, who denounced exports to South Africa during the apartheid regime and thus stimulated the campaign to approve Italian Law n. 185/90. (See Chapter 4, Section 2). Lastly, in Hungary worker participation in trade unions is low and there is no trace of their involvement in the arms trade.

8 P. Mistry (2012). "End of an era for BAE aircraft manufacturing in Brough", BBC News, East Yorkshire, 1 March 2012, available at https://www.bbc.co.uk/news/uk-england-humber-17217413 (last accessed 15 January 2020).

### *4.1 The role of defence firms*

The collapse of the Soviet Union, the end of a bi-polar system, and the signing of the first disarmament agreements led to a drastic reduction in world military expenditure. This had a profound impact on the state of the Western arms industry, resulting in a significant reduction in sales and employment, followed by a process of rationalisation. The fall in global demand for armaments resulted in increased competition between exporters. At the same time rapidly increasing economies of scale in the production of armaments, made possible through the use of new technologies, drew attention to the inefficiency of the national armaments markets in Europe. [9]

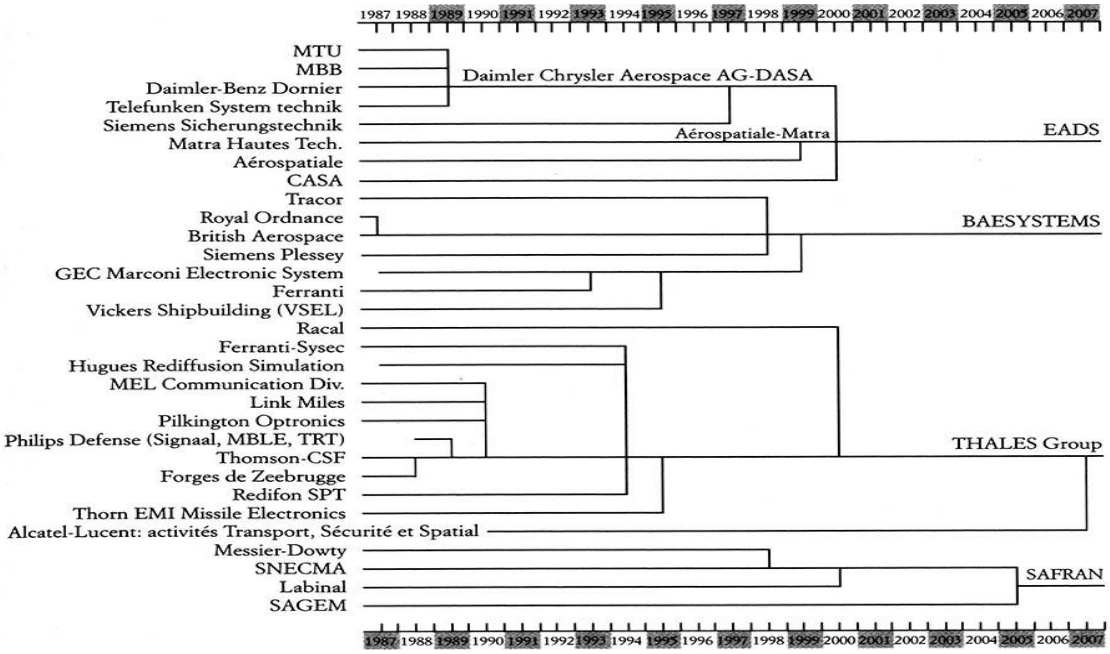
Despite national variations the response of the European arms industries to the changed security environment can be summarised in three main trends:

- *concentration* on key business areas and acquisition of other companies by those companies that wanted to remain active in the armaments market;
- *internationalisation* of companies through equity participation, collaborative programmes, joint ventures, consortia or mergers at the inter-European or international level;
- *privatisation* of state controlled arms industries.

These processes and developments in military technology completely reshaped the Western system of arms production. In the 1990s this process grew more intensive particularly on a European level, resulting in the establishment of numerous collaborative armaments programmes. The figure below exemplifies the quick process of integration and concentration that started in the late Eighties and led to the 2008 consolidation immediately prior to the approval of Directive 43/2009 of four dominant defence companies in the EU: BAE Systems and EADS (now Airbus), Finmeccanica (now Leonardo) and Thales. After the 2000s however this consolidation trend slowed, and firms adjusted to the acquisitions of the late 1990s. An attempted merger between EADS and BAE Systems failed in 2012 due to Germany's opposition. Thus the same big four dominated in 2007 immediately prior to approval of the ICT Directive and now in 2020.

[9] B. Schmitt (2003). “The European Union and Armaments. Getting the bigger ban for the Euro”. *EUISS Chaillot Paper* (63). Paris: European Union Institute for Security Studies (EUISS). Available online at: https://www.peacepalacelibrary.nl/ebooks/files/chai63e.pdfo (last accessed 19 December 2018).

Figure 1.1 The process of concentration of the European defence industry




*Source:* L. Mampaey (2008). “Il sistema militare industriale.” In: C. Bonaiuti and A. Lodovisi (Eds.) *L'industria militare e la difesa europea*. Milano: Jaca Book, p. 35

As a consequence of this integration and the growing number of coproductions, EU firms worked together and started to push their demand for a harmonisation of MS regulations on arms export control and transparency. In fact, according to the defence companies, different arms transfers control regulations and different operational requirements among MS hampered cooperation considered essential for the survival of the EU defence base. Thus, they asked to establish a European defence market of sufficient size that would harmonise acquisition procedures and operational requirements.

Defence companies enjoyed the role of first mover in this process. They were able to analyse the situation (promoting and carrying out studies on the European defence industry), quickly organise transnationally, speak with one voice, and place their demands in a wider political and economics narrative. These tasks were facilitated by the ability that the strongest defence companies had already developed at the national level in networking and lobbying.

In fact, in the Eighties there were already three associations of defence companies, revolving mainly around the aerospace sector, which is the most integrated sector: AECMA (European Association of Aerospace Industries), EDIG (European Defence

Industries Group) and EUROSPACE, the Association of the European Space Industry.[10] In 2004 these associations merged as ASD, the Aerospace and Defence Industries Association of Europe, with the purpose of enhancing the competitive development of the Defence Industrial Technological base.[11] Secondly, they carried out studies and analysis of the economic and political situation for the European defence industry.

Lastly, they were able to speak with one voice at a time when MS were divided. In fact in 1994 and 1995 EDIG published two different reports which clarified the interests and objectives of defence companies with a focus on the simplification of intra-Community transfer and common defence procurement[12].

EDIG proposed the reduction or even elimination of national controls and authorisation procedures with regard to the exchange of parts and components between industries participating in collaborative programmes, and in favour of harmonising national arms export regulations. “The free exchange of parts and components in the framework of collaborative programmes is hindered by the existence of diverse national legislations with complex authorization and control systems. This has the effect of slowing down the production process and has a negative effect on the competitiveness of the European industries.” [13] For this purpose, the demand was for a clear distinction between intra and extra European trade. With regard to the first, EDIG asked for an inter-state agreement on the removal of all restrictions.

Secondly, for exports to third countries they demanded a common European arms export regulation. Considering the difficulties and time necessary to reach this ambitious aim, companies pragmatically asked that in the meantime MS adopt the principle of delegation to the partner country in case of export outside the European boundaries, extending the mutual recognition principle (with some corrections) to the arms transfers field as well.

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10 The European Defence Industries Group, EDIG for short, set up in Brussels in 1990 as an International Association under Belgian Law, draws its membership from all the national defence industry associations of the Western European Armaments Group nations.

11 Unisys (2005). *Intra-Community transfers of Defence Products*. Final report of the study “Assessment of Community initiatives related to intra-community transfers of defence products” carried out by Unisys for the European Commission

12 European Defence Industries Group (EDIG) (1995). *The European defence industry: an agenda item for the 1996 InterGovernmental Conference* (Memorandum, 30 May 1995). Brussels: EDIG, p. 11; EDIG (1994). *EDIG policy paper on conventional defence equipment export* (Reference EPP/94/07, 13 Jan. 1994). Brussels: EDIG, p. 1.

13 EDIG (1995), p. 11.

Thirdly, abandoning the liberal perspective they had adopted for arms transfers, the companies asked the EU to increase military expenditures and investments in research and development in military fields, in order to close the gap with the United States and to gain sufficient economies of scale able to guarantee independent European production. Lastly, they asked for government support to export defence equipment that could take a variety of forms: political, military and financial. At the intergovernmental level they proposed creating a European Export Support Office tasked to support European arms exports towards third markets. However, despite their lobbying power, the reality was that there have always been clear differences between the interests of the most integrated and strongest firms and small, often still nationally based, suppliers.[14]

Since the early proposal of Defence Companies in 1995 which put forth some of the core themes of the EU Commission and main features of Directive 2009/43/EC, defence companies and especially the big four have been involved intensively in EU Commission activities and studies, such as: the 2002 European Advisory Group on Aerospace, participation in the 2004 Group of Personalities on Security Research, and the most recent Group of Personalities, established in 2015, to advise the Commission on establishing a Preparatory Action on Common Security and Defence Policy (CSDP)-related research.[15] Similarly many defence company representatives have been invited to the European Defence Agency annual conference, totalling 230 representatives of European Defence companies in 2019.[16] Overall, the four biggest defence companies have been actively involved in EU institutional initiatives towards creating a CSDP.

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14 J. Mawdsley (2008a).”European union armaments policy: options for small states?”, *European security*, 17(2-3): 367-385.

15 In 2015, the European Commission invited key personalities from European industry, government, the European Parliament and academia to advise it on establishing a Preparatory Action on Common Security and Defence Policy (CSDP)-related research. The primary mission of this Group of Personalities was to help establish recommendations for a long-term vision for EU-funded CSDP-related research which can boost European defence cooperation. The group published its final report in March 2016 explicitly endorsing the establishment of a Pilot Project and Preparatory Action on military research (currently running with a €90 million budget until 2020) and setting out proposals on "the next steps" - likely to be a multi-billion euro European Defence Research Programme to run, initially, between 2021 and 2027. A. D. James (2018). “Policy Entrepreneurship and Agenda Setting: Comparing and Contrasting the Origins of the European Research Programmes for Security and Defense”, in N. Karampekios**,** I. Oikonomou**,** E. Carayannis, (Eds.). *The Emergence of EU Defense Research Policy: from innovation to Militarization*, Berlin: Springer. pp. 15-43.

16 EDA website, *Information on the annual conference,* available online at https://eda-ac19.b2match.io/page-611 (last accessed 14 October 2019).

### *4.2 The role of non-governmental organisations*

Peace organisations and NGOs (non-governmental organisations) on arms control and transparency can be subdivided into two main groups: the first aims to stop arms trade and arms production completely (European Network Against Arms Trade); the second aims to regulate arms trade, and focuses especially on human rights, conflict prevention and promoting development (Bruxelles Group, Iansa, Controlarms). There are about thirty NGOs in Europe specialising in the complex theme of arms control, but there are also hundreds of other organisations dealing with similar subjects, such as the peaceful settlement of disputes, civilian defence, human rights, developments and so on (Amnesty International, Basic, Oxfam).

These organisations started to collaborate at the European level during the 1990s, playing an important role in promoting and approving the Code of Conduct on Arms exports in 1992 and 1998. The Code of Conduct empowered the newly formed NGO networks and organizations which used it as a focal point for their activities. In particular, by identifying the worrying gaps between common aspirations (as expressed in the preamble of the Code) and the sobering reality, NGOs increased their leverage on states.

The main institutional interlocutor at the European level is the Parliament, but there are also links developed with the Council, and informal annual meetings of a specific Committee dealing with conventional arms (Council Working Party on Conventional Arms Exports). Networks with the Commission have not been developed yet, except sporadically. This is also due to the fact that European arms exports is still under the CFSP framework and the Commission has only recently started to legislate the internal arms market (with the exceptions that will be explained in detail in the second part of this section). As a consequence NGOs did not benefit from consistent funds from the Commission, as opposed to what happened, for example, to environmental associations[17]. This has contributed to further widening the gap of resources between the two main groups of private, non-state actors, associations and companies (and the gap between representation of general and particular interests at the European level).

17 M. A. Pollack (1997). “Representing diffuse interests in EC policy-making”. *Journal of European Public Policy*, 4(4): 572-590.

### *4.3 The role of the European Court of Justice*

Article 346 of the Treaty on the Functioning of the European Union removes arms exports policy from common European regulation. In particular it envisages that:

1. The provisions of this Treaty shall not preclude the application of the following rules:

(a) No MS shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) Any MS 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, however, adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

This article has never been amended. For a long time it has been interpreted widely by MS as excluding the defence sector from the whole EU law. However, the European Court of Justice with thirteen decisions has offered a new interpretation of Article 346, expanding the EU law domain .[18]

In a nutshell the guidelines which emerged from the decisions of the European Court of justice can be summarised as follows:

Article 346 (formerly 223 of the Treaty of Rome and then 296 of the Treaty of the European Union) is no longer an automatic exclusion from the EU law. On the contrary "it is just one of the Treaty-based derogations which deal with exceptional and clearly defined cases which must be interpreted strictly." [19]

Article 346 can be invoked by MS only if their essential security interests are at stake. The European Court of Justice (ECJ) has specified: "It is for MS to prove that the

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18 European Court of Justice (1999). *Judgment of the Court (Sixth Chamber) of 16 September 1999* (Commission of the European Communities v Kingdom of Spain, Case C-414/97). Luxembourg: ECJ, p. 417. This interpretation was reiterated in Commission, Interpretative Communication on the Application of Article 296 of the Treaty in the field of defence procurement COM(2006)779 final. This position has been confirmed and further refined in subsequent judgments, including for example: the *Agusta* judgments. See European Court of Justice (2008b). *Judgment of the Court (Grand Chamber) of 8 April 2008* (Commission of the European Communities v Italian Republic. Case C-337/05 p. 203); and European Court of Justice (2008a). *Judgment of the Court (Second Chamber) of 2 October 2008* (Commission of the European Communities v Italian Republic. Case C-157/06). Luxembourg: ECJ, p.530.

19 V. Randazzo, (2014), "Article 346 and the qualified application of EU law to defence". *EUISS Brief* No. 42: 2.Available online at: http://www.iss.europa.eu/uploads/media/Brief_22_Article_346.pdf (last accessed 1 April 2019).

measures they take are necessary in order to protect their essential security interests, and that such an objective cannot be achieved through less restrictive means. In doing so, MS have first to identify the 'essential security interests' they intend to protect. Hence, MS must make a credible case that the interest at stake is a security (not an economic) one, and that it can be defined as essential."[20] On this issue, MS do, in fact, enjoy a margin of discretion: neither the Commission, nor the Court of Justice, nor national courts would second-guess the MS choices in identifying their security interests or in qualifying them as essential.

Secondly, Article 346 can be invoked only where specific conditions are fulfilled: the first concerns the material scope, i.e. what type of product is covered; the second is about the *necessity* and *proportionality* of the MS's specific measure for the protection of its essential security interests.

This evolving interpretation of the Court has dramatically enlarged the field of application of the European law, moving from a whole exception, to the exemption from European law, only when the essential interests of state security are at stake. In this trajectory the Court has been influenced by the Commission. According to Koutrakos: "In this vein it is worth pointing out that the Communication on the application of Article 346 TFEU also features in the subsequent judgements of the court. There emerges, therefore a direct interaction between these institutions based on a shared understanding of this wholly exceptional provision. While the Commission's initiative does not bind the Court, it signalled a shift in its enforcement approach which enabled the latter to respond and apply in the manner examined in the previous sections." [21] According to the European Commission "the internal market principles will finally apply in sectors which have been traditionally excluded from community law." [22] These interpretations have been the basis to change perspective from analysing the intra-Community transfers as a foreign policy issue to an internal market perspective, starting to consider, in principle, defence goods like other civil goods. This was the legal terrain from which the Directive originated.

20 *Ibidem*, p. 3.
21 P. Koutrakos (2013). *The EU Common Security and Defence Policy.* Oxford: Oxford University Press, p. 269.
22 European Commission (2009), *Press release*, 25 August 2009. Available online at http://europa.eu/rapid/press-release_IP-09-1250_en.htm?locale=en (last accessed 20 October 2018).

Figure 1.2 The expansion of the domain of the EU law in the armaments field as a consequence of ECJ decisions.

| | **Arms transfers (imports and exports within the EU)** | | **Arms exports to third countries** |
|---|---|---|---|
| | | Essential security interest | |
| **Before 1999** | Outside the EU Law | | |
| **After 2004** | Under the EU Law | Outside the EU law | |

### *4.4 The role of the European Commission*

Despite the limits of Article 346, the role of the Commission in the field of arms production restructuring and indirectly of arms transfers, at least within EU boundaries, has been particularly active and dynamic. Starting in the Nineties, this institution has been able to create the terrain in order to legislate even in areas that were traditional domains of the nation state, both indirectly, by stimulating for example the judicial interpretation of the ECJ of the primary law, and directly by creating secondary legislation in this field.

The Commission has used all the instruments at its disposal ranging from communications, infringements procedures, preparatory actions, impact assessment procedures, creating groups of politicians, academics, think tankers and CEOs from defence industries, called “Group of Personalities on defence research” who are able to make recommendations for the defence field, reframing the issue, activating the ECJ, and using its agenda-setting power. The following are the most important documents concerning intra-Community transfers which led in the end to the approval of the ICT Directive which is at the core of the analysis.

The activism of the Commission in the defence and military sector starts with two Communications in 1996 and 1997 and an action plan “with the aim to facilitate the development of cooperation in the defence industry sector”.[23]

23 European Commission (1996). *Communication from the Commission. The Challenges facing the European Defence-related Industry, a Contribution for Action at European level* (COM (96)10, final),

The Communication of 1996 had already put on the table all the key themes which would be articulated in the following years: the necessity of a restrictive interpretation of Article 223 of the Treaty of Rome for intra-Community transfers, the need to reduce internal barriers for transfers of defence material within EU boundaries and to export the aspiration for a unique regulation, and if this was not possible, to introduce other forms of mutual recognition. There is also reference to the progressive overlapping between civil and military research as a requisite for opening funds for research firstly in the dual-use and then military sectors.[24]

All these proposals are preceded by a description of the dramatic situation which the defence industry experienced after the collapse of bipolarism, their reaction based on integration and internationalisation and the necessity to eliminate those national barriers that hamper intra-Community transfers.

On December 4, 1997 the Commission published a Communication entitled Implementing European Union Strategy on Defence-Related Industries that defined, for the first time, a real strategy for intervention in the military sector.[25] This Communication is considered the first "comprehensive approach to the restructuring and consolidation of the defence industries of the MS, based on an assessment of the economic problems and challenges facing their fragmented state in an increasingly globalised market."[26]

The Communication set up an action plan that identifies the final objectives of the efforts of the EU in the area:

- strengthen the competitiveness of the European defence industry;
- preserve the Defence Technological and Industrial Base;
- favour the integration of European Defence Technological and Industrial Base in the general economy to avoid duplication of efforts between the civil and the military areas;
- create the necessary preconditions for a European Security and Defence Identity.

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Brussels Commission of the European Communities; European Commission (1997). *Communication from the Commission to the Council and the European Parliament, the economic and Social Committee and the Committee of the Regions. Implementing European Union strategy on defence-related industries* (COM (97)583, final). Brussels: Commission of the European Communities.

24 European Commission (1996), *ibidem.*

25 European Commission (1997). *Implementing European Union Strategy on Defence Related Industries* (91 COM (97) 583 final, adopted on 12/11/1997). Brussels: European Commission.

26 See Koutrakos (2013) and European Commission (1996).

The document also dealt with public procurement standardisation and technical harmonisation, competition policy, structural funds, export policies, and import duties on military equipment.

The second important step is represented by the Communication of 2003 “Towards an EU Defence Equipment Policy” in which the Commission reiterated the need for a coherent cross-pillar approach to the legal regulation of defence industries with special emphasis on standardisation, intra-Community transfers, competition, procurement, exports of dual use goods, and funds for security research.[27] More importantly the Commission envisaged the possibility of a legal initiative in this field and planned an impact assessment to evaluate the reliability of this kind of initiative.[28]

In particular, regarding intra-Community transfers, the Commission stated that “a simplified licence system could help to reduce the heavy administrative procedures, which impede the circulation of components of defence equipment between EU countries.” [29] The Commission proposed launching an impact assessment study and starting to elaborate the appropriate legal instruments.

In 2003 a Green Paper on defence procurement and future initiatives was published. Despite focusing primarily on procurement, it represents an important turning point because for the first time it was worked on by the DG (Directorate General) Internal Market and Financial Services instead of as previously by the DG External Relations.[30] The reframing of the issue is extremely important because arms transfers (within the EU) became an internal market issue, and as a consequence, subject to the rule of the internal market, albeit of course with the exception of Article 346. This passage has been favoured by ECJ decisions reducing the field of application of Article 346. This enables EU law to intervene in harmonising relevant national laws for the establishment and functioning of the internal market.[31] Defence goods are assimilated

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27 European Commission (2003). *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. European Defence-Industrial and market issues. Towards an EU Defence Equipment Policy* (COM (2003)113, final). Brussels: European Commission.

28 *Ibidem.*

29 *Ibidem,* p.3.

30 European Commission (2004). *Green Paper. Defence Procurement* (COM (2004)608, final). Brussels: European Commission; European Commission (2005). *Communication from the Commission to the European Parliament to the Council and the European Parliament on the results of the consultation launched by the Green Paper on Defence Procurement and on the future of Commission initiatives* (COM (2005)626, final). Brussels: European Commission; J. Strikwerda (2017). “Sovereignty at stake? The European Commission's proposal for a Defence and Security Procurement Directive”. *European Security*, *26*(1): 19-36.

31 M. Trybus, & L. R. Butler, (2017). “The internal market and national security: Transposition, impact and reform of the EU Directive on Intra-Community transfers of Defence Products”. *Common Market Law Review,* 54(2):408.

to all other civil goods. And MS are legally and normatively linked to the internal market rules, despite the relevant exceptions envisaged in Article 346.

In 2005 the EU Commission promoted a study aimed at analysing the nature of legal and administrative obstacles to intra-Community transfers of military equipment and to delineate possible measures to facilitate such transfers with a view to increasing the efficiency of the internal market. This study was carried out by Unisys.[32] In the same year, after the Commission promoted a online consultation with stakeholders concerning the EU Directive, companies and non-governmental organisations uploaded their observations on the possibility of introducing general and global licences.[33]

In December 2006, the Commission adopted the *Interpretative Communication on the application of Article 296 [then 346 TFEU] of the Treaty in the field of defence procurement*. Its objective is to prevent possible misinterpretation and misuse of Article 296 in the field of defence procurement, and give contract-awarding authorities some guidance for their assessment whether the use of the exemption is justified. The thrust of the Commission's initiative is that both the field and the conditions of application of Article 296 must be interpreted in a restrictive way.[34] Despite the fact that the communication was not legally binding, the Commission explained that it has the power to assess whether the conditions for applying Article 296 are fulfilled and consequently if it may bring infringement actions against non-compliant MS.

Its main features can be summarized as follows:

1. The scope of the exception is sufficiently wide to cover not only the goods on the military list, but also services and works directly related to the list of goods. However it does not cover dual use goods.
2. Regarding the conditions of application, if it is the prerogative of the MS to define its essential security interest, this interest cannot be of an economic or industrial nature.
3. Regarding the role of the Commission, it is not for the Commission to assess the essential security interests of MS, nor which military equipment they procure

32 Unisys (2005). *Intra-Community transfers of Defence Products*. Final report of the study "Assessment of Community initiatives related to intra-community transfers of defence products" carried out by Unisys for the European Commission.
33 S. Depauw (2008), "The European Defence Package: Towards a liberalization and harmonization of the European defence market", *Background Note, Brussels*: Flemish Peace Institute, 7 April 2008.
34 Koutrakos (2013).

to protect those interests. However, as guardian of the Treaty, the Commission may verify whether the conditions for exempting procurement contracts on the basis of Article [346 TFEU] are fulfilled.

4. Concerning the burden of evidence, when the Commission investigates a defence procurement case, it is for the MS concerned to furnish evidence that its essential interests are at stake.[35]

In conclusion, according to Koutrakos, "In this vein, it is worth pointing out that the Communication on the application of Article 346 TFEU also features in the subsequent judgments of the Court. There emerges, therefore, a direct interaction between these institutions based on a shared understanding of this wholly exceptional provision. While the Commission's initiative does not bind the Court, it signalled a shift in its enforcement approach[..]".[36] Furthermore, after the reframing of armament issue within the DG Internal Market, this communication represents another important step in binding MS towards both the legal and unwritten rules of the internal market. The Commission warned MS that, as guardian of the Treaty, it may verify whether the conditions for exempting procurement contracts are fulfilled, and thus it can stimulate integration by law, albeit with some relevant limits, also in the field of procurement and intra-Community transfers.

On 5 December 2007, the European Commission submitted the so-called "*Defence Package*", setting out a set of proposals aimed at strengthening the competitiveness of the defence industry, including a Communication "*A strategy for a stronger and more competitive European defence industry*" and two Directive proposals.[37] The first Directive deals with defence procurement. The second one relates to simplifying terms and conditions of transfers of defence-related products within the Community.[38] Thus in a single package deal the Commission includes both defence procurement and an intra-Community transfer directives proposal (which had created suspicion from MS and from some companies). The defence package represents the most important

35 *Ibidem.*
36 *Ibidem*, p. 93.
37 European Commission (2007a). *Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community* (hereinafter "Impact Assessment", SEC(2007)1593). Brussels: European Commission.
38 European Commission (2007b). *Proposal for a Directive on simplifying terms and conditions of transfers of defence-related products within the Community* (COM(2007)765 final). Brussels: European Commission.

output of the Commission in the armaments field. It aims to improve the functioning of the European defence market.

## 5. The Directive's aims, boundaries and content

### *5.1 Aims and boundaries of the Directive: a change in perspective*

Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence-related products within the Community was adopted on 6 May 2009.[39] The deadlines for MS were 30 June 2011 to adopt the laws, regulations and administrative provisions necessary to comply with the Directive, and 30 June 2012 to enter these provisions into force. Considering the high degree of misfit between the spirit and letter of the Directive, and some prescriptive MS regulations based on individual licences and *ex ante* controls, the transposition period was quite long for some MS, but at the end of the second deadline all MS had adopted and entered the Directive into force. In this section the Directive is outlined briefly as the focus in the thesis is on its transposition at the domestic level. [40]

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39 European Union (2009). *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* [2009] *O.J. L146/1*.

40 For an exhaustive legal analysis of the ICT Directive and the legal context of EU Common Security and Defence Policy, see Trybus & Butler (2017): 403-441 and Koutrakos (2013). For analysis of the legal text and political debate around the ICT Directive see F. Liberti, S. Matelly & J.P. Maulny, (2010). *Pratiques communautaires internes de contrôle des exportations et des transferts intracommunautaires de produits de defense*. Paris: Institut de relations internationales et stratégiques, available at https://www.defense.gouv.fr/content/download/104465/1019134/EPS2009_pratiques_communautaires.pdf (last accessed 14 January 2020); H. Masson, L. Marta, P. Leger & M. Lundmark (2010). "The Transfer Directive: Perceptions in European Countries and Recommendations". *Fondation pour la Recherche Stratégique Recherches & Documents,* No. 4. Available online at: https://www.files.ethz.ch/isn/119430/ RD_201004.pdf (last accessed 18 October 2018); L. Mampaey and M. Tudosia (2008). "Le Paquet défense de la Commission Européenne. Un pas risqué vers le marché européen de l'armement»*, Note D'Analyse du GRIP*, 25 June 2008. For impact assessments and studies on the implementation of the Directive, see the following: L. Mampaey, V. Moreau, Y. Quéau and J. Seniora (2014). *Study on the Implementation of Directive 2009/43/EC on Transfers of Defence-Related Products* Brussels: Groupe de Recherche et d'information sur la paixet la securite. Available online at: http://www.grip. org/en/node/1421 (last accessed: 10 May 2016); H. Masson, K. Martin, Y. Quéau & J. Seniora, (2015). *The Impact of the 'Defence Package' Directives on European Defence*. Study for the European Parliament (Brussels: European Parliament). Available online at: http://www.europarl.europa.eu/RegData/etudes/STUD/2015/549044/EXPO_STU(2015)549044_EN.pdf (last accessed 18 October 2018); European Commission, Evaluation of Directive 2009/43/EC on the Transfers of defence-related products within the Community Final Report (prepared by Technopolis) June 2016. P. Sartori, A.Marrone and P. Sartori, A. Marrone & M. Nones (2018). "Looking Through the Fog of Brexit: Scenarios and Implications for the European Defence Industry". *Documenti IAI* (18): 2-76.

The purpose of the Directive is to reduce the administrative burden in intra-Community transfers of defence material. According to Article 1.1 the aim of the Directive is to simplify the rules and procedures of intra-Community transfers.

In principle, with this Directive defence goods are considered like other goods and "the rule on intra-Union transfers and on public procurement are adopted on the basis of the Union's market internal power".[41] The ICT was adopted under Article 114 TFEU which enables EU legislation to harmonise relevant national laws for the establishment and functioning of the Internal Market.[42]

This point of departure reflects an important change in perspective, a reframing of the issue with a new approach to the armaments field. The starting point is no longer represented by foreign and security policy approaches but by an EU internal market approach. The DG of reference is Internal Market, Industry, Entrepreneurship and SMEs. This new perspective is a way to circumvent MS opposition towards a supranational intervention in a core state power like armaments. This procedure presents analogies with the dynamics of penetration by law which has characterised other fields such as telecommunications or the health care sector.[43] This change in approach is also important because it implies a change in the consequential order between political and economic variables. It exchanges principles, with exception. Now the principle is the free movement of defence goods (with a series of limits), and all political and constitutional principles and bans regulating arms export become the exception.

This leads to the first limit of the Directive, which regulates only intra-Community transfers and not exports to third countries. According to Article 1.2, the Directive does not affect the discretion of MS as regards policy on the export of defence-related products. Arms exports to non-European countries shall be considered an intergovernmental issue which falls under Chapter 5 of the TFEU, in the framework of a Common Foreign and Security Policy: "While the rule on intra-union transfers and on public procurement are adopted on the basis of the Union's market internal power, the rules on exports of armaments are set out in a measure adopted within the Common Foreign and Security Policy framework."[44]

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41 Koutrakos (2013), p.223.
42 Trybus and Butler (2017): 403-441.
43J. H. H. Weiler. (1991). "The Transformation of Europe". *The Yale Law Journal*, Vol. 100, No. 8, Symposium: International Law, (June): 2403-2483.
44 Koutrakos (2013), p. 234.

In compliance with this limit, the Directive introduces the fundamental distinction between transfers and exports. “Assuming that the risks of exporting defence-related goods within the European Union is low or simply non-existent, the newly established regulatory framework seeks to reduce the administrative burdens for defence firms and national authorities arising from the lack of coordination between the export control regimes of MS.”[45]

Secondly, even within the EU boundaries the Directive has two further important exceptions concerning intra-Community transfers, which are linked to the sensitivity of the defence goods and that makes it impossible to create an internal free market of armament *sic et simpliciter* (see Art.1.3). The first limit is represented by Article 346 which originally *de facto* exempted defence matter from EU regulation, but since 1999, in line with the ECJ decisions and the interpretation of the Commission, it has been interpreted in a restrictive way, thus to be invoked only if the security of the MS is at stake. This limit is absolute and implies a total exemption from ECJ jurisdiction.

The second limit is represented by Article 36 of the TFEU which includes all the exceptions to the free market rules, envisaging the possibility to derogate to the prohibitions or restrictions on exports, imports and transit on the basis of public security reasons. According to this article, the fundamental rights of free movement of goods within EU borders “shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on the grounds of public morality, public policy or public security, protection of health and life of humans, animal and plants, the protection of national treasures with artistic, historic or archaeological value, the protection of industrial property."[46] Article 36, which condenses history of law and entire parts of national constitutions into a few words, is extremely important and also refers to public security, thus representing the third important exception to the Directive. In this case the exemption for the EU law is partial, because it does not concern ECJ jurisdiction.

Therefore, the direct application of the free movement principles alone is insufficient to remove national restrictions in light of their potential to be justified under Article 36 or

45 M. Trybus (2014). *Buying Defence and Security in Europe: the EU Defence and Security Procurement Directive in Context*, Cambridge: CUP; p. 1 and D. Fiott (2017).”Patriotism, Preferences and Serendipity: Understanding the Adoption of the Defence Transfers Directive”. *Journal of Common Market Studies*, 55(5): 1045-1061.

46 Article 36 of the Treaty on the Functioning of the European Union.

346 of the TFEU.[47] Thus “licences albeit in a simplified form must subsist”[48]. In other words, Directive 43/2009 recognizes the reality that licensing measures remain, in principle, justifiable on public security and/or essential national security grounds in exceptional circumstances.

### *5.2 The content of the Directive in a nutshell*

In a nutshell, Directive 2009/43/EC firstly introduces a basic distinction between intra-Community transfers and exports to non-EU countries.
Secondly it envisages new, very simplified types of export licences - the general licences and global licences, to be used for arms intra-Community transfers within European borders with reliable partners. Thirdly, it foresees a new certification system for companies, aimed at establishing trustworthy relations among European partners and governments dealing with certified companies. The system of *ex ante* control tends to be replaced with *ex post* controls, founded upon inspections carried out by the authorities. This way it tends to move responsibility for export controls from the state to the companies, whose reliability should have been verified by a certification. Lastly, for intra-Community transfers, it introduces a system of *ex post* controls founded upon inspections carried out by the authorities, instead of the highly complex and articulated systems of *ex ante* control which had characterized most of the domestic national regulation (particularly the more restrictive and prescriptive ones).
Though the Directive was aimed at regulating only the intra-European exchanges, it can have a relevant impact not only on the traceability of internal transfers of spare parts and components, and thus on internal security, but also on extra-European exports, considering the fact that European MS have different regulations with varying degrees of strictness. Its outcomes are going to have a relevant impact not only on restructuring European industries and the internal arms market, but also on arms exports control and transparency, and even on the European Foreign and Security Policy.

47 *Ibidem.*
48 *Ibidem.*

### *5.2.1 General licences*

General licences are thought to make exchanging defence materials easier and to lighten administrative burdens. Instead of following complex authorization procedures for each defence material, one licence may authorize several transfers to more than one recipient. In particular, according to Article 5 of the Directive, MS shall publish general transfer licences directly granting authorisation to suppliers established on their territory, which fulfil the terms and conditions attached to the general transfer licence, to perform transfers of defence-related products, to be specified in the general transfer licence, to a category or categories of recipients located in another MS. According to Article 4.5 of the Directive, MS shall determine the terms and conditions of transfer licences for defence-related products. According to Article 5.2, the publication of general licences is mandatory in at least four circumstances: a) when the recipient is certified in accordance with the ICT's certification provisions; b) when the recipient is part of a MS's armed forces or a defence contracting authority, purchasing for the exclusive use by that MS's armed forces; c) when the transfer is made for the purposes of demonstration, evaluation or exhibition, and d) when the transfer is made for the purposes of maintenance and repair.

### *5.2.2 Global licences*

Global licences play an intermediate role between general and individual licences. They authorize one supplier to send one or more shipment to one or more specified recipients. According to Article 6 of the Directive, MS shall decide to grant global transfer licences to an individual supplier, at its request, authorising transfers of defence-related products to recipients in one or more EU countries. MS shall determine in each global transfer licence the defence-related products or categories of products covered by the global transfer licence and the authorised recipients or category of recipients. A global transfer licence shall be granted for a period of three years, which may be renewed by the MS. MS may define all conditions for the release of transfer licences. Some MS with stricter legislation have detailed the defence material to be exported and the maximum quantity of each kind of armament material that is permitted to be exported within the three-year period.

*5.2.3 Individual licences*

Individual licences in intra-Community transfers must be considered an exception with respect to general and global licences and shall be used only in specific and particular cases, linked to the protection of essential security interests or in exceptional cases of suspected unreliability of the recipient.

In fact, according to Article 7 of the Directive, MS shall decide to grant individual transfer licences to an individual supplier authorising one transfer of a specified quantity of specified defence-related products to be conveyed via one or several shipments to one recipient where:

(a) the request for a transfer licence is limited to one transfer;

(b) it is necessary for the protection of the essential security interests of the MS or on grounds of public policy;

(c) it is necessary for compliance with international obligations and commitments of MS; or

(d) a MS has serious reason to believe that the supplier will not be able to comply with all the terms and conditions necessary to grant it a global transfer licence.

*5.2.4 Reporting requirements*

According to Article 8 of the Directive, MS shall ensure and regularly check that suppliers keep detailed and complete records of their transfers, in accordance with the legislation in force in that MS, and shall determine the reporting requirements attached to the use of a general, global or individual transfer licence. Such records shall include commercial documents containing the following information:

(a) a description of the defence-related product and its reference under the Annex;

(b) the quantity and value of the defence-related product;

(c) the dates of transfer;

(d) the name and address of the supplier and recipient;

(e) where known, the end-use and end-user of the defence-related product;

(f) proof that the information on an export limitation attached to a transfer licence has been transmitted to the recipient of the defence-related products.

The lightening of export procedures and reduction of information required *ex ante* when a company applies for a general and global licence are counterbalanced by the information required *ex post* through the register in which companies must write all the information describing the defence-related product transferred, the quantity, value,

date, name and address of the supplier, and attach proof that the recipient of the defence materials has been informed about export restrictions.

*5.2.5 Transparency*

The Directive makes no reference to transparency nor reporting to National Parliament about defence materials transferred under general, global and individual intra-Community transfers. The only reference to a form of communication for data transparency in the Directive is laid down in point 41 in the Directive's long Preamble, according to which the Commission should regularly publish a report on the implementation of this Directive, which may be accompanied by legislative proposals where appropriate.

This lack of reference prompted strong criticism from European NGOs acting in the field of arms transparency and disarmament and among researchers from independent research institutes (see sub-section 6.3).

*5.2.6 Certification*

Certification is one of the core elements of the Directive and introduces a new approach to the system of defence transfer control. The objective of recipient certification is to establish their reliability for receiving defence-related products under a general transfer licence published in another MS. It is a confidence-building measure and a tool to reinforce *ex-post* controls. It is intended as an alternative form of controls to traditional *ex ante* controls, and as a means to reduce the risk of illicit transfers and enhance the traceability of the defence-related products transferred under a general transfer licence and mutual trust in compliance with legal requirements, paying particular attention to re-export, and quality of internal control programmes.

The Directive indicates the procedures and criteria to be followed at a national level in order to certify the reliability of a company. Paragraph 8 of Article 9 states that MS shall publish and regularly update a list of certified recipients and inform the Commission, the European Parliament and the other MS about the list.

The Commission shall make a central register of recipients certified by MS publicly available on its website.[49]

49The Commission website address is http://ec.europa.eu/growth/tools-databases/certider/index.cfm (last accessed 8 June 2019).

### *5.2.7 Re-export*

The Directive clearly states that, in compliance with the EU Treaties, the norms apply only to the internal market and do not touch the MS's discretion concerning their export policies.

In line with this distinction, Article 4.6 of the Directive states that MS shall determine all the terms and conditions of transfer licences, including any limitations on the export of defence-related products to legal or natural persons in third countries having regard, *inter alia*, to the risk for the preservation of human rights, peace, security and stability created by the transfer. MS may, whilst complying with Community law, avail themselves of the possibility to request end-use assurances, including end-user certificates, or may not.

In other words MS have full control on exports to third countries, and their foreign policy on their export policy, in accordance with the spirit and letter of the Treaty of Rome if they want, but they also have the possibility to change their national regulation in a liberal way or to transpose the vague formula of the Directive. In countries with strict regulation this might create an opportunity to soften end-user control (also encouraged by the Commission) while transposing the Directive. Each MS, on the basis of the characteristics and tradition of its national arms export control regulations, may decide whether to maintain full control or to delegate responsibility of re-export to the partner country.

The ICT applies to defence-related products (Arts. 2 and 3.1). These are set out in an Annex which must correspond to the EU Common Military List ("CML") adopted in the context of Council Common Position 2008/944/CFSP on European Arms Exports (8 December 2008)[50]

### *5.2.8 Vagueness of the Directive*

Given that the Directive treats aspects which are the domain of the nation state, such as security and foreign policy, several Articles are formulated in a vague or flexible way, leaving MS to choose how to apply them to get the best fit with their domestic regulation. In fact, firstly, terms and conditions of general licences, arms covered by general licences are left to the decision of each MS. More importantly, in cases of re-export the state may or may not include a clause to re-exports and it may or may not

50 Trybus and Butler (2017): 414.

delegate the responsibility on the final destination to the government of the European partner country in coproduction; it may or may not include an End-user certificate.
Secondly, even the process of company certification is voluntary, thus its application is left to the discretion of MS and their companies.
Lastly, the lack of reference to transparency and ways of reporting to the Parliament for the new kind of simplified licences leaves the state the possibility once again to choose in the transposition phase whether to extend transparency to the new kinds of licences or not.
In conclusion, the binding force of the Directive remains extremely limited and most crucial aspects are left to the discretion of MS. In most cases - particularly those concerning exports to third countries - the lack of prescriptiveness of the Directive is intrinsically linked to the internal market. If the Directive had taken a specific approach with regard to third countries, it would have lent itself to a legal challenge. The ambiguity and flexibility on many crucial aspects such as transparency, or delegation to the partner country in cases of re-export to third countries, or controls on end use or certification might not be not completely neutral. In fact, it transforms obligations into possibility and - if transposed *sic et simpliciter* - it may introduce a margin of ambiguity and flexibility at the domestic level as well, replacing the preceding formulation that is more and better detailed by primary law, unless a majority is able to agree on a specific disposal. Given the sensitivity of the issue, it is not always easy to come to an agreement on this. Thus, even voluntary norms may favour Europeanisation and impress a precise direction to domestic change and to the Europeanisation process.

I argue that, despite the vagueness and voluntary formulation of many parts in the Directive, its impact on the marketisation process of arms export regulation has been relevant. The transposition has led to sensitive domestic change and towards a pro-market and pro-industry arms export control model.

## 6. The reaction to the Directive

### *6.1. The reactions of MS to the Directive*

Initially MS were sceptical about the Defence Package, because it represented an important step towards the intervention of the Commission and more generally, of the EU law in a field which was considered "core" state power touching the heart of nation states, with attention to its capacity for defence and state survival.[51]

However, scepticism and a critical attitude was openly expressed by only two MS: the UK and France. These two key actors, albeit expressing very different traditions and approaches to European defence - the first one more supranational and prescriptive, the other more liberal and flexible - converged on a very similar position. They supported a European defence equipment market but preferred that it be managed at the intergovernmental level.[52]

In fact the UK - which has seen the European Union as no more than a market and which has for a long time opposed a "closer Union"- was naturally suspicious of this step which also had symbolic value. More concretely, UK government and companies feared that the Directive would have entailed new additional administrative burdens for companies compared to a national regulation which was characterised by flexibility and lightness of touch.[53] Secondly, the UK Government was worried that the Directive- which focused on simplifying intra-Community exchange- would have penalized UK commercial and political relationships with their transatlantic ally, the USA. In the UK, in fact, these simplified procedures including general and global licences, already existed and had been used both with EU countries and with some non-EU countries including both western allies like the USA and other Middle East countries such as Saudi Arabia. [54]

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51 Strikwerda (2017) and Fiott (2017).

52 Since 2004 in response to the Green Paper from the Commission in 2004, "the United Kingdom (UK) and France voiced that they saw no need for a Directive" and expressed their preference for an intergovernmental channel in which each MS could have the final say. In that period in fact British and French attitude had converged for different reasons towards the creation of EDA with a British leadership".(Strikwerda (2017): 20).

53 "A Directive would mean a burden on the already existent structure and not make the defence market more effective and efficient". See Strikwerda (2017): 27.

54 Furthermore in that period the UK had the presidency of EDA (the European Defence Agency) and this guaranteed the London government better control of this delicate subject.

The French Government was initially sceptical as well. Despite France having traditionally supported *l'Europe de la Defence* and believing that armaments cooperation must serve the cause of European Political Integration, its government was equally suspicious towards an increasing role for the Commission in this field. According to Fiott, "foremost among the French Government's demands were reservations about how far an ICT Directive would empower the European Commission". [55] Béraud-Sudreau argues that "The Directive was perceived as infringing upon national sovereignty as it opens doors to challenging licence denials at a supranational judiciary institution. [..] They were all worried that the Commission would meddle in their business." [56] Furthermore, the French Government and bureaucracies were afraid that, for the so called "principle of parallelism between internal and external power"[57], the power of the Commission on intra-Community transfers would also be extended to arms exports to third countries. As Béraud-Sudreau points out: "after having organised the free-circulation of military goods within the EU, the Commission could take competences on exports to the rest of the world."[58] Therefore, also in this case, at first national interests prevailed over the idea of a European defence and unique defence market, if it were not led and shaped by France.[59]

On the other hand, Germany, which had rigorous and strict regulation, feared that the Directive might be too liberal and flexible particularly with regard to re-exports. They were concerned that free movement within the European boundaries would have facilitated exports from the countries with the most permissive regulations in order to

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55 Fiott (2017): 9; L. Béraud-Sudreau (2014). French adaptation strategies for arms export controls since the 1990s. *Paris Paper n° 10*: 31. French Government (2010) LOI n°2011-702 du 22 juin 2011 relative au contrôle des importations et des exportations de matériels de guerre et de matériels assimilés, à la simplification des transferts des produits liés à la défense dans l'Union européenne et aux marchés de défense et de sécurité. Available online at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024228630&categorieLien=id (last accessed: 20 March 2016).

56 Béraud-Sudreau, (2014): 31, note 58.

57 According to a doctrine of implied powers developed by the European Court of Justice, and codified in the Lisbon treaty, where the treaties assign explicit powers to the EU in a particular area, it must also have similar powers to conclude agreements with non-EU countries in the same field: T. Konstadinides, (2014). "EU Foreign Policy under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitations", *European Law Review.* 39(4): 511-530.

58 Béraud-Sudreau, (2014): 33 and note 67.

59 "Free trade would be good for both the budget of the Ministry of Defence, and the SMEs in France. For France, the main concerns during these informal meetings with the Commission were the scope of the Directive. French officials had instructions to make sure that the Directive would not unnecessarily touch upon the sovereignty of the state" Strikwerda (2017): 27. According to Fiott, " foremost among the French Government's demands were reservations about how far an ICT Directive would empower the European Commission: Fiott (2017): 9.

extend exports to third markets, thus circumventing those regulations which were stricter and more rigorous.[60] This risk of congregating towards the lowest common denominator was also shared by NGOs, particularly in the first phase and for the first version of the Defence package (see sub-section 6.3). Divergently, German defence companies are reported to support the Directive which was seen as a tool to lower administrative burden and support German arms exports, enlarging the opportunities to sell in third markets.[61]

Italy, Sweden, and Spain - which were characterized by strong and integrated defence companies but at the same time had prescriptive and rigorous regulations - were overall in favour of the Directive. Sweden and Italy in part had already initiated a process of liberalisation and marketisation of their arms transfers regulation at the domestic level; they were among the six which participated together with the UK, France, Germany in the "Framework agreement" which simplified the exchange of coproduced defence equipment and all suffered from declining demand following the end of the Cold War. Thus, despite their rigorous regulations, this time the trend towards liberalisation prevailed. Worries about re-exports which could have weakened their rigorous procedures and bans were counterbalanced by the hope for advantages for their domestic companies. [62]

Italy is reported to have enthusiastically supported the Directive and even to have pushed for more harmonised regulation. [63] Some sectors of the governments, administration and companies saw in the approval of the Directive, the opportunity to completely update their national regulation in order to make domestic industry more competitive. [64] Sweden supported the Directive because its aims matched a "marketisation" process of Swedish domestic regulation and defence industrial policy

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60 According to Fiott, "the German Federal Government were concerned that the proposed Directive could weaken Germany's strict export policies and, as a consequence, supersede German law. As one German law-maker succinctly put it, the 'most important prerequisite for the implementation of Directive 2009/43/EC is […] that MS retain control of their own arms export criteria'. Berlin was unwilling to see the national export authority (BAFA) lose its oversight responsibilities. It did not want to create the undesirable situation whereby other EU MS could re-export German defence equipment to non-EU countries with suspect human rights records". Fiott (2017):8.

61 German firms were interested in offsetting decreased demand, supporting German arms exports and lowering administrative costs: Fiott (2017): 8.

62 "We believe in an open, market liberal and transparent market, because otherwise we cannot have a competitive industry in Europe that actually will be globally competitive and survive in the long run". Strikwerda (2017):27.

63 M. Nones, & L. Marta, (2007). *Il processo di integrazione del mercato della difesa europeo e le sue implicazioni per l'Italia.* Senato della Repubblica, Contributi di Istituti di ricerca specializzati (82). Dossier No 82, November 2007. Available online at: http://www.iai.it/sites/default/files/pi_a_c_082.pdf (last accessed 23 May 2019).

64 *Ibidem.*

which had already begun in preceding years[65]. The Directive was adopted under the Swedish Presidency of the EU.

Similarly for Spain the Directive was a way to introduce a "more flexible mechanism for their companies"[66] and "of boosting the competitiveness of Spanish defence firms".[67] "In Poland, government and industry generally viewed the proposed Directive as positive because it could help Polish manufacturers to export more easily to the EU market and to lower the cost burden on its national export authority." [68] Overall for all these countries patriotism and the hope of boosting and revitalising domestic companies prevailed over worries of losing control in this sensitive field and softening their national regulation.

The overall position of countries with smaller and medium defence was less enthusiastic and more suspicious.

For example, the Netherland Government on the one hand hoped that the Directive would create opportunities for domestic companies[69] and facilitate their entry into the defence market. On the other hand, they feared that the Defence Package would benefit only prime contractors and the strongest companies. Similarly, the Norwegian Government and companies shared scepticism with companies towards the Defence package and especially the procurement Directive, fearing that they might end up favouring the larger nations (e.g., Germany, the United Kingdom [UK] and France) at the expense of the smaller countries (e.g., Norway and Sweden)."[70] Likewise, the Hungarian Government thought that the ICT Directive might only favour prime contractors, major subsystems producers and integrators. Similarly Hungarian companies perceived a double standard, differentiating between small and medium companies left alone to market forces, and prime contractors, protected, hugely subsidised and supported by domestic government and by European Union institutions.[71]

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65 M. Britz, (2010). "The Role of Marketization in the Europeanization of Defense Industry Policy". *Bulletin of Science, Technology & Society,* 30 (3):176-184.

66 Fiott (2017): 7.

67 *Ibidem.*

68 *Ibidem..*

69 Strikwerda (2017): 27.

70 F. Castellacci,,A.M. Fevolden,, & M. Lundmark. (2014). "How are defence companies responding to EU defence and security market liberalization? A comparative study of Norway and Sweden". *Journal of European public policy*, 21(8):1219.

71 J. Black *et alii* (2016). *Central and Eastern European countries: measures to enhance balanced defence industry in Europe and to address barriers to defence cooperation across Europe.* Technical Annex: Country Profiles and Appendixes to the RAND's report to the European defence Agency on balanced defence industry in Europe, p.52, Available online at: https://www.eda.europa.eu/docs/default-

However, their position was basically in favour and their scepticism was expressed mainly behind closed doors. Furthermore, the two important players, France and the UK, ended up changing their minds and eventually the Directive was approved. In fact, after a while the French position towards the Directive changed and became favourable. In particular, civil servants responsible for export promotion viewed the Intra-Community transfer Directive as an opportunity to simplify control processes and convinced the new French Government of this.

Overall, France's domestic commercial interests like Italy's and Sweden's, prevailed over concerns about losing control of the final destination of coproduced goods and about the loosening of national arms export control regulations, and about the growing role of the Commission in respect to nation-states in the armament field.[72]

Similarly, between 2005 and 2006, the UK's position also changed and became favourable to the internal market Directive. The reasons for this change of attitude are difficult to gather because of often differing and conflicting declarations and they are widely explained in Chapter 6. In a nutshell, once the UK understood that the Commission had legal competence to initiate a legislative process and that this process could not be blocked, the UK Government tried to influence the process. British representatives at the EU tried to shape the content of the Directive, and they were successful. As the then UK Secretary of State for Defence, Desmond Browne, reported: "we did not agree with the early proposals. We argued for a set of proposals which were much more akin to the scheme that we have in this country". [73] Indeed, the Commission realized during the negotiations that the Germany–UK 'three-tier' system offered an efficient blueprint for the proposed EU regime.[74] In the end they agreed because *de facto* the Commission promoted the British German export model and because the administrative burden was eased given that the certification process was

source/documents/rr-1459-eda-central-and-eastern-europe-report---technical-annex---final.pdf (last accessed 18 March 2019).

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72 However there are also other explanations for the change of attitude of the French Government. For example according to another interview with a representative of the Defence Ministry carried out by Beraud-Sudreau, the main variable that determined the French Government's change in attitude was the reframing of the issue from one of external relations to an internal market that "bound" the French Government to adhere to it: "at first, French authorities were rather against the ICT Directive. For the people responsible for export controls, this had to do with the core of what can't become supranational. […] But the Commission came with a package presented as "internal market". […] This way the Commission managed to convince the Ministry of Foreign Affairs […]."Béraud-Sudreau, 2014:32, note 60.

73 Fiott (2017).

74 Liberti *et alii* (2010), p. 6.

not obligatory but voluntary. As a consequence the Directive on intra-Community transfers was adopted on 6 May 2009.

### *6.2 The reaction of defence companies to the Directive*

Defence companies (in particular prime contractors and big associations of defence companies) were overall in favour of the ICT Directive mainly because it met most of the requests that they had advanced in preceding years. In fact, as explained before, EDIG, the European Defence Industries Group, had presented two documents in 1994/5 in which companies complained about the fragmentation of the European armaments market which penalized the competitiveness of the European arms industry and addressed three main proposals:

1) The supply of defence equipment to European Governments and the sale of components and subsystems to European exporting companies should be unrestricted;
2) Until a European export policy outside Europe has been agreed upon and a European authority has been given the responsibility to apply it, such sales of European defence equipment towards third countries should be controlled by the nation of the exporting companies.
3) Lastly they asked for financial, political and military support from MS to export to third countries. [75]

The Directive 43/2009 distinguished between intra-Community transfers and exports and included two of the three points enshrined in the document elaborated by the companies 14 years before. Furthermore, in its preamble the Directive 43/2009 adopts a similar narrative to that elaborated by the EDIG group.

As a consequence, European defence companies (particularly prime contractors and their associations) supported the Directive. This positive attitude is confirmed by the documentation on the consultation undertaken by the Commission for the Directive and by a study commissioned by the Commission in 2005 carried out by Unisys. [76]

75 European Defence Industries Group (1994 and 1995).
76 Unisys (2005); European Commission (2007c). *Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community*. Commission Staff Working document SEC(2007)1593. Brussels: European Commission, p. 87.

According to Depauw, the preceding consultations between the Commission and the European defence industry showed that the Commission's initiative was received positively by the defence industry, who saw a significant need for harmonisation of the defence market and a simplification of the licensing system in the European Union. [77] The defence companies also contributed to shaping the Directive: "The certification of companies which is introduced in the proposed Directive to offset this as a confidence-building measure was actually an industry proposal."[78]

The position of the strongest companies and their associations read harmonisation in the arms export control field in more liberal terms than supranational. They prioritised the reduction or even elimination of national controls for intra-Community transfers (interpreted as measures having the equivalent effect to quantitative restrictions) and the opportunities for enlarging export to third markets with respect to supranational management of the European arms market.[79] And in line with this interpretation, companies blocked the proposal to create a database able to follow and monitor in real time the *passage* of all parts and components of co-produced defence material moved within EU boundaries.[80]

The final version of the Directive is less liberal than what was requested by companies both in the formulation of general licences and global licences, and in re-exports because it does not simply delegate the responsibility of export to the partner country but leaves it to the MS to decide whether or not to apply conditions on re-exports. But overall the spirit and narrative/approach are similar and the attitude of the defence companies is broadly favourable to the Directive.

However, the group of companies is not homogeneous in terms of aims and interests: fractures exist according to the state where they have their headquarters, sectors, more (aeronautic) or less (naval) integrated, and their place in the supply chain. The most important fracture is between a few big prime contractors and a myriad of small-sized and medium-sized companies which supply the prime contractors. These latter companies were more sceptical towards the Defence Package, showing indifference towards the ICT Directive and criticism towards the other twin Directives on Defence

77 Depauw (2008): 11.
78 *Ibidem.*
79 Thus, harmonisation in the arms export field, is mainly intended by companies to be in terms of liberalisation and negative integration, and less in term of positive integration. "Onerous licensing requirements are seen as measures having equivalent effect to quantitative restrictions according to Article 35 TFEU" that is as obstacle to free trade. Trybus and Butler (2017): 409. Licensing measures remain justifiable only as an exception under Article 36 and Article 346 of the TFEU.
80 Depauw (2008):11.

Procurement. They feared that the Defence Package would benefit only prime contractors. [81]

### *6.3 The reaction of non-governmental organisations and civil society associations dealing with arms control and disarmament*

On the contrary, NGOs and associations working on arms transfers control and human rights were very critical towards the Directive on intra-Community transfers. They started from a different narrative which did not focus only on the synergies between strengthening the defence industrial base and creating a Europe of Defence, and a Common Security and Defence Policy. They highlighted the contrast between the economic and political dimensions, and the risks that the latter dimension would be subordinate to the first one.

The perspective of NGOs is well summarised by Luc Mampaey in a note referring to the first version of the Directive: “By privileging a market approach which completely ignores the foreign policy and geopolitics aspect of the arms trade and without a harmonised and legally binding instrument for controlling arms export, the Defence Package threatens to reduce the European policy on arms export to its lowest common denominator, implying a serious setback in terms of transparency, which in turn would increase the risk of unwanted re-exportation of arms towards third countries.”[82]

The proposal for a Directive simplifying transfers of defence-related products in the Community raised three main points of concern that were considered incompatible with the progress made in the area of transparency and democratic control achieved after ten years of operation of the mechanisms established by the EU Code of Conduct on Arms Exports (adopted on 8 June 1998). [83]

The main points of friction were: [84]

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81 J. Mawdsley (2002), “The Gap between Rhetoric and Reality: Weapons Acquisition and ESDP” Bonn, Germany: Bonn International Center for Conversion, *BICC Papers,* 26 ; Castellacci *et alii* (2014); Mampaey *et alii* (2014).
82 Mampaey and Tudosia (2008): 1.
83 ENAAT (European Network Against Arms Trade) (2016b). *Why the EU should not subsidy military research*. ENAAT Position Paper on the proposal of Preparatory action on Defence research. Available online at http://enaat.org/wp-content/uploads/2016/09/ENAAT-Position-on-Defence-research-PA_FINAL.pdf (last accessed 7 October 2019); Mampaey and Tudosia (2008).
84 *Ibidem.*

Risks of unwanted re-exports: despite the Directive leaving the possibility for MS to introduce limits to re-exports, according to the representatives of NGOs it is likely that MS will not use this opportunity and tend to leave the final say to the government of the country where the assembling and exporting co-producing company is located. Thus, according to them, the principle of global or general licences would make it easy for a company that considers its domestic regulation too restrictive, to send the equipment first to a subsidiary located in a MS deemed to be more conciliatory, less restrictive and to export from that country. The harmonisation of European arms export policy would thus be reduced to its lowest common denominator.[85]

Enterprise certification: NGOs expressed criticism around the growing responsibility of the companies in managing and reporting back data on arms exports, particularly with attention to maintaining the registers on arms exports and the certification procedures. "In their view companies cannot be expected to subordinate company interests to the protection of peace and security. Therefore government must guarantee that it will assess such factors individually for each transaction even for transfer of military equipment within the EU". [86]

Transparency: The third objection regards transparency and possibilities for public and parliamentary control on arms trade. Overall for Depauw, "from a parliamentary point of view, the provisions adopted in the Directive are more worrisome. The Directive does not contain any prescription on how MS should report to their national parliaments."[87] Moreover, according to the same author: "Furthermore, the Directive initiates a shift from *ex-ante* to *ex-post* controls which might entail loss of transparency at the national level. Whereas national licensing officers used to assess licence applications *before* transfers of goods took place – in most MS licences were granted on an individual basis – they will now only be able to check what *has been* traded from

85 ENAAT (2016b); D. Dell'Olio, "Il dibattito sulla normativa comunitaria in materia di commercio di armamenti: situazione attuale e prospettive future", *Sistema informativo a schede-Archivio Disarmo* – 1-2 /2010, avaliable at http://www.archiviodisarmo.it/index.php/it/2013-05-08-17-44-50/sistema-informativo-a-schede-sis/sistema-a-schede/finish/57/91, (last accessed 11 January 2019).

86 Depauw (2008): 12 and note 24.

87 S. Depauw (2011). "Risks of the ICT-directive in terms of transparency and export control". In S. Depauw, and A. Bailes (Eds.) *Export controls and the European defence market: Can effectiveness be combined with responsibility?* Brussels: Flemish Peace Institute, p. 70.

their territory to other MS under general and global licences after these transfers have taken place". [88]

In conclusion, the position of NGOs is more critical towards the ICT Directive. However, like other categories of actors in this field, it is possible to identify different attitudes within this category of actors. The researchers of research institutes which belong to the networks of associations working for arms controls warned about the possible risks in terms of loss of transparency and responsibility of the Directive (Flemish Peace Institute, *Group de Research sur la Paix and sur les Conflits*). They were followed by the European Network Against Arms Trade and by those NGOs which had a more radical position against arms trade and arms exports. These groups of organisations started to focus more on the Commission's acts because they realised that this channel would have been much more effective than the intergovernmental one. On the other hand, NGOs such as Amnesty International, Saferworld, Controlarms, gave priority to and concentred their efforts on strengthening the European Code of Conduct on Arms Exports and on the creation of the Arms Trade Treaty, considering the issues treated by the Directive to be too technical and complex to be communicated to the public.[89]

## 7. Outline of the thesis

After this introduction, the thesis revolves around five fundamental chapters.

The first chapter explains the theoretical framework of the thesis. Starting from the debate on European integration theories applied to the Defence Package and the Directive on intra-Community transfers, it offers a critical view of this debate, and explains why a change of approach is necessary. Then, it overviews the general Europeanisation literature, in terms of key themes and key relevant authors and undertakes a critical assessment of strengths and weaknesses. Secondly, it focuses on the European literature with respect to security and armaments issues, undertaking a critical analysis that enlightens the gap in their empirical understanding. Lastly, it explains the theoretical perspective shaped on the issue of the thesis.

The second chapter explains the methodology based on three case studies. Firstly it clarifies the criteria followed to select the three case studies and why the ICT Directive was chosen. Then it explicates the methodological approaches and procedures.

88 Depauw (2008), p. 12.
89 Béraud-Sudreau (2014).

Operationalizing European Directive n. 43/2009 as the independent variable and the national transposition measures in three case studies as the dependent variables, the methodological framework refers to Europeanisation in an EU perspective with a top-down understanding of the EU's impact on three MS. Thus, the chapter explains the chosen methodological tools in detail, in order to assess the direction and intensity of domestic change: two ideal models, eight dimensions and a universal taxonomy articulating each dimension on a scale from 0 to 5 are explained. The universal taxonomy also allows for comparing the different case studies and answering the fundamental question on the direction of the Europeanisation process in this field.

The third, fourth and fifth chapters are the core of the thesis and correspond to the three case studies: Italy, Hungary and the UK: one country with especially intrusive and strict regulations (Italy), one country with more flexible regulations (the UK, which inspired the Directive), and one country with new regulations. All three case studies follow the same scheme. Firstly there is an introductory section which offers information about defence industry and the main societal actors, and their weight and role in that specific country. The second section of each case study chapter investigates in detail the domestic arms export control regulation as it was before the approval of the Directive. The third section explains the regulation as it appears immediately after the transposition of the Directive. Then, using the eight dimensions and assigning a mark for each of them before and after the transposition, on the basis of the taxonomy illustrated in the methodology, it is possible to assess direction and intensity of domestic change for each dimension and overall in respect to the two ideal models.

Finally, the conclusion of the thesis compares the three different case studies in a diachronic and comparative perspective using the two models and the eight dimensions as a universal reference. The conclusion answers the fundamental question and verify whether states converge and, if so, around what they converge. The empirical findings are that the Europeanisation process is unbalanced toward the lower values of each dimension and overall that MS converge around a pro-industry model rather than an ethically and politically regulated one. However, this process of convergence is not absolute, but relative, and it presents several limits and contradictions that are explained at the end of the thesis together with suggestions for further research.

# Chapter 2. Theory

## 1. Introduction

This chapter explains the theoretical framework of the thesis. Starting from the debate on European integration theories applied to the Defence Package and the Directive on intra-Community transfers, it offers a critical view of this academic debate, and explains why a change of approach from grand theories to the mid-level theory of Europeanisation could be fruitful. Then, it overviews the general Europeanisation literature, in terms of key themes and key relevant authors and undertakes a critical assessment of its strengths and weaknesses. Finally, it focuses on the Europeanisation literature with respect to security and armaments issues, undertaking a critical analysis to show a gap in the literature. Lastly it explains the theoretical framework shaping the thesis.

## 2. "Big" European integration theories and the scholars debate around the "Defence Package"

For a long time, studies concerning arms transfer and production have been dominated by a realist and intergovernmentalist approach. The Intra-Community transfer Directive and the Defence Package have attracted the attention of scholars because they represented the first supranational acts in the field of armaments and defence which until then had been viewed as essential to the remit of a sovereign nation state[90]. Furthermore, the process leading to the approval of the Defence Package was characterised by the participation of different actors and factors which offered multifaceted food for thought to academics:

1. Transnational defence companies had pressed for the liberalisation and harmonisation of the defence market for years.

90 For an overview of this stance see K. Krause (1995). *Arms and the state: patterns of military production and trade.* Cambridge: Cambridge University Press.

2. The European Court of Justice since 1999 had ruled ten times that Article 223 of the Treaty of Rome (the defence exemption) should be interpreted in a restrictive way, considering armaments similar to other goods, thus changing the approach to regulating the arms market, and extending the EU law domain also to this state core field, albeit with several exceptions and strong limitations.
3. Since 1996/7 the European Commission has played a persistent and active defence policy role. To meet this aim the Commission used all the wide range of powers and acts at its disposal: communications, infringement procedures to stimulate the work of the Court in this field, preparatory actions, the creation of a group of experts, green papers, reframing the subject changing perspective and DG, strategic use of the ECJ decisions, and to conclude, power of initiative, drawing and promoting the Defence Package. The Commission placed its actions within a coherent architecture which was articulated in three main objectives: simplifying internal arms transfers, harmonising defence procurement and increasing defence research funds. All these three led to concrete results.
4. Lastly, MS, particularly those with a strong defence industry and prescriptive national regulations (such as Italy and France), after initial diffidence, changed their mind, accepted the defence package and tried to obtain the maximum for their national companies. Thus some of the key state actors used the directive to strengthen and project their domestic defence companies and to promote reform that would have changed their regulation in a more liberal and flexible way.

This richness of actors, variables and dynamics of course has stimulated the academic debate. In particular, the emergence of transnational and supranational actors in a field which had always been considered intergovernmental nourished and strengthened supranational and neo-functionalists theories and studies.

In the following sections, I will show how the academic debate of scholars from the discipline of European integration theories developed their analysis of integration, and then applied it to the Defence Package, including the Directive on Procurement and the directive on intra-Community transfers, and on very similar issues such as the European Defence Fund. I will conclude by arguing that the debate has missed some important factors, and thus has weaknesses that my thesis will address.

### *2.1 Neo-functionalism, supranationalism and the role of non-state actors as drivers of integration*

This paragraph embraces not only neo-functionalist scholars in *strictu sensu*, but also all those scholars that see supranational actors and non-governmental actors as drivers of change/European integration in the defence field particularly with regard to arms transfer control and transparency.

Neo-functionalism is one of the most relevant European integration theories. Its birth dates back to the late 1950s with the publication of "The Uniting of Europe" by Ernst Haas, one of the founders of neo-functionalism.[91] Other publications have followed by other eminent scholars who have used this approach for European integration theories such as Lindber and Schmitter.[92]

Haas defines integration as "the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre whose institutions possess or demand jurisdiction over pre-existing national states. The end result of a process of political integration is a new political community superimposed over the pre-existing ones."[93]

According to neo-functionalists, the dynamics of integration revolves around the concept of spillover. Three main kinds of spillover have been formulated by neo-functionalists.

The first is a functional spillover which explains change from one sector to another. Functional spillover refers to the way in which the creation and deepening of integration in one economic sector would create pressures for further economic integration within and beyond that sector, and create authoritative capacity at the European level.[94]

The second is a political spillover. This takes places when non state actors such as interest groups, members of bureaucracy and other domestic actors direct their expectations and activities at the new supranational level of decision-making.[95]

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91 First published in 1958 and then printed in 1968. E.B. Haas (1968). *The uniting of Europe; political, social, and economic forces, 1950-1957.* Stanford: Stanford University Press.

92 L. Lindberg, and S. Scheingold, (1970) *Europe's Would-Be Polity*. Englewood Cliffs: Prentice Hall. P.C. Schmitter (1971). "A Revised Theory of Regional Integration". In: L. Lindberg, S. Scheingold, (Eds.): *Regional Integration. Theory and Research*. Cambridge: Harvard University Press, pp. 232-264.

93 Haas (1968), p. 16.

94 *Ibidem*, pp. 283-317.

95 *Ibidem*, p xxxiv.

Interest groups, bureaucrats and other domestic actors will exercise pressure and influence on governments and press them to advance the process of integration.[96]
The third is called institutional or cultivated spillover and it is deployed by the activities of the EU's supranational institutions, such as the Commission, the European Court of Justice and the European Parliament, which create additional pressure for further integration and also support the formation of a transnational coalition.

Overall, neo-functionalists recognise the importance of interest-based actors, technical actors and supranational actors in driving the process of European Integration (Richardson 58): "The economic technician, the planner, the innovating industrialist and trade unionist advanced the movement of European integration not the politicians, the scholars, the poet, the writer".[97]

Stone Sweet and Sandholtz are considered scholars who provide the most prominent example of research in the tradition of Erns Haas.[98] In their famous 1998 publication "European integration and supranational governance" they explain the dynamics of integration offering interesting analogies with those dynamics in the armament field. [99]They argue that European integration is provoked and sustained by the development of causal connections between three factors: a) transnational exchange, b) supranational organization, and c) European Community (EC) rule-making: "We explain the transition, in any given policy sector, from national to intergovernmental to supranational governance, in two ways. First cross-border transactions and communications generate a social demand for EC rules and regulation, which supranational organizations work to supply. [..]Second, once EC rules are in place, a process of institutionalization ensues, and this process provokes further integration".[100]
In their interpretation the drivers of integration are non-governmental actors on the demand side and EU supranational institutions on the supply side.

One of the first authors to deal with the armaments field using a neo-functional lens, was Terrence Guay (1997) who, observing the integration of defence companies, hypothesised a functional spillover would also occur in the armaments field. He found that, since the early Nineties, the "Commission and Parliament have played key roles

96 *Ibidem*.
97 Haas (1968): xix.
98 J. Richardson (2006). *European Union: power and policy-making, (3rd Edition). A*bingdon U.K.; New York: Routledge.
99 A. Stone Sweet & W. Sandholtz (1997). "European integration and supranational governance", *Journal of European Public Policy*, 4(3): 297-317.
100 *Ibidem*, p. 297.

in expanding the EU's policy-making machinery to include defence industrial matters, while the Council of Ministers has tried to resist such actions."[101] In 2003 Ulrika Mörth, before the approval of the Defence Package, predicted the strategy of the Commission which would "reframe" the defence market issue from an industrial issue to an internal market one.[102]

In 2011 Chantal Lavallée was one of the first scholars to focus on the role of the European Commission in Common Foreign and Security Policy. In particular she identified the Commission as a "meeting point" where MS and non-governmental actors (defence companies and NGOs) were included in these new activities such as conflict prevention and defence research. This inclusive attitude formed the basis of a new collective European security governance, intended in a wider sense. She focused more on the proactive role of the Commission as aggregator, and less on the asymmetries in the involvement of different non-governmental actors.[103]

More recently neo-functionalism has been particularly applied to one of the three main streams of the EU Commission, the one concerning funds for defence and security research.

For example, Edler and James (2015) studied the emergence of the European Security Research Programme (ESRP) under the Seventh Framework Programme. [104] They claimed that the new area of security research was open thanks to the *entrepreneurship* of the EU Commission and in particular to some mid-ranking officials of the Commission who were able to identify a window of opportunity, to mobilise interests around a proposal for a new research theme (security).[105] Mawdsley argues

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101 T. R. Guay (1997), "The European Union, expansion of policy-making, and defence industrial policy", *Journal of European Public Policy*, 4(3): 404-421. "While the Treaty of Rome allowed MSs to establish policies governing the trade in and production of armaments at the national level, the European Union (EU) has gradually been expanding its influence in defence industry matters. This article traces the history of EU involvement in defence industrial policy, with an emphasis on events over the past decade. One significant finding is that the European Commission and Parliament have played key roles in expanding the EU's policy-making machinery to include defence industrial matters, while the Council of Ministers has tried to resist such actions. A second important conclusion is that the concept of spillover is particularly appropriate in describing how and why the EU's policy-making has expanded to include defence industrial policies." Guay (1997):404.

102 U. Mörth, (2003), *Organizing European cooperation: the case of armaments.* Oxford: Rowman & Littlefield.

103 C. Lavallée (2011), "The European Commission's position in the field of security and defence: an unconventional actor at a meeting point", *Perspectives on European Politics and Society*, 12(4): 371-389.

104 J. Edler, & A. D. James (2015), "Understanding the emergence of new science and technology policies: policy entrepreneurship, agenda setting and the development of the European framework Programme". *Research Policy*, 44(6): 1252-1265.

105 *Ibidem.*

that the dynamics and narratives that led to the European Defence Fund are similar to those that led to the approval of the ESPRIT (European Strategic *Programme* for Research and Development in Information Technologies) programme from 1984 to 1998: “like with ESPRIT, the momentum behind the programme came from the European Commission with some prominent backers in the European Parliament associated with the Kangaroo group”.[106]

In a similar vein, Pierre Haroche (2018) investigated the origin of the Commission Proposal for a European Defence Fund (EDF). The author, using qualitative methodologies based on interviews with officials from the Commission, MEPs and defence officials, concludes that the origin and development of the EDF can be explained with neo-functionalist lenses: he stated that the Commission was at the origin of the reform and “mobilised transnational economic interests”[107] According to Haroche, “the EDF illustrates the interdependence between industry—a sector over which the Commission possesses significant power—and defence—a sector traditionally managed by intergovernmental procedures. Spillover logic allowed the Commission to seek to extend its power from the former to the latter, with the potential to become a key player in the field of defence.”[108]

Castellacci, Fevolden and Lundmark [109] focused on the European Defence and Security Procurement Directive 2009/81/EC and studied how the defence industry reacted to the Directive. The authors used qualitative interviews undertaken with representatives of companies and focused on two case studies: Norway and Sweden. Their theoretical framework is once again neo-functionalism as formulated by Sandholtz and Sweet. They concluded that the defence companies in these two case studies “believe that the liberalization of the European defence market will at best be partial and fear that the new regulations might end up favouring the larger nations (e.g. Germany, the United Kingdom and France) at the expense of the smaller countries (e.g., Norway and Sweden). The companies’ scepticism and response to the Directive

106 J. Mawdsley (2018). “The Emergence of the European Defense Research Programme*”. In:* Karampekios, N; Oikonomou, I; Carayannis, E (Eds.) *The Emergence of EU Defense Research Policy: From Innovation to Militarization*. Berlin: Springer, p.208.
107 P. Haroche (2018). ”Supranationalism Strikes Back: The European Defence Fund and the Strengthening of the European Commission in the Area of Defence”. *Paper presented at the UACES Conference,* Bath 3-5 September 2018.
108 *Ibidem.*
109 Castellacci *et alii* (2014).

vary according to the defence industrial policy regime they are part of and their position in the defence industrial value-chain."[110]

Among scholars, including those supporting (claiming) neo-functionalist theories, some scholars emphasise the entrepreneurial role of the Commission (Lavallée, Guay, Edler and James; Haroche),[111] whereas they exclude the role of defence companies as a driving force of change. There are only a few exceptions in the academic world such as Schilde, Castellacci *et alii* who argue differently.[112] On the other hand, moving from the academic world to commentators closer to policy-making, there is much more of a focus on the "powerful driving force" of the defence companies for the integration process,[113] or on the substantive power of influence of the big enterprises which is carried out via a large number of informal meetings and conferences in collaboration with think tanks.[114] As I will explain more fully at the end of this section, these different conclusions are also due to the use of different methodologies and the limits of qualitative methodologies based on interviews with main actors and on process tracing.

*Limits*

Despite being declared "obsolescent" by its same founder and despite initially being considered valid only in the areas of low politics, neo-functionalism is able to grasp several important aspects of the dynamics of integration in the armament field, leading to the approval of the ICT Directive. In fact the role of transnational actors such as the more integrated defence companies and supranational bodies, such as the Commission is undeniable and has emerged powerfully, particularly since the Nineties.[115]

However, there is one fundamental limit which is even more evident in the armament

110 Castellacci *et alii* (2014): 1218. Using this approach they also discovered that the attitude of big companies is completely different from that of small companies. Therefore, considering defence companies as a unique block can be misleading.

111 See also M. Citi (2014), "Revisiting creeping competences in the EU: the case of security R&D policy", *Journal of European integration*, 36(2):135-151.

112 K. Schilde (2017). *The political economy of European security.* Cambridge: Cambridge University Press; Castellacci *et alii* (2014); D. Bigo and J. Jeandesboz (2010), "The EU and the European security industry questioning the 'public-private dialogue". *INEX Policy Brief* no. 5, February 2010.

113 B. Schmitt, (2000), "From cooperation to integration: defense and aerospace industries in Europe", *EUISS Chaillot Paper* 40, Paris: European Union Institute for Security Studies (EUISS), available at oldeuiss.eu/uploads/media/cp040e.pdf (accessed 19 December 2018).

114 Schmitt (2001), F. Slijper (2005). "The emerging EU Military-Industrial Complex: Arms industry lobbying in Brussels", TNI briefing series, 2005/1, Amsterdam May 2005 available at https://www.tni.org/en/article/the-arms-industry-dominates-eu-defense-policy.

115 B. Rosamond (2000). *Theories of European integration.* Basingstoke: Macmillan.

field. This concerns the excessive optimism of the spillover processes (despite some authors having then theorised about the possibility of spill back). The self-sustaining dynamic and inexorability of the process of regional political integration has not been confirmed by evidence in recent years. It is, however, worth remembering that the same neo-functionalist scholars envisaged that not only spillover but also spill back—intended as the retreat on level and scope of authority, perhaps returning to the status quo prior to initiating integration—was possible.[116]

In the specific arms export control field, what emerges clearly is that despite the intense activity of supranational bodies and the pressure of defence companies and the set-up of several committees and institutions, and approval of EU acts, this dynamic has not generated a common arms export policy, nor a CSDF/CFSP. This is linked to one of the main critic addressed to neo-functionalists, according to which the increasing transnational exchanges do not create a political Europe or an identity in Europe. [117]

Neo-functionalism expects MS convergence due to supranational institutions and large transnational firms but this overlooks the reality of MS differences and contexts.

### *2.2 Rational choice institutionalism*

Institutionalist approaches are built around the claim that institutions do matter, they are able to shape both process, policy outcomes and the behaviour of actors. The intuitionalist literature is diverse and articulated according to the kind of institutionalism (historical, rational choice and sociological) and the level of analysis (global, USA, EU, etc.). [118]

In the EU context, among others, Fritz Scharpf is one of the eminent scholars applying rational choice institutionalism to the European integration theories, motivating this approach with the fact that neo-functionalism had ignored and underestimated the role of decision-making rules on the integration process. “The institutionalist turn in integration studies dates back at least to Scharpf’s seminal articles (1985, 1988) on

116 Schmitter (1971), p. 242.
117 D. Webber (2019).”Trends in European political (dis)integration. An analysis of postfunctionalist and other explanations”, *Journal of European Public Policy*, 26: 37.
118 M. A Polllack (2005). “Theorizing EU Policy-Making”. In H. Wallace, W. Wallace, and M. A. Pollack (Eds), *Policy-making in the European Union*, Oxford. New York: Oxford University Press, pp. 12-45.

the joint-decision trap." [119]

He argues that the inefficiency of EU policies are due to specific rules such as unanimous decision-making and joint decision-making. However, there are some exit strategies to this trap.[120]The first exit strategy is led by the ECJ which can promote integration by law, circumventing stalemates from intergovernmental and joint decision-making processes. Later Suzanne Schmidt focused on another exit strategy, orchestrated by the Commission, which could strategically use the decisions of the ECJ to push MS into initiating legislative procedure. This legislative procedure can be better controlled by MS than a simple integration by law which is beyond MS control.[121] This second exit strategy presents some interesting analogies with the dynamics that led to the approval of the Defence Package.

In fact, one of the first articles published about the Defence Package that triggered academic debate was written by Weiss and Blauberger in 2013.[122] It can be placed in the rational choice institutionalist perspective. The two authors observed that MS seemed to be diffident towards an increasing power of the Commission in the field until 2005 but then they changed their mind and accepted the Defence Package and Procurement Directive. Thus, they asked why MS changed their attitude towards the EU Directive on Defence Procurement. As a methodology, they used a process-tracing analysis based on official documents and also on structured and semi structured interviews. [123] Their conclusions supported an institutionalist perspective, and in particular Scharpf's (and Schmidt's) lenses of European integration, according to which an exit strategy to the impasse of the intergovernmental solutions was represented by the strategic use by the Commission of the ECJ decisions to push MS to accept a directive in this delicate field.[124] They explain that "the Commission's role as a strategic policy entrepreneur was crucial for pushing and pulling MS governments towards approval of EU secondary legislation. In contrast to previous, unsuccessful initiatives,

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119 M.D. Aspinwall and G. Schneider (2000). "Same Menu, Separate Tables: The Institutionalist Turn in Political Science and the Study of European Integration". *European Journal of Political Research* 38:1–36 F. Scharpf, (1988), "The joint-decision trap: lessons from German federalism and European integration", *Public Administration* 66(3): 239–78.
120 *Ibidem.*
121 S. K. Schmidt (2011) "Overcoming the joint-decision trap in single-market legislation: the interplay between judicial and legislative politics". In G. Falkner (Ed.), *The EU's Decision Traps: Comparing Policies, Oxford: Oxford University Press*, pp. 38–53.
122 M. Blauberger, and M. Weiss. (2013). "If you can't beat me, join me! How the commission pushed and pulled MSs into legislating defence procurement". *Journal of European public policy*, 20(8): 1120–1138.
123 *Ibidem.*
124 Scharpf (1988); Schmidt (2011).

the Commission was able to draw on new case law of the European Court of Justice (ECJ), threatening to leave integration (uncontrolled) to the judges, while devising a regulatory 'middle ground' which allowed MS to re-establish legal certainty and to regain political control."[125] A directive is thus interpreted as a "lesser evil" with respect to an integration by law managed by the ECJ, which is more uncertain and more difficult for MS to control.[126]

This analysis once again emphasises the entrepreneurial role of the European Commission but offers institutional reasons for this behaviour and overall for the dynamics that led to the approval of the Procurement Directive. In fact, the possibility for the ECJ to integrate by law, and the regrouping by the Commission of different kinds of powers (in particular the power of initiating infringement procedures, to be the guardian of the treaty and at the same time the power of initiative of the legislative process) explain why MS did change their mind and accepted an expansion of the EU law. This article has attracted scholarly attention and has opened a wide debate about European integration in the armaments field especially as concerns the Defence Package.

*Limits*

Rational choice institutionalism and in particular Scharpf's theory on the joint decision trap and its exit strategies fits well in explaining the interinstitutional dynamics that have characterised the arms export control field in the EU, including their stalemates and imbalances. It is able to explain a significant part of the interinstitutional dynamics between the Commission, the Council, the European Parliament and the ECJ, the effectiveness and stalemates of different decision-making modes and the overall asymmetries.

However, it presents two fundamental limitations.

Firstly it deals mainly with the EU level, focusing on interinstitutional dynamics and their imbalances and asymmetries but with no sufficient tools to explain and follow the differentiated implementation of the EU act at the national level, nor to explore the diversity of the impacts of these interinstitutional dynamics at the domestic level.

125 Blauberger and Weiss (2013):1121.

126 *Ibidem.* Blauberger and Weiss excluded other interpretations on the basis of structured interviews. For example they excluded the possibility that the real entrepreneur of change was represented by defence companies because interviews and declarations from German companies showed criticism about the Defence Directive.

The second limit, connected more to the rational choice declination, is the postulate according to which actors act in a rational and egoistic way and that their preferences are fixed. This postulate, which is shared by two other fundamental theories of European integration, intergovernmentalism and neo-functionalism has been heavily questioned in recent years with Brexit and rising populism: **"**The debate about Brexit in the UK has been and still is an excellent example of how emotions and other irrational variables in domestic polities impact the EU".[127]

### *2.3 Realism, intergovernmentalism, liberal intergovernmentalism and economic patriotism*

Realism is the oldest theory of international relations. It is a family of theories dating back to Thucydides, and including Hobbes, Machiavelli and Waltz. One of the most famous scholars is Morgenthau who wrote in 1948 "Politics among nations" which explains some of the pillars of realism: states are the dominant actors in the international system which is considered anarchic. Their priority is to survive by maintaining military security. In order to do that they are postulated to act in a rational and egoistic way.

Intergovernmentalism is realism applied to regional studies and to European integration theories. According to Hoffman, one intergovernmentalist scholar, the European integration process is the result of bargaining between MS, which are the primary actors, whereas the EU and other forms of cooperation are temporary instruments for the pursuit of national goals. [128]

Liberal intergovernmentalism is a theory which adds the liberal model of preference formation to the intergovernmental perspective. Thus, on the one hand EU and international institutions are the result of bargaining between states pursuing their interest. On the other, this interest is the result of combining the interests of domestic actors, such as the legislature, the executive and societal groups. One of the most

127 C.Lequesne (2018)."Brexit and the Future of EU Theory" in P. Diamond , P. Nedergaard , B. Rosamond (Eds.) *The Routledge Handbook of the Politics of Brexit* London: Routledge.
128 S. Hoffmann, (1966). "Obstinate or obsolete? The fate of the nation-state and the case of Western Europe". *Daedalus, 95*(3): 862–915.

famous scholars is Andrew Moravcsik, who in his book The Choice for Europe enshrined all these basic principles of liberal intergovernmentalism.[129]

Liberal intergovernmentalism argues that steps towards economic integration and the liberalisation of regulatory regimes are explained by the interests and preferences of larger MS.[130]

In 1993 Moravcsik explained defence integration through an intergovernmentalist lens:

> *Ideally, defense firms prefer national policies that protect domestic markets from foreign competition, while simultaneously promoting arms export abroad. However, after the end of the Cold War, defense contractors have called for greater political cooperation and demand consolidation at the EU level, in order to alleviate the heavy pressure of decreasing defense budgets and intense competition with US firms.[131]*

Daniel Fiott applies a combination of economic patriotism and liberal intergovernmentalism to explain why MS adopted the ICT directive. Economic patriotism refers to "economic choices which seek to discriminate in favour of particular social groups, firms, or sectors understood by the decision-makers as "insiders" because of their territorial status".[132] The fundamental question and methodologies are very similar to those used by Blauberger and Weiss: Fiott asks why MS accepted the intra-Community transfer Directive, despite its limited effectiveness and MS's initial scepticism. His methodologies are based on interviews with representatives of MS Ministries of Defence and Foreign Affairs and literature on the field. The empirical findings support both economic patriotism (for the initial phase) and liberal intergovernmentalism (for the second phase of MS bargaining)[133].

In a nutshell, according to Fiott, economic patriotism explains how national industrial interests drive forward EU Defence industrial co-operation.[134] The author quotes a

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129 A. Moravcsik (1998). *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht*. Ithaca: Cornell University Press. A. Moravcsik (1993b) "Preferences and power in the European community: a liberal inter-governmentalist approach", *Journal of Common Market Studies* 31(4): 473–524.
130 Pollack (2005).
131 A. Moravcsik (1993a). "Armaments among Allies: European Weapons Collaboration" In: P. Evans, H.K. Jacobson, and R. D. Putnam, (Eds.) *Double-edged diplomacy. International bargaining and domestic politics.* Berkeley, CA: University of California Press, pp. 128–167.
132 C. Hoeffler (2012)."European Armament Co-operation and the Renewal of Industrial Policy Motives", *Journal of European Public Policy*, 19(3): 438. See also B. Clift, and C. Woll, (2012). "Economic patriotism: reinventing control over open markets", *Journal of European Public Policy* 19(3), Vol.19(3): 307-323.
133 Fiott (2017).
134 *Ibidem.*

specific case study: “In the specific case of France, ‘economic patriotism’ has provided a compelling explanation for why the ICT Directive was high on the French Presidency’s agenda. The fact that France decided to reform its domestic licencing regime within an EU setting bears testament to the theoretical claim that defense-industrial Europeanization reflects the interests of major defense-industrial actors. France could not realistically reform on a national basis without putting in place a level playing field at the EU level.”[135] In a second phase, liberal intergovernmentalism “shows how these various industrial interests play out through negotiations/intergovernmental bargaining between MS governments’ and lead to the Directive.” [136]

Catherine Hoeffler uses economic patriotism to explain why MS did agree to liberalise and integrate their defence companies. According to her, arms-producing countries have promoted common market-oriented procurement and liberalisation at the European level as industrial strategies intended to support national and European firms. [137]

*Limits*

Intergovernmentalism has dominated the debate for a long time starting from the failure of the European Defence Community in the 1950s to the mid-1990s. Armaments touch the heart of a nation state because they are linked to its survival, thus it is unlikely that a state would delegate this crucial task to a supranational authority. However there are two fundamental limits to this group of theories as applied to arms transfer control and transparency in the EU context.

The first one is that even in a core state power, in the EU context the role of non-state actors, such as the Commission, the ECJ and defence companies is undeniable. In the specific case of the ICT Directive, this was approved despite initial resistance from MS, particularly Britain and France which are two of the strongest actors in the EU context, and thanks to the alliance between the EC and ECJ under pressure from defence companies. Even the liberal intergovernmentalist declination, which takes into account the role of domestic actors in the construction of national preferences, underestimates the transnational networks and activities which have been extremely relevant for the approval of the ICT Directive and the role of supranational institutions.

135 *Ibidem,* p. 1056.
136 *Ibidem,* p.1057.
137Hoeffler (2012):436.

The second fundamental limit – which is shared with neofunctionalism and rational choice institutionalism – is the initial postulate implying that MS are rational and egoistic actors, a claim that clashes with recent events like Brexit which indicates the need for a positive or negative identity more than a egoistic economic calculus.
With respect to the other theories, liberal intergovernmentalism is also more aware of domestic context but tends not to drill down to focus on MS differences, except in terms of broad national interests. The complexity of institutions and political battles over competing interests goes missing at the liberal intergovernmentalism level.

### *2.4 Constructivism*

For constructivists institutions are understood broadly to include not only rules but also informal norms, and these rules and norms are expected to constitute actors, and to shape their identities and their preferences.[138] Actor preferences therefore are not exogenously given and fixed as in rationalist models, but endogenous to institutions and individuals' identities that are shaped and re-shaped by their social environment. Constructivist generally reject the rationalist conception of actors as utility maximises, operating according to a logic of consequentiality in favour of March and Olsen's conception of a logic of appropriateness.[139] Institutions and values influence preferences and identities in a more profound way.[140] This alternative approach is chosen by authors whose studies of the CFSP have suggested that actors in this policy area are also led by norms.[141] Some scholars have emphasised the civilian power of EU as it might represent a new ethical actor in international affairs who bases its

138 *Ibidem.*
139 J.P Olsen. and V. March. (2004), "The logic of appropriateness". *ARENA Working Papers* 4/9.
140*Ibidem*. Focusing on the EU, Jabko attributes the surge of liberalising legislation to the Commission's 'strategic constructivism', which persuaded a heterogeneous coalition of political actors that 'the market idea' was the solution to all that was wrong in Europe. The idea of market fundamentalism has also been widespread in the studies of Europeanisation in the fields of labour law and labour market. N. Jabko (2006). "Playing the market: a political strategy for uniting Europe, 1985-2005." *West European Politics*, 30 (3): 644-645.
141 H. Sjursen, (2002). "Why expand? The question of legitimacy and justification in the EU's enlargement policy." *Journal of Common Market Studies,* 40 (3): 491-513. M. K. D. Cross (2015). "The European Defense Agency and the MSs: Public and Hidden Transcripts", *European Foreign Affairs Review*, 20 (2/1): 83 – 102.

strength and its strategic culture on the normative principles of peace, freedom, democracy, human rights, rule of law, equality and social justice. [142]

Strikwerda is a scholar who applies constructivist theories to the armament field and in particular to the approval of the Procurement Directive. She asks the same research question as her predecessors: Why did MS change their mind between 2004 and 2007 and accept the Procurement Directive? Her methodology is process-tracing based on official documents (discussions in national parliament, reports, official statements on defence procurement) and on semi-structured interviews. Strikwerda focuses on four case studies (the Netherlands, France, Sweden and the UK)[143].

Her conclusions differ from those of the other scholars such as Fiott and Blauberger and Weiss and support a constructivist approach. According to Strikwerda, MS accepted the Directive because they had a sense of obligation towards internal market rules (written and unwritten). The turning point is represented by the "reframing" of the issue from defence/external relations to the internal market. When the internal market rules were extended also to defence goods, they explicated their normative force over MS who felt a sense of obligation towards these fundamental rules of the EU: "Contravening internal market rules or not acknowledging the competence of the Commission in this policy field would be a high cost."[144] That is why MS accepted the Directive. Strikwerda claims that the normative variable is more determinant than the legal one, because MS were not formally obliged to accept the Directive. [145]

*Limits*

The general limit of constructivism is that it does not explain why ideas change and it tends to underestimate the material variables which influence the change of ideas. There are some studies that identify a relationship, for example, between financial and economic crises and there is a lack of clarity about the interplay of ideas and material forces.[146] Constructivism in the form of Strikwerda's work has the most nuanced sense of how states may react to reframing but there are questions about how to systematically demonstrate this and how to drill down. In this specific case this limit is

142 I. Manners (2006). "European Union 'Normative Power' and the Security Challenge", *European Security*, 15(4): 405-421.
143 Strikwerda (2017): 19-36.
144 *Ibidem, p.*: 24.
145 *Ibidem.*
146 J.Howorth (2014). *Security and defence policy in the European Union*. Basingstoke: Palgrave Macmillan.

also connected to limitations in methods used in the armament field, which is more exposed to ambiguity, rhetoric and hypocrisy as will be explained in the next chapter.

## 3. The Europeanisation literature

### *3.1 The Europeanisation literature*

Europeanisation literature originated in the 1990s as a reaction to the debate around big integration theories, in particular intergovernmentalism versus neo-functionalism which seemed to have lost part of its analytical appeal. Europeanisation scholars wanted to open up a new perspective, a new angle to observe the European integration which had been until then neglected: the domestic level. Whereas the classical European integration theories started from an ontological question about the nature of integration, or why countries decide to pool sovereignty and create institutions like the EU, Europeanisation moved from a "post-ontological position" observing that EU institutions have developed and generated effects on domestic politics.[147]

*Definitions and different approaches: uploading and downloading*

Europeanisation is a wide and very elastic concept which has covered different dimensions and different definitions according to the scholars that have adopted it. Radaelli, one of the most famous Europeanisation scholars, had appropriately introduced the term of conceptual stretching to define Europeanisation. [148]

An initial fundamental distinction concerns the perspective according to which the Europeanisation process is analysed. On the one hand, a group of scholars has conceptualised Europeanisation "as the process *of downloading* EU directives, regulations and institutional structures at the domestic level."[149] Another group of scholars has extended this concept to the process of *uploading* to the EU shared

147 P. Graziano (2013). *Europeanization and domestic policy change: The case of Italy*. Abingdon, Oxon, New York: Routledge. K. Lynggaard, I. Manners, K. Löfgren (Eds). (2015).*Research methods in European Union studies.* Houndmills, Basingstoke, New York, NY : Palgrave Macmillan.
148 C. M. Radaelli (2000). "Whither Europeanization? Concept Stretching and Substantive Change." *European Integration online Papers* (EIoP), Vol. 4, No. 8, July 17.
149 K. E. Howell (2002), "Up-loading, Downloading and European Integration: Assessing the Europeanization of UK Financial Services Regulation", *Queen's Papers on Europeanisation*, 11: 1.

beliefs, informal and formal rules, discourse, identities.[150] The first one is a *top-down* perspective where top is the EU and down is the domestic level. The second one is a *bottom-up* perspective where bottom is the domestic level, and MS and up is the EU.

Among the authors that have adopted the top-down perspective, Ladrech is one of those that better captures this approach in his definition. In fact he defines Europeanisation as "an incremental process re-orienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organizational logic of national politics and policy-making."[151]

Some scholars, however, have adopted a bottom-up perspective. With this approach they investigate how MS seek to upload their policy preferences onto the EU agenda. Risse, Cowles and Caporaso define Europeanisation as the emergence and development at the European level of distinct structures of governance, that is, of political, legal, and social institutions associated with political problem-solving that formalise interactions among the actors, and of policy networks specialised in creating authoritative European rules.[152]

According to some academics the bottom-up approach can coincide with traditional studies of Europeanisation theories (which try to explain the nature of the EU and the process of integration starting from the MS level). For example, according to Irondelle when considering a bottom-up approach, "the focus is on the process of integration itself and on the creation of common institutions and policies that contribute to the emergence of a European polity. Neo-functionalism, liberal intergovernmentalism and multi-level governance follow this approach." [153]

Overall most of the Europeanisation scholars recognise that between the two approaches and directions there is continual interaction. The top-down and bottom-up approaches are interlinked and mutually constitutive as they happen at the same time. Europeanisation is not just a result or a consequence of policy, but also an ongoing and mutually constitutive process, as the responses of MS to the EU integration process feed back into EU institutions. In practice these two processes are interlinked.

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150 *Ibidem.*

151 R. Ladrech, (1994). "Europeanization of Domestic Politics and Institutions: The case of France", *Journal of Common Market Studies,* 32 (1): 69.

152 T. Risse, M. G. Cowles, and J. Caporaso, (2001) "Europeanization and Domestic Change: Introduction". In M. G. Cowles, J. Caporaso and T. Risse (Eds.), *Europeanization and Domestic Change* Ithaca, NY: Cornell University Press, pp. 1–20.

153 B. Irondelle (2003). "Europeanisation without the European Union? French military reforms 1991-96". *Journal of European Public Policy.* 10(2):210.

[154] Borzel found that some MS upload their policy preferences at the EU level through the policy-making process to ease the downloading of these policies once they have been adopted.[155]

As reported by Howell, the first perspective considers that the EU level initiates changes and creates an outcome at the domestic level, whereas in the second perspective the domestic level initiates changes and creates an outcome at the EU level. In the top-down perspective European integration is an independent variable and change in domestic systems is the dependent variable. In the bottom-up perspective European integration is the dependent variable whereas MS and their policy preferences are the independent variables.[156]

A second different declination of the interpretation of Europeanisation concerns the different aspects affected by Europeanisation. Domestic adaptation may involve policy (norms, goals, policy instruments and style, organisational structure and actor networks); polity (government-parliament relations, administrative structures, judicial structures and intergovernmental relations), politics (party and electoral politics, interest intermediation, public opinion) and institutions.

Radaelli also adds shared belief, styles and ways of doing things, thus offering one of the widest and most used definitions of Europeanisation, as a "Processes of (a) construction (b) diffusion and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the making of EU public policy and politics and then incorporated in the logic of domestic discourse, identities, political structures and public policies." [157]

*Possible output of Europeanisation process*

To link the variables of EU policies and domestic impact, Europeanisation literature created a framework of possible outputs of the Europeanisation process in a top-down approach at the domestic level. According to Knill and Lehmkul (and developed by

154 G. Bandov, K. Herceg (2018) "N. Research on Europeanization in Literature: From the Top-down Approach to Europeanization as a Multi-directional Process". *Cadmus Journal,* 3(5): 134-144.
155 T.A. Börzel (2002), "MS Responses to Europeanization". *Journal of Common Market Studies,* 40 (2): 193-214.
156 Howell (2002): 3.
157 C.M. Radaelli (2002), **"**The domestic impact of European Union public policy: notes on concepts, methods, and the challenge of empirical research" , *Politique européenne* 2002/1 (n° 5):108.

Radaelli) there are four main typologies of output which are listed by scholars[158]: a) absorption - which entails only small non-fundamental changes whereas the core is maintained without real modification of essential structures and neither change to the logic of political behaviour; b) transformation - which entails deep changes in the fundamental logic of political behaviour; c) inertia - which is a situation of lack of change, lags, delays in the transposition, sheer resistance; and d) retrenchment (that is intended as a paradoxical effect, as it implies that national policy becomes less European than it was, strengthening coalitions of domestic actors opposing reform).

*Fit and misfit*

One of the first theoretical findings of the Europeanisation literature is represented by the idea of fit or misfit. Risse and collaborators express this concept as follows. The (degree of) adaptational pressure for change depends on the degree of fit or misfit between European institutions, rules and practices and the domestic structure if institutions, rules and practices differ from the European ones.[159] "The lower the compatibility (fit) between European institutions on the one hand and the national institutions on the other the higher the adaptational pressure.[...] We will thus expect domestic change particularly in those cases where the misfit is high and the adaptational pressures are therefore strong". [160]

*Mediating factors*

However this condition is necessary but not sufficient. In fact as explained by Börzel there are obviously domestic factors and actors that may block change or on the contrary emphasise domestic change, pulling this well beyond what is requested at the European level.[161] Graziano explains that in case of high adaptational pressures the presence or absence of mediating factors is crucial for the degree to which domestic changes adjusting to Europeanisation should be expected.[162]

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158 C. Knill, & D. Lehmkuhl, (1999). "How Europe matters. Different mechanisms of Europeanization", *European integration online paper*s (EIoP), 3(7). C.M.Radaelli, (2000). "Whither Europeanization? Concept stretching and substantive change". *European Integration online Papers (EIoP)*, 4(8). Focusing on the top-down impact Europeanisation is operationalised as processes of domestic change arising from EU level policies, Europeanisation literature created a sort of typology to classify the different kind of outputs of the Europeanisation process.

159 T. Risse., M.G. Cowles and J. Caporaso, (2001), *op. cit.*, p. 12.

160 *Ibidem*. Other scholars specified that if the misfit is too high it might discourage domestic actors from change. Thus, the ideal adaptational pressure generating domestic change is a medium level of misfit.

161 T.A. Börzel (2002)."MS responses to Europeanization", *Journal of Common Market Studies*, *40*(2): 193-214.

162 Graziano (2013).

The first resistance might (or might not) emerge from the same government or bureaucracies which "will try to defend their existing policy tradition and not accept deviation from the status quo".[163] According to Duina, implementation policies with significant misfit were either doomed to fail due to a reluctant domestic government and or administration. [164]According to Knill and Lenschow, the main difficulties and obstacles to implementation were due to administrative resistance.[165] The unwilling state machinery needed to be forced by societal actors to comply, but empirical studies problematised this first theoretical assumption.

Benzen created a typology of national variables (which may differ from one author to another), that influence the domestic impact of the Europeanisation process and explains the great empirical variation in the effect of the EU policies and the differential impact in different MS. These national variables are:

- the domestic culture of compliance with European Union measures;
- the institutional capacity, intended as a highly developed institutional capacity to implement changes which increase the likelihood of successful adaptation;
- the existence of veto players: "Veto points in the domestic decision making process provide actors with entry points to block unwanted changes, and thus a high number of veto points will lead to problematic conditions for change arising from EU pressure, whereas few veto points eases the process. If pro-change actors have access to resources from supportive formal institutions this will obviously also help tip the power balance in their favour".[166]

*Different mechanisms of European integration*

A final classification traced by Europeanisaton scholars refers to the different mechanisms of European integration. Knill and Lehmkuhl argue that different mechanisms of Europeanisation may influence the kind of domestic adaptation. They identify three types of EU pressure: positive integration, negative integration and framing integration.

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163 O. Treib (2014) "Implementing and complying with EU governance outputs", *Living Reviews in European Governance*, Vol. 9, (2014), No. 1.

164 F.G. Duina, (1997). "Explaining Legal Implementation in the European Union", *International Journal of the Sociology of Law*, 25(2): 155–179.

165 C. Knill and A. Lenschow, (2000). "Do New Brooms Really Sweep Cleaner? Implementation of New Instruments in EU Environmental Policy". In C. Knill, A. Lenschow (Eds), *Implementing EU Environmental Policy: New Directions and Old Problems,* Manchester. Manchester University Press, pp. 251–282.

166 S. R. Bentzen (2009), *Theorising top-down Europeanisation Examining the implementation of the 1992 Maternity directive in Denmark*. Dissertation on EU Studies, p. 14. Available online at: https://core.ac.uk/download/pdf/12518744.pdf (last accessed 17 April 2019).

Positive integration involves a model prescribed by the EU for the MS to follow which will take the shape of specific, articulated requirements which MS must implement, found in new regulatory policies meant to curb the negative externalities, arising from the internal market[167]. As examples of policy areas using mechanisms of positive integration, Knill and Lehmkuhl mention environmental regulations and policies having to do with health and safety at work.

The second mechanism is negative integration, "which is found in old regulatory policies focusing on creating the internal market, typically through requirement upon the MS to liberalise or deregulate." In this second mechanism Europeanisation may empower a specific group of actors wishing to liberalise the market.[168] The third mechanism of Europeanisation is called by Knill and Lehmkul "framing integration". This is found in policy areas where the EU is only able to formulate vague and symbolic policies, usually due to lack of competences to regulate in a hierarchical manner. [169]

*Strengths and weaknesses of Europeanisation studies*

The Europeanisation literature has the great advantage of having called scholarly attention to domestic adaptation and the impact of European regional integration. However, there are three fundamental limits. It is interesting to note that these limits are recognised and indicated by the same Europeanisation scholars.

First, the top-down approach risks focusing too much on compliance performance, thus adopting a pro-European normative stance. "This top–down school is interested in comparing the intended and actually achieved outcomes of implementation, where the degree of the goal attainment serves as an indicator for implementation success. Implicitly or explicitly, top-down perspectives tend to view discretion and the resulting deviations from the centrally decided rule as a control problem." [170]

2. The second fundamental limit is the confusion about the causes of domestic change. It is not always easy to distinguish EU sources of change from cross-border influence

167 Knill & Lehmkul (1999):2.
168 *Ibidem.* See also K. Featherstone & C.M. Radaelli, (Eds.) (2003). *The politics of Europeanization*. Oxford: Oxford University Press.
169 Knill and Lehmkul (1999):3. Framing integration aims at reform by altering the beliefs and expectations of relevant actors in a way to facilitate the envisioned changes. The extent of change observed in the beliefs and expectations of central actors is the explanatory factor in accounts of domestic change. EU policies can influence this by providing legitimacy to domestic actors supporting reform, or by providing solutions to experienced problems, and thus convincing domestic actors of the viability of reform.
170 E. Thomann (2019), *Customized Implementation of European Union Food Safety Policy United in Diversity?* London: Palgrave Macmillan, p.241.

or from global or other European supranational actor influence. When a scholar is analysing the domestic change as adaptation to the European environment he may tend to overestimate European variables over global or domestic ones. This is also a methodological problem that several scholars have tried to address, finding certain methodological strategies to tackle the problem.[171] But, given the high number of variables at different levels that may influence domestic change, the problem has not yet been completely resolved.

3. The third limit concerns the lack of elements about the causes of Europeanisation. This literature describes a process and a domestic change but does not investigate the reasons why this domestic change happens, nor what the main factors and actors driving European integration are.

## *3.2 The Europeanisation literature in the armament field*

### *3.2.1 Europeanisation, defence economics and armaments: an introduction*

The debates concerning the Europeanisation of the armaments sector started with the assumption that European states in NATO should collaborate more closely on procurement, research and industrial policy to improve efficiency and achieve economy of scale and reduce duplication. Faced with the drastic reduction of military expenditures following the collapse of bipolarism and increasing competitiveness, companies looked for strategies to tackle this hard situation, firstly by reducing the costs of productions.

One of the most quoted clear examples of fragmentation and overlapping in Europe was and is represented by the competition in fighter jet production Three different defence companies developed three fighter jets, a project which carried high production costs: the Rafale realised by Dassault in France, the Eurofighter Typhoon produced by EADS, Alenia Areonautica and BAE Systems (UK) and the Gripen constructed by Saab, a Swedish company.[172] Hartley adopting a defence economic

171 M. Haverland (2005). "Does the EU cause domestic developments? The problem of case selection in Europeanization research". *European Integration online Papers (EIoP)*, 9(2).
172 M. H. A. Larivé (2014). *Debating European Security and Defense Policy: Understanding the Complexity* (Global Interdisciplinary Studies Series). London: Routledge.

perspective “calculated that Europe could realize efficiency gains of 10-20 per cent through improved inter-European defense-industrial cooperation .”[173]

Under this pressure, during the late Nineties the first agreements concerning arms production and restructuring were signed by some of the European countries. In 1996 WEAO (Western European Armaments Organization) was created under the WEU (Western European Union) to fund armaments research. [174] In the same year OCCAR (*Organisme Conjointe de Cooperation en Matiere d’Armement*) was created by four MS - Italy, France, the United Kingdom and Germany - and then enlarged to other EUMS with the aim of improving production collaboration.[175] In 2000 a Letter of Intent (LOI) and then a Framework Agreement was signed. It touched on topics such as: security of supply, transfer/export procedures, security of information, research, treatment of technical information and harmonisation of military requirements. It introduced a Global Project Licence aimed at facilitating exchange of components and spare parts which presents strong analogies with the Global and General Licences envisaged in the ICT Directive which was approved seven years later and which of course covers all the EUMS:[176]

However, early studies on the extent to which this was happening suggested that the effect of Europeanisation was limited, considering the intergovernmental nature of these armament institutions and that OCCAR and LOI involve only a part of the EUMS and in particular the main producers and exporters.[177]

The birth of the ESPD and CSDP opened new scholars' perspectives. In 2003 the EU launched European Security Strategy (ESS) identifying threats and challenges, as well as the EU's objectives and goals in defence and security.[178] In 2004 the European Defence Agency was created to develop defence capabilities in the crisis management sector; to promote and strengthen European armaments cooperation; to contribute to strengthening the EDIB and to creating a European market for internationally competitive defence materials. Also the European Commission, since 1996 has been

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173 T. Sandler and K. Hartley (1999). *The Political Economy of NATO: Past, Present and into the 21st Century,* Cambridge: Cambridge University Press.

174 K. Schilde (2017).

175 *Ibidem.*

176 *Ibidem.*

177 J.Mawdsley (2000). “The changing face of European Armaments Co-operation: continuity and change in British, French and German Armament Policy 1990-2000”, *PhD Thesis*, University of Newcastle upon Tyne, Department of Politics, October 2000. M. DeVore (2013), “Explaining European Armaments Cooperation: Interests, Institutional Design and Armaments Organizations” *European Foreign Affairs Review:* 1–27.

178 S. Biscop (2019). *European Strategy in the 21st Centurt,* London and New York: Routledge.

dealing with the armaments field to facilitate collaboration in the armament sector, to increase funds for security and defence research and to ease intra-Community transfers of defence materials.

The growing initiatives and institutions that revolved around the CSDP and CFSP stimulated a new stream of studies with different academic perspectives. Constructivist scholars (like Manner, Meyer and Stricknann), who claim that identity, discourse, culture and ideas form the key driver for policy choice in the field of International relations, focused on the normative power of the CFSP. [179] According to Manners the EU is committed to doing the least harm by promoting nine universal normative principles: peace, freedom, democracy, human rights, rule of law, equality, social solidarity, sustainable development and good governance.[180] Other scholars such as Webber adopted a security governance approach, claiming that the creation of supranational institutional structures would have favoured élites socialisation. [181] Another stream of studies revolves around the growing role of the two supranational EU bodies, the Commission and the ECJ, but this will be addressed in the next section. On the other hand, studies on the EDA stressed the largely intergovernmental nature of this agency and the limited engagement with it by larger states,[182] and the continuing "techno nationalism", maximising military-technological autonomy in order to maximise national strategic autonomy" thus leaving defence industry and technology still well rooted at the national level of EU MS.[183]

EU and armaments is an immense theme. Under this broad umbrella, a plurality of aspects relating to armaments can be analysed, of which the most important are: arms production, military expenditures and arms procurement, arms exports, arms export control, foreign and defence policy at the national and EU levels. Different kinds of arms require different approaches (for example, light arms and weapons of mass destruction have their own specific literature). Furthermore, different academic perspectives can be included, such as political economy, economics (micro and macro economics), but also international relations, strategic studies, war studies, geopolitics,

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179 I. C. Meyer ad E. Strickann. (2001). "Solidifying constructivism; how material and Ideational factors interact in European Defence", *Journal of Common Market Studies,* 49 (1):61-81.

180 I. Manners (2006). "European Union 'Normative Power' and the Security Challenge", *European Security*, 15(4): 405-421.

181 M. Webber *et alii* (2004). "The governance of European security ", *Review of International Studies* (2004), (30): 3–26.

182 J. Mawdsley, (2015). "France, the UK and EDA". In N. Karampekios and I. Oikonomou (Eds). *The European Defence Agency: Arming Europe*. London and New York: Routledge, pp.139-154.

183 R.A. Bitzinger, (2010). "Globalization revisited: internationalizing armaments production". In: A.T.H. Tan (Ed.). *The global arms trade: a handbook.* London: Routledge, pp. 208–220.

military studies, comparative, European and international law, history, European integration theories, political science and decision-making processes. There are also myriad streams of studies which could be analysed, such as the complex relationships between NATO and the EU armament policy, the complex intertwining between European integration and globalisation dynamics in the restructuring of arms production and its consequences, and so on.

The present dissertation covers only one dimension of armaments (arms export control) and one main disciplinary perspective (European Integration theory), which is explained in the following section.

### *3.2.2 The Europeanisation literature in the field of arms exports control*

The Europeanisation literature has also inspired researchers in the armaments field. Most of the authors are not scholars but are researchers from peace research institutes or practitioners. Their studies are extremely interesting. If on the one hand their theoretical references are less articulated and their methods less sophisticated, on the other, practical experience gives substance to the Europeanisation tools and offers some interesting suggestions for further studies. Another characteristic of these studies is that they focus mainly on the European Code of Conduct, whereas there are no studies applying Europeanisation to the Directive on Intra-Community transfer, thus showing a lack of studies in this field, a gap which this thesis will help to bridge.

Kyree Holm's contribution is one of the best structured. Holm investigates the impact of another instrument the EU Code of Conduct on Arms Exports on national legal frameworks using three case studies (Italy, Germany and Belgium) and Europeanisation theories as theoretical references. The aim is to assess domestic change in arms export practice and whether there is convergence among MS on their arms export control policies. [184] The cases are chosen, among other factors, in order to represent high regulation countries (Germany and Italy) and low regulation countries (Belgium). Holm observes that despite the voluntary dimension of the European Code of Conduct on arms exports "has served to pressure Italy and Germany to lower their

184 K.Holm, (2006). "Europeanising export controls: the impact of the European Union code of conduct on arms exports in Belgium, Germany and Italy." *European Security*, 15(2): 213-234.

levels of export control, while nevertheless improving Belgian standards."[185] The result is a convergence trend toward a median level outcome.[186]

Mark Bromley, a senior researcher of SIPRI, in two successive publications reaches conclusions compatible with those of Holm. The first study is realised together with Brzoska, another well-established researcher on arms control. Using quantitative methods, the study finds that the Code of Conduct had some impact on national arms export policies, but was limited to reducing arms export to the countries whose governments are violators of human rights and to states in conflicts. However, the impact is limited, it does not affect broader norms concerning democracy and economic development. Furthermore, according to these two authors, there was little evidence that the adoption of the Code of Conduct had improved harmonisation of national arms export policies.[187]

Another study by Bromley in the same year, dealt with the domestic impact of the EU Code of Conduct focusing on three case studies: the Czech Republic, the Netherlands and Spain. He used qualitative methods and in particular interviews with main actors in the field. He found that the adoption of the non-binding Code of Conduct on European arms exports has favoured an increase in transparency and parliamentary accountability in the three case studies: "Especially in countries that were not so transparent to start with, the implementation of the Code of Conduct has led to greater public transparency. This has led to more information being available on arms exports, which in turn has led to political parties and civil society in some MS citing examples from other MS to push for domestic change. In this way the Code's implementation has indirectly, through the process of benchmarking, increased the levels of parliamentary accountability across the EU." [188]

However, with the passage of time, this moderating influence with respect to domestic change in the direction of a more transparent and responsible arms export policy seems to have decreased or even disappeared. For example, Bromley in 2012, undertaking an assessment of the impact of the EU Common Position 2008/944/CFSP on European Arms Exports (8 December 2008) – which is the new more binding

185 *Ibidem,* p.,230.
186 *Ibidem,* p.231.
187 M. Bromley, and M. Brzoska (2008)."Towards a common, restrictive EU arms export policy? The EU Code of Conduct on major conventional arms exports', *European Foreign Affairs Review*, 13(2): 333-356.
188 M. Bromley (2008). "The impact on domestic policy of the EU Code of Conduct on Arms Exports. the Czech Republic, the Netherlands and Spain", *SIPRI Policy Paper* n. 21, May 2008.

formula of the Code of Conduct – indicates that the trend of increasing transparency continues but "there were signs that this dynamic might be losing its momentum."[189] More drastically other researchers and NGO representatives identified an inversion of the direction of the Europeanisation process, toward more pragmatic arms export policies and practices. For example, Nils Duquet of the Flemish Peace Institute, analysing EU arms export policies towards the countries of the Arab spring, basing the analysis on quantitative methods drawn from EU consolidated report on arms exports and national reports on arms exports, claims that "Instead of a more restrictive approach to arms exports, several MS have continued their relaxed arms export policy vis-à-vis the Arab region, or have further eroded their traditionally restrictive arms export policy for this region." [190]

In conclusion, armament studies show a moderate impact of the EU Code of Conduct on domestic arms export policies towards a more responsible and transparent arms export control system. However, this influence is weak and declines until nearly disappearing from the late 2010s. Overall Europeanisation studies on armaments offer extremely interesting contributions, concerning the output of domestic change as consequences of the Europeanisation process as a result of the intergovernmental channel. However, they focus mainly on the European Code of Conduct, whereas there are no studies applying Europeanisation to the Directive on Intra-Community transfers and there is thus a gap in the literature.

## 4.Conclusion: the rationale for Europeanisation

After reviewing the European integration scholars' debate on EU arms export control regulation I explained their strengths and weaknesses and identified their limits that can be summarised as follow. Neo-functionalism expects MS convergence due to supranational institutions and large transnational firms but this overlooks the reality of MS differences and contexts. Rational choice institutionalism has the conceptual tools to look at differences in MS structures and contexts, but has not focused on these differences in explaining the defence policy area. It has not drilled down. Liberal

189 M. Bromley (2012). "The review of the EU Common Position on arms exports: prospect for strengthening controls". *Non Proliferation papers*, n 7, January 2012: 7.
190 N. Duquet, (2014). *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies'*, Brussels: Flemish Peace Institute.

intergovernmentalism is also more aware of the domestic context but has tended not to drill down to focus on the question of MS differences, except in terms of broad national interests. Constructivism in the form of Strikwerda's work has the most nuanced sense of how states may react to reframing but there are questions about how to systematically demonstrate this and how to drill down which need more explanation.

Moreover all these "big integration theories" share a fundamental limitation when applied to arms export control and especially to the defence package: they are not falsifiable. In order to answer the fundamental question "why did MS accept the ICT Directive?", the most appropriate methods are interviews, process tracing or focus groups. But these methods, as I explain in depth in the methodological chapter, are particularly weak in the armaments field, because actors (representatives of governments, bureaucracies, companies) tend not to disclose all the information, and change their answers according to the interlocutor, thus making the basis of a theoretical castle extremely irregular. That's why different scholars (Fiott, Strikwerda, Blauberger and Weiss) asking the *same* fundamental question and using the *same* research methods, reach opposite conclusions, validating intergovernmental, constructivist and institutionalist theories respectively.

In order to address these theoretical and methodological weaknesses which characterise a "big theories" approach to the armament field in general and to the ICT Directive in particular, I decided to circumvent them, by changing perspective (top-down), theoretical framework and methods. Europeanisation theory appears to be the most flexible approach, allowing a top-down perspective to investigate how European integration works in practice.

Besides this, there are a number of other reasons why I chose the Europeanisation lens to investigate domestic change as triggered by the transposition of the Directive on intra-Community transfers.

Firstly, Europeanisation allows gathering a great variety of responses between different MS and the diversity of the transposition pathways of each MS, in harmony with the different weight and role of the defence industry and other social actors, different legal traditions, as well as different social and economic conditions. This flexibility and concreteness allows gathering original MS contributions for re-defining and re-appropriating European commitments in domestic policy arenas.

Secondly, in the specific arms export control field, MS focusing on the differences between MS and their domestic actors is even more important. As Mawdsley has argued, treating the EU as a *sui generis* actor, where the knowledge gained from studying defence economics at a national level can be ignored, can lead to misreading the particular issue.[191] My thesis argues that combining insights from the national public policy-making literature with measures designed to take into account the unusual nature of the armaments field can, in fact, give a better understanding of the direction that Europeanisation is taking in this sector. Rather than concentrating on negotiations in Brussels as other scholars have done, I concentrate on the national transposition of the Directive in three states and look for evidence of policy change.

Thirdly, the ICT Directive which is at the core of the present dissertation, is very general and vague in its formulation because it touches on a topic which has been jealously guarded by MS and managed at the intergovernmental level. As a consequence, it leaves a wide marge of manoeuvre to MS in transposition measures. Thus, MS decisions are crucial to the success and failure of the EU policy.

Fourthly, I fill a lack in the arms export control literature considering that most of the studies focus on the supranational level of the ICT Directive. There are only a few cases that study the Europeanisation of arms export control from a domestic perspective and a few comparative analyses of the domestic impact. Domestic regulation and change have also been neglected by scholars because of the effort that research of this nature requires.

Though adopting Europeanisation as the theoretical lens, the thesis also tries to address the main weaknesses of Europeanisation literature in reference to the three main points explained in section 4 as follows:

1) That Europeanisation is good *a priori*. The thesis does not adopt the formula of the "goodness of fit" which characterises Europeanisation literature. The direction and content of EU policies or acts can be another important variable influencing the attitude of MS and of European citizens. And so in the thesis I investigate the direction of the Europeanisation process. As a consequence the term of comparison for domestic change is not represented by the European directives (the European act disposal) in terms of compliance, but by the national legislative situation preceding the approval of the Directive.

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191 Mawdsley (2000*).*

2) The Europeanisation literature is characterised by confusion about the causes of domestic change. Being aware that this limit cannot be completely overcome, I assess domestic change by analysing the national laws transposing the Directive 43/2009. Despite expressing also national and even global variables, the national laws transposing the Directive are undeniably linked to the European level.

3) Europeanisation is not a grand theory and does not investigate the overriding factors that generate European integration, but looks at the domestic change as a consequence of EU variables. I use Europeanisation lenses exactly for what they are: a tool that enables studying the direction of the Europeanisation process and the domestic adaptation. I do not pretend to explain what drives the Europeanisation process but just the direction of change. Asking what type of model is emerging and asking who gains from that model also indirectly sheds light on the question of who the driving actors are in this field.

In conclusion, I adopt a top-down approach focusing on the domestic change in three national case studies as a consequence of the implementation of Directive 2009/43/EC on intra-Community transfer using two models and eight dimensions measured from 0 to 5. In this way the analysis offers an original contribution to the Europeanisation process in the field of arms transfers control and transparency. This analysis allows me to investigate the direction of the Europeanisation process in the armaments field at a domestic level. As instruments to investigate domestic change, I use national domestic laws on arms export control and transparency before and after the transposition of the Directive, in order to avoid basing methods on declaring which are extremely changeable in this field. It also allows me to draw on national public policy literature to ensure that my understanding of domestic change is sensitive to the existing context (see Chapter 3 for a full explanation).

# Chapter 3. Methodology

### 5.4.1.1 Introduction

Colin Powell's famous UN speech showing a model vial of anthrax and presenting evidence on Iraq's development of biological weapons – most of which has since been proved false – is emblematic for understanding the risks and difficulties in investigating arms (conventional and unconventional) control. It shows how representation, rhetoric and non-knowledge are used in the arms control field, and the infinite traps connected to long chains of non-knowledge which starts from an anonymous "witness" and arrives at the UN, becoming a casus belli for military intervention.[192]

In the armament sector, the risk of relying on statements that do not correspond to the truth are theorised by strategic studies and are confirmed by empirical findings. Strategic studies teach that perception of threat plays a fundamental role.[193] For example, a state might be interested in overstating its military equipment, armed forces and even military expenditures for deterrence reasons. By contrast, a government might be interested in understating its armaments exports towards unreliable governments because of internal social pressure to commit to responsible arms transfer control and to be consistent with the domestic obligation of rule of law or other democratic values.[194]

Secondly, a state might adopt rhetoric or hypocritical declarations, making far reaching commitments that they are not willing or able to keep.[195] It might happen that a state adheres to a treaty or to an arms control instrument in order to obtain a façade of

192 "Full text of Colin Powell's speech", 5 February 2003, https://www.theguardian.com/world/2003/feb/05/iraq.usa, last accessed 12 may 2019.
193 Bozzo (1991).
194 J. Erickson (2015). *Dangerous trade: arms exports, human rights and international reputation.* New York: Columbia University Press, p. 23.
195 S. Krasner (1999). *Sovereignty: Organized Hypocrisy*. Princeton: Princeton University Press. A. Héritier (1997)."Policy-making by subterfuge: interest accommodation, innovation and substitute democratic legitimation in Europe - perspectives from distinctive policy areas." *Journal of European Public Policy*, 4(2):171-189.

ethicality, but that they formulate it in such a vague way as to render it easy to circumvent.

Thirdly, in the specific field of conventional arms export control, it might happen that actors in this sector change versions according to the interlocutor. A member of government might want to appear more restrictive and ethically oriented with the parliament and with civil society, whereas with operators in the sector and peers they are freer to show a more favourable attitude toward a liberal and flexible market within and outside European boundaries. There are several empirical instances that confirm this. For example, a representative of the Italian Presidency of the Council declared during a meeting with the NGOs that the Italian Government pushed from the beginning to make the Directive stricter particularly with respect to the joint responsibility of MS on the final destination of coproduced goods.[196] Nevertheless, the representatives of the Italian Foreign Ministry asserted their desire to liberalise arms export policies with non EU members and extended the principle of delegation beyond the Directive.[197] A similar double attitude can be found in the UK Government when explaining the reasons for its scepticism towards the Defence Package: in interviews by scholars these officials answered that the Directive was too burdensome on domestic regulation,[198] but to the House of Commons they said the Directive was too light to sustain rigorous domestic regulation.[199] The secrecy that characterises this sector makes it more difficult to control the veracity of a declaration, especially if a meeting takes place behind closed doors.

Fourthly, some actors and companies rarely disclose their interests and admit that they want to influence the Commission or a political body. They tend to leave few written traces of their lobbying activity. It is more likely that they use a think tank to shape their interests and perception in a wider political perspective in a consistent narrative. For this reason, the use of a methodology such as *process tracing analysis* might overestimate the role of those actors leaving written traces compared to those who use less evident or less direct ways to influence a political body.[200] As a consequence, an

196 Minutes of the meeting between Italian NGOs Rete Italian per il Disarmo and the Representatives of the Italian Government, held on the 30 May 2009, not published, author attended.

197 F. Azzarello of the UAMA declared that the Italian law was penalising for Italian companies. During a hearing in the Senate Defense Committee, he claimed: "I am referring to a desirable introduction, in article 13 of law 185/90, of the provision of a global export license, already provided for within the EU, for movements outside the EU.", 24 May 2017, IV Commission of the Italian Senate, Affair n. 912, https://www.senato.it/leg17/3655, last accessed 15 March 2019.

198 Fiott (2017).

199 *Ibidem*.

200 D. Collier (2011)."Understanding process tracing." *Political Science & Politics*, *44*(4): 823-830.

analysis based on process tracing or voluntary declarations can reach different results compared to assessment using a sort of network analysis extended to informal meetings and other forms of socialization.

Another strategy used by companies and which seems successful is that of complaining regardless, even when they are quite satisfied with a legislative measure or the economic situation. Furthermore, they tend to paint the economic situation as worse than it actually is in order to obtain more support from the states and the EU. For example in 2016, a representative of the most important Italian defence company complained about a crisis in the sector. The representative asked for major support from the Italian state in terms of public expenditures, political support for exports and investments on research and development.[201] However, upon examining the official data including the research presented in that meeting, no trace of crisis in the sector was found; the representative was merely exaggerating in order to stimulate state support. It might happen that these kinds of exaggerated claims are reported in a document that is then quoted as a point of departure in a scholar's paper, resulting in a chain and multiplication of non-knowledge.[202]

Fifthly, the boundaries between each category of actors are blurred. For example, the same person working as a consultant for the government administration might be collaborating simultaneously on several projects with defence companies and writing essays for a think tank. This makes it hard to understand who he is representing when making a declaration or a political move. Furthermore, there are cases of "revolving doors", where high officials are hired from domestic companies.[203]

Lastly, the analysis is complicated by the fact that each actor category is fragmented: for example, studies reveal clearly different positions within the administration between

201 Flyorbitnews (2016). "Dove va l'industria della difesa Italiana", June 2016. Available online at http://www.flyorbitnews.com/2016/06/09/dove-va-lindustria-della-difesa-italiana/ (last accessed 07 September 2019)).

202 A. Brzozowski (2019). "European Defence Fund talks reveal rift over EU's defence future". *Euractiv*. Available online at https://www.euractiv.com/authors/alexandra-brzozowski/ (last accessed 15 March 2019); Mawdsley (2018); ENAAT (2016b). "Why the EU should not subsidy military research." *ENAAT Position Paper on the proposal of Preparatory action on Defence research*, available online at: http://enaat.org/wp-content/uploads/2016/09/ENAAT-Position-on-Defence-research-PA_FINAL.pdf (last accessed 15 March 2019).

203 Among others see, I. Davis, (2002). *The regulation of arms and dual-use exports: Germany, Sweden and the UK.* Oxford: Oxford University Press; A. Stavrianakis (2010). *Taking aim at the arms trade. NGOs, global civil society and the world military order.* London: Zed Books. L. Mampaey, (2008). "Il sistema militare industriale." In: C. Bonaiuti and A. Lodovisi (Eds.), *L'industria militare e la difesa europea* (pp. 32-43). Milano: Jaca Books; P. Holden (2016). *Indefensible: seven myths that sustain the global arms trade*. London: Zed Books.

officers responsible for controlling arms exports and officers tasked with supporting arms exports.[204] Similarly, at the EU level, the positions of different DGs are differentiated with regard to human rights or how to distribute funds for military and civil research. As explained before, there is also a differentiation between the category of defence companies (prime contractor and subcontractors) and between NGOs (opposing the arms trade or in favour of strict regulation). Thus, it might appear superficial to attribute a position to a category of actor after just a few interviews given in the same context with the same interlocutor with the same segment of that actor category.

For all the reasons mentioned above, the arms control field is extremely vulnerable to these variabilities. Consequently, the use of qualitative methods, and particularly interviews and process tracing, must be treated with caution; otherwise, the overall theoretical castle may be built on the quicksand of changeable declarations from actors in this field.

The question of the limits of quantitative and qualitative methods in the armaments field has been discussed among scholars who have dealt with armament issues for a long time. For example Williams et al brought together a group from critical military and war studies to examine methodologies for military-related research.[205] Most of the group's attention is devoted to access, data sources and qualitative methods. At the same time, there are also useful references to quantitative methods. For instance, Mawdsley engages with quantitative methods and the limits of the existing datasets, but also small N comparison and process tracing.[206] Another scholar who devoted time to qualitative methods and especially to issues with process tracing based on official documents and interviews is Deschaux-Beaume. Despite focusing mainly on military personnel, she reports difficulties related to the unavailability of certain documents due to the sensitivity of the subject but also of reticence of those being interviewed. "In any research project on defence matters an essential methodological problem quickly emerges: the problem of access to internal documents, very opaque technical jargon, specific languages and social codes. The environment is difficult and suspicious."[207]

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204 For France, see Béraud-Sudreau (2014); for the UK, see Davis (2002) and Stavrianakis (2010).
205 Williams *et alii* (2016). *The Routledge Companion to Military Research Methods*, London: Routledge.
206 J. Mawdsley (2016). "Comparing Militaries: the challenges of Datasets and Process-Tracing." In A. Williams *et al.* (Eds.), *The Routledge Companion to Military Research Methods*. London: Routledge, pp. 115-125.
207 D. Deschaux-Beaume (2012). "Investigating the military field: qualitative research strategy and interviewing in the defence networks." *Current Sociology*, 60(1): 101–117.

She argues that it is not sufficient to rely on a few interviews to rebuild a fact, because the actors are often neither objective nor sincere. “The interviewees cannot be assumed to be objective, as they are personally involved. There are peculiar methodological challenges particularly due to the status of military speech”. [208] Consequently, she combined two techniques. She opted for a multiplication of interviews at different levels of the decision-making processes in order to avoid unilateral and official discourse and to triangulate the collected data and sources.[209]

As Mawdsley and Holden have argued, the armaments field is extremely disposed to exchanging opinions for facts and creating myths that are not scientifically demonstrated. Mawdsley analyses EDA documents and explains how not all of the principles on which they are based are scientifically demonstrated nor consistent with each other. [210] Holden demolishes “seven myths” which do not have any strong scientific basis but which are, however, widespread in the arms environment and reported as fact - not just by economic and political actors who are directly involved - but also by EU bodies and even by the newly arrived scholars, as a premise for their analysis.[211]

Given that it is not only possible but likely to find opposite declarations from different actor categories, it is also easy to confirm a thesis or refute another depending on which declaration you want to pick up. This also affects the principle of falsifiability of the hypothesis that each scholar wants to test. That is perhaps why different scholars asking the same fundamental question using the same methods in the same discipline can reach opposite conclusions.

208 *Ibidem,* p. 115.
209 *Ibidem.*
210 J. Mawdsley (2008b). “L’industria europea degli armamenti nel contesto dell’integrazione europea.” In C. Bonaiuti, Dameri, Lodovisi (2008) (Eds.) *L’industria militare e la difesa europea: rischi e prospettive*, pp. 75-82.
211 .P. Holden (2016). *Indefensible: seven myths that sustain the global arms trade*. London: Zed Books.

## 2. Methodological approach of the thesis

### *2.1 Approach of the thesis*

Being aware of the methodological limits mentioned above, this thesis has used a different methodology, and perspective. Trying to avoid methodological traps and unilateral perspectives, it is based on source and methods that are less exposed to subjectivity and changeability.

The research involves a comparative study of the implementation of the EU Defence Package and especially on the impact of EU Directive 2009/43/EC (6 May 2009) on different national arms exports control legislations. The specific aim is to assess the impact of the Directive on some crucial aspects of national legislations and policies on arms export control and transparency in EU countries.

The thesis revolves around the following fundamental questions: what is the direction of the Europeanisation process in the field of arms export control and transparency? In particular, do MS converge and what do they converge around? Do they converge around a strict arms export model where commercial variables are subordinate to political ones, or around a more flexible and liberal model or do they tend to converge around a mediation between these two models? Is there an imbalance in this convergence with regard to one model or another?

In order to answer these questions, I narrowed the field of analysis to one Directive, Directive 43/2009, and three case studies: Italy, the United Kingdom and Hungary. Operationalising the Directive as the independent variable, and the national transposition and implementation as the dependent variable, my analytical framework refers to Europeanisation in an EU perspective, with a top-down understanding of the EU's impact on the MS through the formulated policy of the internal arms market Directive carrying specific requirements for MS laws.

### *2.2 Why the three case studies*

I selected the UK, Italy and Hungary as case studies on the basis of the following criteria. These criteria principally concern the kind of legislation on arms export control and the degree of transparency. The legislation and rules about transparency can be more or less advanced, and more or less strict (with respect to transparency, we are referring particularly to internal and end-user control and exports prohibitions). I chose these three EU MS because of their very different levels of strictness and rigor concerning national arms export control regulation: one country with especially intrusive and strict regulation (Italy), one country with more flexible regulation (the UK), and one country with newer regulation (Hungary). I was able to evaluate the differences and similarities in the transposition of the Directive and its impact on national regulation of arms export.

The three case studies differ also in size, structure and technical autonomy of the national defence industries (including relatively large industries capable of developing various kinds of weapons, well-integrated at the European level, as well as medium and small defence industries that involve smaller capabilities or produce small parts and components for larger systems). The three case studies differ also in weight of societal actors: defence companies are strong in Italy and the UK but are minimal in Hungary. Similarly, non-governmental organisations are strong in Italy and the UK but not in Hungary.

The hypothesis is that, despite great differences between these three case studies (in terms of their regulations, constitutions, institutions and relationships between the state and the market), these three case studies tend to converge around a similar arms export control model, as a consequence of the domestic change generated by the Europeanisation process in this field.

### *2.3 Why the Directive 2009/43/EC?*

EU Directive 2009/43/EC of the European Parliament and of the Council of May 6$^{th}$ 2009, simplifying terms and conditions for the transfer of defence-related products within the Community, is intended to remove obstacles to the free circulation within the

EU market of defence-related products, by reducing administrative burdens and simplifying terms and conditions to obtain arms exports licences. The directive's aim is to strengthen the technological and industrial bases of the European defence industry.

I chose this Directive for the following three main reasons.

First, the Directive is the first EU binding act on the delicate subject of conventional arms transfers. As explained in the introductory chapter, armament issues have long been exempted from EU regulation for legal reasons (due to a restrictive interpretation of Article 223) but also for political and strategic reasons. The ICT Directive is the first in the arms transfer field.

The second is because it is the output of an unconventional decision-making process. The process differed from the traditional inter-governmental approaches to armament issues. By contrast, this directive has seen the proactive role of the Commission in collaboration with the ECJ in the phase of the initiative.

The third is that that the ICT Directive is grounded in the rules of internal market and freedom of movement of goods, as opposed to a CFSP perspective, as a way to harmonise arms export control regulation. I investigate the advantages and disadvantages of this perspective applied to the armaments field and the consequences of influence/consistency with the CFSP.

This directive has generated a wide debate both politically between practitioners and representatives of NGOs and academically representing a point of departure from the traditional intergovernmental decision-making processes that has dominated EU armament issues.

### *2.4 Two models and eight dimensions*

In order to assess the direction of domestic change and compare the different case studies, I use two fundamental arms export regulation models. They are two ideal types. The first one is *the restrictive model*. This model focuses on ethical variables such as respect for human rights, peace and development. In the model, the rule of law prevails over commercial ones in arms exports, where there is maximum transparency and active involvement of civil society, strict bans and an emphasis on the principle of responsibility for all the actors involved.

At the opposite of the spectrum there is the arms export control *pro-industry model*, intended as an arms export control regulation characterised by the maximum weight given to commercial variables over ethical and even strategic ones. In this model transparency is minimal and also the obligations of the executive branch with respect to parliament are reduced to minimum terms. This leaves maximum flexibility to the executive power in deciding arms export policy, emphasising pragmatism. Consequently, the aspects regulated by primary law are exiguous, with most regulated by executive acts or bureaucracies, and/or just analysed case by case. In the pro-industry model, the principle of responsibility is replaced by the principle of delegation, including delegating the export decision to a country with lower barriers to exports. The first ideal model emphasises checks and balances, and is characterised by the presence of different actors that may slow down the decision-making process but can offer better guarantees against corruption and illicit traffic. The second model is extremely centralised. The first is transparent and accountable whereas the second is opaque and most of the information is not reported to the public. Of course, these are two ideal types and the concrete domestic arms control regulations can be placed in one of the different intermediate points of the continuum linking these two poles.

In order to identify these two models, I used eight dimensions: (a) balance between political strategic variables and economic-industrial variables; (b) balance between legislative and executive power in regulating arms exports; (c) balance between primary law and secondary law in regulating arms exports; (d) balance between transparency and opacity in arms transfers data; (e) balance between national responsibility on the final destination of co-produced goods and mutual recognition principle/delegation to partner countries; (f) balance between centralisation and checks and balances in the authorisation and control procedures; (g) balance between the role and weight of the state with respect to the role of the companies; and (h) balance between common standards and fragmentation in arms export control rules.

## 3. The comparative taxonomy to assess direction and intensity of domestic change

Having established the dimensions, there remains the question of how to assess the individual policy characteristics that shape each dimension. What are the key

indicators and evidence for domestic change? According to Hall, domestic change can involve: 1) the overarching goals that guide policy in a particular field; 2) the techniques or policy instruments used to attain those goals, that is to adjust arms export licensing procedures or control in order to pursue the fundamental goals; and lastly 3) the precise settings of these instruments.[212] According to the variables involved, Hall distinguishes three kinds of changes. He defines a first order change where instrument settings change in light of experience and new knowledge, while the overall goals and instruments of the policy remain the same. When instruments of policy are altered but the overall goal(s) remain the same, there is a second order change. The third order change alters the hierarchy of goals and fundamental paradigms that shape the values and objectives pursued in the policy.[213]

Building on Hall, Graziano investigates domestic change as a result of the Europeanisation process in Italy, comparing three different sectors (agricultural policy, cohesion policy and employment policy).[214] He uses four political institutional dimensions to assess the Italian case: executive-legislature relationships, centre-periphery relationship,- political party-interest group power balance and bureaucratic functioning. According to the *number* involved in change Graziano classifies the intensity of change. He calls "policy transformation those cases in which all four policy structure dimensions show relevant change, policy adjustment when two or three policy structure dimensions change significantly, and policy continuity when one dimension significantly changes or no policy structure change is detected."[215]

Building on Graziano and Hall, I assess domestic change along my eight dimensions. I measure each of these dimensions on a scale from 0 to 5. This scale allows me to assess better the intensity of change. Some of the eight dimensions involved relate directly to the fundamental goals and principles of arms export control policies: for example, the first dimension which concerns the balance between economic and strategic, political and ethical variables. The way in which each MS orders the different variables (ethical, political and strategic issues on the one hand and economic and industrial on the other) in case they conflict directly, informs policy goals, according to which principles and bans on exports are defined. Thus, the number of dimensions,

212 P. Hall (1993). Policy paradigms, social learning, and the state: the case of economic policymaking in Britain**.** *Comparative Politics*, 25(3): 275-296.
213 *Ibidem.* p. 278.
214 Graziano (2013).
215 *Ibidem,* p. 17.

the intensity of change along the scale but also the relevance of the dimensions with respect to the paradigms and goals of arms export policy will be considered in order to assess domestic change.

To assess the direction and intensity of change at the domestic level, I use a scale of intensity expressed in the form of taxonomy for each of the eight dimensions. The scale is based exclusively on the legal disposal and formulation of the regulation of arms export control and transparency. Overall lower values are associated with a pro-industry model of European arms exports whereas higher values with a restrictive model, where ethical and political values prevail. The taxonomy is articulated as follows for each of the eight dimensions:

### *3.1 First dimension: political and strategic variables versus economic and industrial variables*

The first dimension concerns the balance between economic and industrial variables on one side and political and ethical variables on the other. In order to measure this first dimension, I use a scale of intensity from 0 to 5, where 5 indicates the maximum weight of political and strategic variables, and 0 the minimum weight of political variables (and maximum weight of economic variables in the formulation). It is important to remember that the measurement is undertaken on the letter of the laws and not on the practices in arms exports. Thus, if the main regulation makes no reference to economic industrial variables in the text and disposal of the law and in assessing arms export policy, the rank is 5. Where there are explicit references to economic and industrial variables, in assessing export criteria, plus other references to the right of secrecy and commercial confidentiality, without a clear priority of the political variables over the economic ones, the rank is 1. If there is no regulation and the only criteria followed is just that of profit with no regard to security and ethical values, the rank is 0. Between 0 and 5 there are other intermediate levels as illustrated in the following figure.

Table 3.1- Balance between political and economic variables: scale of intensity

| Rank | Scale description |
|---|---|
| 5 | In the main legislation (primary law), there is no reference to economic-industrial variables in assessing arms export policy. |
| 4 | Economic industrial variables are quoted in primary law on arms export control and transparency but they are clearly subordinated to the political and strategical ones. |
| 3 | Economic and industrial variables are present and there is no clear hierarchy/order of priority between political, ethical and economic variables *de iure* or *de facto*. |
| 2 | Economic and industrial variables are present in the regulation and there is also one of two elements: a) a member of the Ministry of Economics or of International/European trade is responsible for the authorisation procedures and not the Foreign and Defence Ministry; b) in primary law there are explicit references to the right to secrecy and commercial confidentiality of the companies as limits to transparency. |
| 1 | Economic and industrial variables are present in the regulation and there is also one of two elements: a) a member of the Ministry of Economics or of European/International Trade is responsible for the authorisation procedures instead of the Foreign or Defence Ministry; b) in primary law there are explicit references to the right to secrecy and commercial confidentiality of the companies as limits to transparency. |
| 0 | Economic industrial variables have full priority over political ones (strategic, defence, security and ethical variables), or there is no regulation of arms exports. |

### *3.2 Second dimension: primary law versus secondary law*

Considering the role and weight of primary law with respect to secondary and sub-legislative regulation, I created a scale from 5 to 0. If the primary law precisely details (thus limiting the discretion of the executive) the three keys pillars of any arms export regulation, which are a) the export control licensing procedures and *ex post* control, b) the criteria or bans on exports (in a binding, unique and immediately applicable way), and c) the quality and quantity of data to be reported to the Parliament, the mark is 5. If the executive branch enjoys a wide margin of discretion for all these three pillars in the framework of a primary regulation, without any approval from the Parliament the rank is 1. If the executive is completely free without any primary law framework, the rank is 0. The intermediate levels are described in the following Table.

Table 3.2 - Balance between primary and secondary law: scale of intensity

| Rank | Description of the scale |
|---|---|
| 5 | The primary law precisely details a) the criteria and bans on exports, indicating ways to implement them automatically as well b) the procedures for authorisation (including terms and conditions for using general licences when introducing end-user controls), c) the quality and quantity in details of the information on transparency. |
| 4 | The primary law accurately details two of the above-mentioned elements. |
| 3 | The primary law accurately details one of the above-mentioned elements. |
| 2 | The primary law details general principles and allows the executive to define the details with previous approval of the Parliament. |
| 1 | The primary law details general principles and allows the executive to define the details without previous approval of the Parliament. |
| 0 | There is no primary law, arms exports regulation is a competence of the executive. |

### *3.3. Third dimension: legislative branch versus executive branch*

The third dimension indicates the power of the parliament in comparison to the power of the government in arms transfer policy. This is a very central dimension in the debate on the Europeanisation process and its direction because there is some important Europeanisation literature explaining the "democratic deficit" of the European Union and demonstrating that Parliaments are the losers in the Europeanisation process.[216] Seikel notes that "the EU's policies and institutions have been frequently criticised for being technocratic and undemocratic". [217] According to Graziano, "European integration (which is, as discussed above, the construction phase of Europeaniation) has weakened Parliaments in four ways. First, the transfer of competences from the national arena to the EU level has removed decision making (involving Europeanization and domestic policy change) with respect to a wide range of activities from the purview of national legislatures. (...) Second, the Union's decisional processes disadvantage national Parliaments. (...) Third, the EU privileges executives over legislatures, offering them opportunities to bypass Parliamentary control. (...) Fourth,

216 Graziano (2013); R. Bellamy (2006). "Still in deficit", *European Law Journal*, 12 (6): 725-742; G. Majone (2014). "From regulatory state to a democratic default", *Journal of Common Market Studies*, 52 (6): 1216-1223. D. Seikel (2016). "A social and democratic Europe? Obstacles and perspectives of action", *Working paper, Hans-Böckler-Stiftung* nr. 207, December 2016: 7; F. Scharpf (2010a). "The asymmetry of European integration, or why the EU cannot be a 'social market economy", *Socio-Economic Review*, 8 (2), 211-250. W. Streeck (2013). *Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus.* Berlin: Suhrkamp; Héritier (1997): 171–189.
217 Seikel (2016): 3.

Parliaments lack the resources and the independence needed to scrutinize effectively the action and activity of their governments in Brussels."[218]

Furthermore, the defence and security field and arms transfer have been covered by military secrecy for a long time and are not accessible to the members of parliament. However, in most European countries after the collapse of the Cold War bipolarism, the scandals due to exporting European-made arms to states in conflicts or not respecting human rights, also thanks to the secrecy and tacit consensus of the exporting governments and bureaucracies, opened a debate for greater transparency. As a consequence, the traditional power of the executive in this field has been progressively integrated with that of parliament, thus enabling the legislature and public opinion to influence, address, orient and control the executive power in the defence and armaments sector. This process has followed different patterns and rhythms according to the history and traditions of each MS. Thus, there is a wide range of possible relationships between the executive and legislative branches.

In order to measure this important relation between the executive and legislative branches, I use three dimensions, two of which are among the eight basic dimensions: a) the power to limit the discretion of the executive with the detail and breadth of primary law; b) the specified provision of information as a means of exercising control over arms export policy, assessing government action and thus directing it; and c) the kind of parliamentary power with respect to export licences which can be preventive or successive.

I created a scale from 5 to 0 moving from the maximum control of the legislature to the complete discretion of the executive in this delicate field. Firstly, when it is parliament, which (by assuming power over the control and direction on the arms trade) dictates and details primary law, the principles and criteria, export procedures and the level of transparency, all these aspects act as guidelines and limit the discretionary actions of the executive power; secondly, when it is the legislature that establishes the quality and quantity of information that the executive must report to parliament, including all crucial data and sensitive information; and thirdly, when parliament has a preventive power in the decision of licence granting, the rank is 5. By contrast, when armament matters are the exclusive competence of the executive, there is no transparency and

218 Graziano (2013), p. 151.

the executive enjoys wide discretion in applying the three classical pillars of any arms export control regulation, the rank is 0. The intermediate levels are explained in the table below.

Table 3.3 Balance between executive and legislative branches: scale of intensity

| **Rank** | **Description of the scale** |
|---|---|
| 5 | It is the legislature that, by assuming power over the control and direction of the arms trade, dictates primary law; the principles to be followed by the competent bodies in the decision-making process on licences, their subsequent controls and the level of transparency. All these aspects act as guidelines, and limit the discretionary actions of the executive power. Secondly, the parliament has a preventive power in licence granting. Thirdly, the information in relation to the parliament is decided by the parliament in the details, by primary law and covers all sensitive and non-sensitive information. |
| 4 | It is the legislature which, by assuming power over the control and direction on the arms trade, dictates primary law in the three above-mentioned principles. All these aspects act as guidelines, and limit the discretionary actions of the executive power. However the power of the parliament in assessing arms export licence is successive and not preventive. This means that the parliament is informed about authorisation to export after these have been granted by the government. Thirdly, the information in the report to the parliament is decided by the parliament in the details, by primary law and covers sensitive and non-sensitive information. |
| 3 | The legislature dictates primary law in two of the basic pillars of national regulation. Secondly the parliament has a successive power in the decision of licence granting. The information delivered to the parliament does not cover sensitive information such as companies and banks involved in arms export, but they offer the legislature some basic information so as to carry out controls. |
| 2 | The legislature dictates primary law details for just one of the basic pillars of each arms trade regulation, whereas the other two pillars are treated in a more general way, leaving the executive a wide marge of discretion in their interpretation and application. Secondly, the parliament has successive power in the decision of licence granting. Thirdly, the annual report is incomplete and does not cover some relevant parts of arms exports, such as general licences or deliveries, thus making it difficult for the legislature and public opinion to have a reliable picture of arms exports direction and policy. |
| 1 | The legislature defines only general guidelines and principles concerning the three pillars of any arms trade regulation (licensing procedures, criteria and transparency). This information is generic and leaves a wide marge of discretion to the executive. The regulation leaves the final say to the executive power which may or may not apply criteria, decide the level of transparency and may or may not apply the end-user certificate, with previous approval of the parliament.<br><br>Secondly the parliament has successive power in the decision of licence granting. Thirdly there is a lack of sensitive information in the report to the parliament, concerning an important/essential part of national exports, such as deliveries. |
| 0 | Armament matters are the exclusive preserve of the government. |

### *3.4. Fourth dimension: transparency versus opacity*

In order to measure the degree of transparency/opacity, I created a scale of intensity: the highest rank of 5 is given to those countries which offer the Parliament an annual report where all data on exports to be reported to the Parliament are detailed by primary law, including all crucial data (such as a description of the material, quantity, value, end-user, and ultimate end-user; also, in cases of coproduction and re-export, banking transactions) and sensitive data (such as banking transactions, and the names of the credit institute and exporting companies), covering both licences and deliveries. All these data are entered in the same row of a table, thus allowing cross-checking controls between fiscal, financial, licensing and delivery values, including brokering expenses. If the information concerns the single licence connecting all these data, the report to the Parliament is, of course, very transparent. It offers both the Parliament and individual citizens' tools not only to stay informed and assess government policy on arms exports, but also to effectively control arms exports, to identify cases of illicit transfers, bribery and corruption. At the other end of the spectrum, if there is no reference to transparency by primary law or there is no report at all, the mark is 0.

Table 3.4 Balance between transparency and opacity: scale of intensity

| **Rank** | **Description of the scale** |
|---|---|
| 5 | All export data are detailed by primary law and binding. They include basic information (value, quantity, and final destination) and sensitive data (banks and companies). These data are not aggregated but are detailed licence by licence, in the same row, thus allowing cross-checking comparison. The information concerns all kinds of arms exported (including small arms), and all licences (and deliveries), including co-productions and global licences and re-exports. All these data are not aggregated. For each licence it is possible to connect all sensitive and crucial data concerning it, thus enabling the Parliament and public opinion to carry out cross-checking. |
| 4 | All export data are detailed by primary law and binding. They include basic information (kind of material, value, quantity, and final destination) and sensitive data (banks and companies). These data are not aggregated. The information concerns all kinds of arms exported (including small arms), and all licences (and deliveries), including co-productions and global licences. However, it is not possible to connect and cross-check the data. |
| 3 | The annual report does not contain sensitive data concerning banking transactions or companies, but it does include all the basic information concerning the military category of arms, the value and the final destination. The data are aggregated by final destination and military category. They include both licences and deliveries. The information concerns all kinds of arms exported (including small arms), and all licences (and deliveries), including co-productions, global and general licences. This corresponds to the best standard practice of the information required for the EU consolidated report. |

| | |
|---|---|
| 2 | The reference by primary law is generic, there is a consistent part of the information which is not included in the report (IE some kinds of licences, for example general licences, and/or deliveries). It is impossible to have a clear picture of this country's exports particularly as regards general and global licences. |
| 1 | No reference to transparency in primary law. However, there is a generic report describing exports. |
| 0 | There is no report to the Parliament nor primary regulation. |

### *3.5 Fifth dimension: responsibility versus delegation*

During the late Eighties several countries, including Italy and the UK, were characterised by an export control policy with a low level of responsibility. It was possible to export to a partner country without any conditions for re-exporting to unreliable countries, or countries in conflicts. These old systems are placed at one extreme of our responsibility scale, with a 0 rank (minimum responsibility and maximum delegation), whereas the maximum rank is given when the exporting state is responsible for all defence material produced in its country and the final destination, including parts and components. In the middle there are several gradations combining a lower degree of responsibility, decreasing only with reliable partner countries, or parts and components which are not considered strategic for the finished defence good.

Table 3.5 Balance between responsibility and delegation: scale of intensity

| **Rank** | **Description of the scale** |
|---|---|
| 5 | Maximum control, information and responsibility on all the kinds of arms, finished systems, parts and components produced and exported from the country. End-user certificate required for all parts and components. Control and transparency on the final end-users. |
| 4 | Delegation only to (reliable) EU countries of decisions (responsibility) on the final destination of small parts and non-strategic components of coproduced goods, but required to be informed about the final destination of these parts, and of re-export. Control on all the goods with the exception of non-strategic parts and components, but transparency also on parts and components. |
| 3 | Delegation only to (reliable) EU countries of the decision on the final destination of small parts and non-strategic components of co-produced goods, without needing to be informed about the final destination of these parts. |
| 2 | Delegation only to a short list of reliable countries (with similar export regulations) of the power to decide on the final destination of all co-produced goods and finished products, and needing to be informed about the final destination of these parts. |

| | |
|---|---|
| 1 | Delegation to all (or a category) of the other countries of the final decision on the final destinations of exports of co-produced goods, previously a general declaration not to export finished goods for non-conventional arms use, and embargoed destinations or illegal purpose (with a simple assurance), without needing to be informed about the final destination of these parts. |
| 0 | Delegation with no conditions to all the partner countries to re-export or export the co-produced goods, without any obligation to be informed on the final destination (legalized triangulation). |

### *3.6. Sixth dimension: common standards versus fragmentation*

There is abundant literature and debate in particular among international law scholars about the process of fragmentation of international and European law. At the international law level, the theme of fragmentation (due to the growing proliferation of international regulatory institutions and law with overlapping jurisdictions) is viewed in two different lights. On the one hand, some authors point out the positive aspects of this institutional pluralism that has produced more progress toward integration and democratisation.[219] On the other, legal scholars underline the risks of erosion of democratic and egalitarian international regulatory systems and undermining the reputation of international law for integrity and certainty. According to Benvenisti and Down,[220] fragmentation limits the opportunities for weaker actors to build the cross-issue coalitions that could potentially increase their bargaining power and influence. Because of fragmentation, the legal panorama is more and more complex. In order to move in this law jungle and to "shop" for the best solution, it is necessary to invest a great amount of resources in legal advisors. Thus, indirectly, complexity might favour the most powerful and richest actors (multinational companies for example) compared to those with fewer resources at their disposal, such as NGOs.

At the European level in the specific field of arms export control and transparency, some scholars have observed that the Common Position on European Arms exports and the Directive on intra-Community transfers, both approved in the same years but following different procedures, might overlap in some articles and create problems of incompatibility, particularly in the norms concerning end-user certificates.[221]

219 M. Maduro (1998). *We, the Court. The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty.* Oxford: Hart Publishing.

220 E. Benvenisti and G. Down (2007). "The empire's new clothes: political economy and the fragmentation of international law." *Stanford Law Review,* 60 (2):595- 632.

221 S. Depauw (2010). *The Common Position on arms exports in the light of the emerging European defence market*. Brussels: Flemish Peace Institute.

Furthermore one of the worries expressed by some analysts [222] was that the introduction of general (and global) licences was so vague and flexible in its interpretation that there would be a risk of a jumble of different general licences, *with different conditions which would have complicated instead of simplified intra-Community transfers.* In fact, a report for the European Commission on the implementation of Directive 43/2009/EC describes a very differentiated panorama of general licences among MS, specifically the kinds of arms covered and terms and conditions, which is represented in a non-uniform multi-coloured table.[223]

The ambiguity and vagueness that characterise the Directive in some points are also read in two contrasting lights. First, there are those who state that ambiguity is linked to norms dynamics, and may favour a virtuous learning process leading to a stricter and more uniform regime;[224] second, there are scholars, lawyers in particular, who posit that ambiguity provides "interpretive leeway" and allows circumvention of norms, thus creating space for material interest under an ethical façade.[225]At an international level, Shaffer and Pollack 2010 explain that ambiguity and vagueness in the formulation is one of the three dimensions of soft law, beside non-binding force and the absence of a judicial authority to enforce norms.[226] Thus it erodes binding force and certainty of law. The analysis is further complicated by the fact that its armaments field is characterised by a veil of rhetoric, ambiguity and secrecy.

In order to measure this dimension articulated in fragmentation and vagueness, I created a scale of intensity from 0 to 5 where 5 represents the absence of ambiguity in formulating export criteria and by unique, clear procedures for export licence granting and control. 0 represents maximum flexibility and diversification in licence granting and control procedures and export criteria, which fall to the discretion of the executive.

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222 Masson *et alii* (2010). Masson *et alii* (2015).
223 Mampaey, *et alii.*
224 S. T. Hansen (2016), "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.
225 *Ibidem,* p. 191, A. Stavrianakis, (2008), "The facade of arms control: how the UK export licensing facilitates arms trade", Goodwin paper #6. London: Campaign against the Arms Trade. February 2008 Available online at https://www.caat.org.uk/resources/publications/government/facade-2008-02.pdf.
226 G. C. Shaffer, & Pollack, M. A. (2009). Hard vs. soft law: Alternatives, complements, and antagonists in international governance. *Minnesota Law Review*, Vol. 94, pp706-99:714-715. Abbott KW and Snidal D (2000) Hard and soft law in international governance. *International Organization* 54(3): 421–456: pp. 400-401.

Table 3.6 Balance between common standards and fragmentation: scale of intensity

| Rank | Scale description |
|---|---|
| 5 | All procedures are unique and established by primary law. There is only one kind of licence, and one kind of end-user certificate for all licences. Criteria are formulated in a clear and unique way. Norms on transparency are clear and there is one way to report exports to the Parliament. They have one way of interpretation and application, which is established at the primary law level and equal for all kinds of exports and licences. |
| 4 | There are two or three main kinds of licences and two or three differentiated procedures on the basis of the reliability of the partner (EU/NATO and extra EU/NATO), simplified procedures, some of which are simplified in terms of negotiation licences and end use controls. However, bans, criteria and end-user controls are the same for all kinds of licences. They are applied in a clear and unique way. |
| 3 | There are few kinds of licences and end-user certificates established by primary law. Export bans and criteria have a unique application (referring to one supranational or scientific source), but it is possible to not request end-user certificates. There is a degree of vagueness and correspondingly of executive discretion in cases where end-user certificates are requested. However, bans and norms on transparency are valid for all the kinds of licences and procedures. |
| 2 | There are few kinds of licences and end-user certificates established by primary law. Export bans and criteria have a unique application (referring to one supranational or scientific source), but it is possible to not request end-user certificates. There is a degree of vagueness and correspondingly of executive discretion in cases where end-user certificates are requested and concerning transparency for some kind of licences. Furthermore there is ambiguity on how to report part of the exports, and transparency is affected by this ambiguity. However, bans are equally applied to all exports. |
| 1 | There are different kinds of licences, with different controls on end-users, and different application of the bans and criteria. A degree of ambiguity and flexibility concerns the interpretation of criteria and bans, export procedures and controls. There is flexibility in choosing the kind of licence and wide use of general and global licences, different degrees of controls and different procedures. |
| 0 | There are no clear procedures in arms export licences but all fall to the discretion of the executive, which may choose better combinations on a case-by-case basis. |

### *3.7 Seventh dimension: checks and balances versus centralisation*

As with the previous dimensions, in order to measure the degree of centralisation in arms export control and transparency management, I created a scale of intensity from 0 to 5. On one end of the spectrum (maximum checks and balances) different authorities are involved in different phases of authorisation and control procedures. The highest number of actors is introduced in order to limit corruption and illegal traffic which can be prevalent in the armaments sector. Different ministries and actors are responsible for dealing with: licence granting, delivery controls, banking transactions, and end-user controls data. Political, administrative and judicial tasks are clearly subdivided and managed by different autonomous actors. In this case, the mark is 5. On the other end of the spectrum (maximum centralisation), there is one single body that has centralised a wide range of political, administrative, control and judicial tasks.

In this case the mark is 0. In the middle of the spectrum, there is a range of varying degrees of centralisation.

Table 3.7 Balance between checks and balances and centralisation: scale of intensity

| Rank | Scale description |
|---|---|
| 5 | There is a clear separation of powers among the fundamental legislative, executive and judicial branches. The licence granting and control procedure is characterised by different ministries and actors being responsible for dealing with autonomously and respectively 1) licence granting, 2) delivery controls, 3) banking transactions, 4) end-user controls data, and 5) audit and inspections. Political, administrative and judicial tasks are clearly subdivided and managed by different autonomous actors. The legislature has the tools to exercise controls in each of these phases. The high number of actors is introduced in order to limit corruption cases and illegal traffic to which the armaments sector is highly vulnerable. |
| 4 | There is a clear separation of powers among the fundamental legislative, executive and judicial branches. The licence granting and control procedure is characterised by the participation of a few administrators and ministers for each phase. Executive political tasks are assigned to a smaller group of ministers. The legislative controls *ex post* that arms export licences procedures are correct. |
| 3 | There is a clear separation of powers among the fundamental legislative, executive, and judicial branches. At the executive branch level there is a collegial inter-ministerial committee which takes the political decisions for assessing licences. At the administrative level, there is a collegial administrative body which carries out several tasks from licence granting, to collecting data on deliveries, audit and *ex post* controls. This committee has a collegial nature and it is helped by other subjects in different tasks (for example custom controls or judicial authorities in the delivery and *ex post* control phases). |
| 2 | There is a clear separation of powers among the fundamental legislative, executive, and judicial branches. However, practically, there is only one administrative body, which is represented by one person or a small group, under the direction of only one single minister, which centralises a group of tasks (licences granting, controls of arrival at final destination, collecting end-user certificates, granting certification for companies, undertaking audits and controls in companies). |
| 1 | The three basic powers are not completely separated from, equal to and independent of each other: the judicial branch is heavily influenced by the executive power. The legislative branch is limited in its function of control and orienting arms export policy because the information at its disposal does not cover an important part of arms exports. There is one administrative body, such as a single person or under the direction of only one minister, which centralises several functions (licences granting, controls of arrival at final destination, collecting end-user certificates, granting certification for companies, undertaking audits and controls in companies). |
| 0 | There is no separation of powers in the field of arms export controls. All the responsibility is in the hands of the executive. |

### *3.8 Eighth dimension: states versus companies*

There is abundant literature concerning the relationships between state and companies, which covers very fundamental themes of political science and political economy. This literature ranges from the discussion about the varieties of capitalism

to debates about post-democracy and new relationships between state and transnational companies. Focusing on the European dimension, some scholars state that the Europeanisation process has increased the power of non-state actors and interest groups with respect to the power of the state, or of the party system. Graziano has investigated the balance between traditional political parties and interest groups.[227] He quotes some authors who claim that the Europeanisation process has made decision making more inclusive and more pluralistic, such as the Spanish debate about environmental policy; [228] new corporatist interests have been included in the implementation of the EU directives, such as in the French implementation of the water directives.[229]

Other scholars with a different theoretical framework have observed that in some sectors, the Europeanisation process has strengthened transactors (i.e. those nongovernmental actors integrated at the European level), and in particular has made those economic actors more integrated (usually first tier and prime contractors) and more Europeanised. Sandholtz and Sweet note how the neo-functionalist perspective views transactors as a driving force for integration. The overall view is optimistic and the advantages are then distributed to the whole community. However, they argue that "supranational governance serves the interests of (1) those individuals, groups, and firms who transact across borders, and (2) those who are advantaged by European rules, and disadvantaged by national rules, in specific policy domains."[230] In terms of relationships between states and transnational companies, the same authors claim that "the long-term interests of MS governments will be increasingly biased toward the long-term interests of transnational society, those who have the most to gain from supranational governance".[231]

In this section, I focus the analysis on the degree of control/responsibility of the state versus the company with respect only to the arms export regulation dimension. Consequently, I measure and compare the company's degree of responsibility to the state's responsibility on arms exports and rank them from 0 to 5. On one end of the spectrum, the state (keeping in mind the sensitivity of defence goods and the dangers

227 Graziano (2013).
228 S. Borras, Font, N., & Gomez, N. (1998). "The Europeanization of national policies in comparison: Spain as a case study." *South European Society and Politics*, 3(2), 23-44: p. 33.
229 E. Montpetit (2000). "Europeanization and domestic politics: Europe and the development of a French environmental policy for the agricultural sector", *Journal of European Public Policy*, 7(4): 588.
230 Sweet & Sandholtz (1997): 299.
231 *Ibidem*: 315.

linked to uncontrolled diffusion) controls companies step by step, in a very intrusive way. On the other end of the spectrum, companies are left with nearly total freedom and flexibility in selling weapons outside national boundaries.

Table 3.8 Balance between state and company responsibilities: scale of intensity

| **Rank** | **Scale description** |
|---|---|
| 5 | Maximum intrusiveness by the state: Companies are controlled by the state in a wide range of tasks: a) the authorisation procedure collecting *ex ante* all the necessary information; b) final delivery (collecting all the information); c) end-user certificate, which must be signed not just by the importing company but also by the importing government; and d) payment to limit cases of corruption and collusion. The application of bans and criteria is assessed and directly controlled by the state. These controls are undertaken systematically for all arms and components exported. |
| 4 | High intrusiveness by the states. Companies are controlled in quite a wide range of tasks, but some sensitive data, such as banking transactions, are not requested from the companies. Furthermore, it is possible to not always involve the importing government in signing the end-user certificate as the signature from the importing company is sufficient. |
| 3 | Medium intrusiveness by the state with respect to the companies. Companies are responsible for some tasks such as checking the reliability of the partner in cases of coproduction and communicating to the partner coproducing company the national bans which must be respected for exports. Companies are responsible for keeping registers of their arms exports under general licences. These registers contain information on quality, quantity, data, and final destination. Economic operators are obliged to communicate these data twice a year or more to the government, which checks the registers regularly. |
| 2 | Medium low intrusiveness. Companies are responsible for keeping registers on their arms exports. However, they are not obliged to send these data to the government regularly. On the contrary it is the government which may organise inspections in the companies, after phone calls to the company, in order to verify whether procedures and bans are being respected. |
| 1 | Companies must only have a register of their exports and they are responsible for the reliability of the buyer, and for the final destination of the goods. The application of bans and criteria is left to the discretion of the companies which however must formalise them in a company code of conduct and provide a report on ethical responsibility to the public. |
| 0 | Companies are not bound at a national level either, and are able to influence not just demand of military goods but also the executive (legislative and judiciary) branch. |

## 3. Investigating domestic change

For each of the three case studies, I assess the positioning on the taxonomy of each of the eight dimensions based on their domestic regulation *before* and *after* the transposition of the ICT Directive. This quantity of data allows me to evaluate each case study diachronically: by comparing the MS sector and legislation before and after

the transposition of the Directive, I can assess the *direction and intensity of domestic change*. Secondly using a common taxonomy for the three case studies allows me to assess whether there is convergence or not, and around which arms export control model.

The comparison and study is based exclusively on legal documentation, including laws, decrees, and regulations concerning arms transfers control and transparency in the three case studies. For each case study I compare the arms trade control regulation as it was *before* the approval of the ICT Directive (in 2008) with the arms trade control regulation *following* the approval of the Directive and after the transposition of the directive at the national level.

The choice to focus on laws in order to assess domestic change was made in order to address two methodological weaknesses. The first concerns the Europeanisation literature, in particular those scholars following a top-down approach. As explained in the theoretical chapter, the main weaknesses of a top-down approach study are that it is difficult to assess whether the domestic change is due to the directive at the EU level or to other factors present at the domestic level and even the global level, based on political or economic indicators. While the regulations/laws that are approved in order to transpose the Directive are clearly linked to the same Directive and to the European level, this does not exclude the presence and weight of other domestic (and global) variables which intervene during the change and shape the final law transposing the directive. In any case the transposition measures will trigger domestic change.

A second point emerged from the methodological limits of the armaments field where the use of interviews or other political documentation is extremely vulnerable to misperception, manipulation and changing versions according to the circumstances and the interlocutor. Furthermore, despite the secrecy that has characterised and is still characterising this field, there is an overabundance of political documents produced by different EU actors and bodies that often do not address crucial points of arms control issues but just side aspects. In contrast when a law or an article of this law has to be approved it is more difficult to misrepresent the position. That is why I focused the analysis on legal documentation.

# Chapter 4. The impact of Directive 2009/43/EC on Italian regulation on arms export control and transparency

## 1. Introduction

This case study, Italy, has been chosen as representative of those European countries characterised by intrusive and rigorous arms export control regulation and by a history of a strong presence of the state in the economy. Countries with strict arms export control laws are those that have faced the biggest challenges in rethinking their arms export control regime, as Directive 2009/43/EC embodies an economic-industrial model based on the principle of free movement of goods, which seeks to remove "lawful" barriers to trade.[232] As a consequence, for these countries the degree of "misfit" with the new European rules is higher. Furthermore, Italy is characterised by the considerable weight of, and active participation by, the most important societal actors in the armaments field: defence companies (ranking in the top eight in the world) and a wide network of NGOs dealing with peace and disarmament.

The chapter begins by illustrating the context relating to arms production and export in Italy and describes the role and weight of the two fundamental societal actors in this sector: defence companies and NGOs. Section 2 analyses the legal instruments and, in particular, Law 185/90, which regulated arms export control and transparency *prior to* Directive 2009/43/EC. Section 3 examines the Italian regulation *after* the Directive, focusing in particular on Legislative Decree 105/2012, which transposes the Directive. Section 4 compares the previous regulation with the new one, in order to investigate the degree and direction of domestic change along eight fundamental dimensions and two models. Lastly, Section 5 draws the main threads of this chapter together, and assesses the overall regulatory and policy impact of the Italian implementation of the ICT Directive.

232 Trybus and Butler (2017): 408.

### *1.1 The main features of the Italian defence industry*

Arms production in Italy has developed since the end of the Second World War thanks to the acquisition of technology from the United States, both under US licences and autonomously. In the early Seventies, the public presence in the Italian military industry strengthened with the control of Fincantieri, one of the most important shipbuilding companies, and with the acquisition of control of Finmeccanica, the main defence company in Italy.[233]The upward trend, sustained by promotional laws, high investments in research and development and by the increase in military expenditures, both domestically and by the main Italian arms importers, continued until 1989. Between 1990 and 1995 Italian military production was characterised by a consistent decline. In the first half of the 1990s, the entire aerospace sector in Italy lost 17,200 jobs (34%).[234] Since the 2000s, the aerospace and defence sector has recovered. Finmeccanica followed an upward trend reaching the value of 14,560 million dollars of arms sales in 2011, followed by a slightly downward trend reaching 8500 million dollars of arms sales revenues in 2016.[235] Overall, according to a study by Prometeia for the Italian Association of Defence Industries, the whole value of defence production in Italy is reported to have reached 13.942 billion euro in 2016.[236] The same study estimates the "direct" Italian employees of the Defence sector were 44,173.[237] The defence and aerospace sectors are privileged in terms of resources invested in Research and Development. In 2016 investments in research and development reached 1376 million euro, corresponding to 10% of total revenues (sales).[238]

The size of Italian defence production is medium-high. Leonardo (former Finmeccanica) the most important Italian defence company, covering approximately

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233 G.Alioti (2008). *"Conversione tra produzioni militari a civili: Storia e prospettive". In C. Bonaiuti & A. Lodovisi (Eds.). L'industria militare e la difesa europea.* Milano*: Jaca Book,,*p. 136*.*

234 *Ibidem.*

235 Sipri, *Sipri Arms Industry database*. Available online at: https://www.sipri.org/databases/armsindustry (last accessed 15 April 2019).

236 A. Mottola (2017), "Convegno AIAD sull'industria della Difesa italiana data", *Rivista Italiana Difesa*, 06-07-2017. The article reports a synthesis of a study on the Italian defence industry: *Studio Prometeia on the impact of the industrial system of the aerospace and defence sector on the country system* in 2016, presented by A. Lanza, during AIAD Conference on the Italian Defence Industry, of the 06 July 2017. The study concerns only Italian companies (without subsidiaries abroad) and takes into account only the "industrial phase" of the defence system (excluding contributions deriving from the Ministry of Defence activities related to personnel, current expenses, etc.).

237 *Ibidem.* According to the same study which is addressed to the defence sector representative, the defence sector has 44,173 employees and, supports more than 110,000 employees of the entire Italian economy, if we calculate indirect employment (73,041 workers) and related industries (41,289 people).

238 *Ibidem.*

70% of the domestic production in the defence and aerospace sector, ranked 9th in the list of main arms producers in 2016, after US companies Lockheed Martin (1), Boeing (2), Raytheon (3), General Dynamics (6), and L3 Communication (8), and after European companies BAE Systems (4) and Airbus group (7).[239] According to the last estimation by SIPRI arms industry database, in the year 2016 Leonardo had sold arms for a value of 8 billion dollars (corresponding to 64% of the total turnover of over 13 billion dollars) and employed 45,630 workers.

Table 4.1 -The SIPRI top 100 arms-producing and military service companies in the world (excluding China) in 2016. Value expressed in million dollars

| Rank (201 | Company (2016) *Note (c) | Country (2 | Arms Sales (2016) | Total Sales (2016) | Arms sales as a % of total sales (2016) | Total profit (2016) | Total employment (2016) |
|---|---|---|---|---|---|---|---|
| 1 | Lockheed Martin Corp. | United Sta | 40830 | 47248 | 86 | 5302 | 97000 |
| 2 | Boeing | United Sta | 29510 | 94571 | 31 | 4895 | 150500 |
| 3 | Raytheon | United Sta | 22910 | 24069 | 95 | 2174 | 63000 |
| 4 | BAE Systems | United Kir | 22790 | 24008 | 95 | 2351 | 83000 |
| 5 | Northrop Grumman Corp. | United Sta | 21400 | 24508 | 87 | 2200 | 67000 |
| 6 | General Dynamics Corp. | United Sta | 19230 | 31353 | 61 | 2955 | 98800 |
| 7 | Airbus Group | Trans-Eurc | 12520 | 73652 | 17 | 1101 | 133780 |
| 8 | BAE Systems Inc. (BAE Systems | United Sta | 9300 | 10000 | 93 | -- | 29500 |
| 8 | L-3 Communications | United Sta | 8890 | 10511 | 85 | 647 | 38000 |
| 9 | Leonardo | Italy | 8500 | 13277 | 64 | 561 | 45630 |
| 10 | Thales | France | 8170 | 16471 | 50 | 1073 | 64100 |

Source: SIPRI Arms Industry Database, available at https://www.sipri.org/databases/armsindustry

Leonardo produces helicopters and aeronautics, unmanned aerial vehicles, defence systems, defence electronics, space, energy and transport. Besides Leonardo, there are several other important companies in Italy. These are big companies specialised in construction of merchant and military ships (Fincantieri is one of the biggest shipbuilding complexes), tanks and vehicles (Iveco), Electronics (Elettronica), missile systems and torpedoes (MBDA and WASS), munitions and light arms, land, naval and aeronautical defence systems (Oto Melara), space (Thales Alenia Space -Italia; Espace). Aerial and military propulsion (Avio), radar (Reinmetal Italia), naval and terrestrial ammunitions (Simmel Difesa).

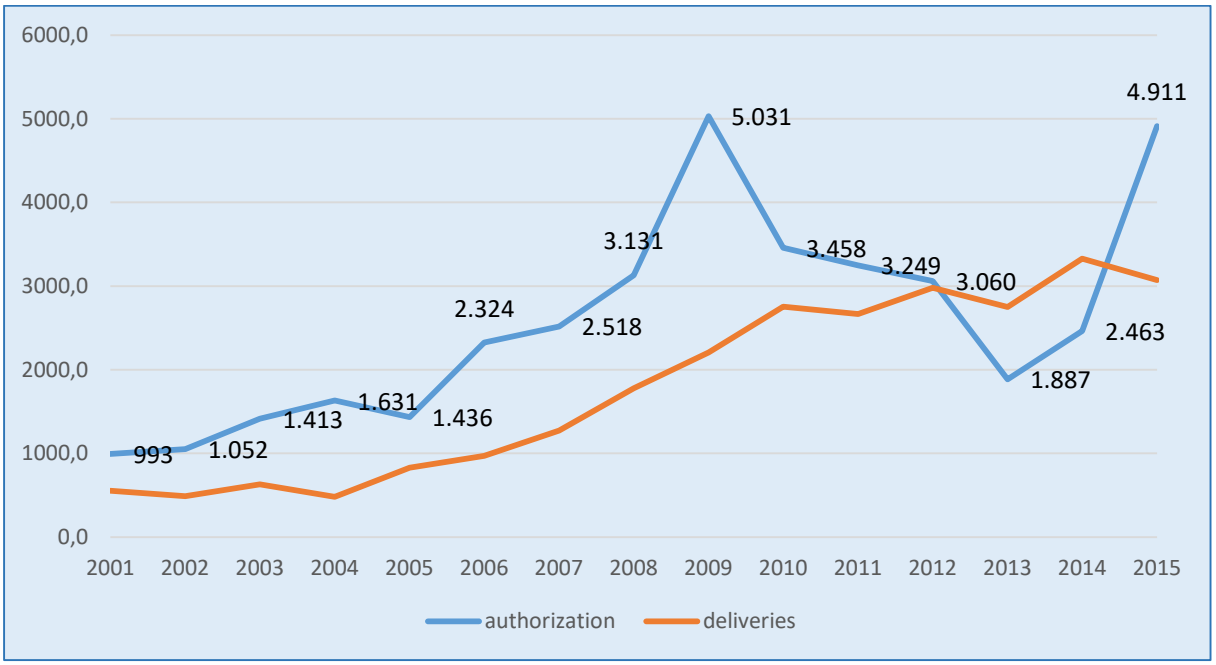
239 SIPRI Arms Industry Database, available at https://www.sipri.org/databases/armsindustry (last accessed April 2019).

Table 4.2 Turnover of the Italian Arms Aerospace and Defence Companies in 2015

| TURNOVER OF THE ITALIAN ARMS AEROSPACE AND DEFENCE COMPANIES IN 2015 | | |
|---|---|---|
| values are expressed in million euro | | |
| | Military sales | Global sales |
| LEONARDO | 8395 | 12995 |
| AUGUSTA WESTLAND | 2692 | 4479 |
| FINCANTIERI | 1056 | 4183 |
| AVIO AERO | 500 | 2000 |
| IVECO DEFENCE VEHICLES DV | 470 | 470 |
| MBDA ITALIA | 422 | 422 |
| OTOMELARA | 365 | 365.2 |
| ELECTRTONICA | 204 | 204 |
| TELESPAZIO | 156 | 412 |
| WASS | 103 | 103.3 |
| VITROCISET | 78 | 150.4 |
| THALES ALENIA SPACE ITALIA | 55 | 619 |
| REINMETALL ITALIA SPA | 44 | 46.8 |
| SIMMEL DIFESA SPA | 36 | 35.7 |
| AEREA SPA | 29 | 28.7 |
| SECONDO MONA | 24 | 44 |
| SELES ES | 2 | 2115 |
| ALEINA AERMACCHI | 2 | 3118 |

Source: IAI (*Istituto Affari Internazionali*), graphs and tables on Italian defence industry available at https://www.iai.it/it/pubblicazioni/bilanci-e-industria-della-difesa (last accessed 15 May 2018).

Figure 4.1 Recent trend of Italian arms exports (million Euro-current prices)




Source: Italian Parliament, various years. *Relazione sulle operazioni autorizzate e svolte per il controllo dell'esportazione e transito dei materiali di armamento, (Report on the operations authorized and carried out for checks on the export, import and transit of war material),* Parliamentary Acts, Doc. CVIII, Rome Chamber of Deputies, Senate of the Republic.

Data from the annual report to the Italian Parliament offer a detailed picture of these last fifteen years (expressed in billion euro current prices) and distinguish between authorisation and deliveries.[240]Each arms export must be previously authorised and then it can be effectively exported. Usually the values of authorisations granted during a specific year do not coincide with the values of deliveries of the same year because it sometimes precedes the real export by several months and because not all the authorisations are utilised and become real exports. The knowledge of these two values is an instrument of control. Authorisations have increased from 1413 million euro in 2004 to 4911 euro in 2015. Similarly, deliveries rose from 630 million euro in 2004 to 3073 million euro in 2015.[241]

240 Italian Parliament (various years*), Relazione sulle operazioni autorizzate e svolte per il controllo dell'esportazione e transito dei materiali di armamento, (Report on the operations authorised and carried out for checks on the export, import and transit of war material),* Parliamentary Acts, Doc. CVIII, Rome Chamber of Deputies, Senate of the Republic, Italy.
241 *Ibidem.*

Table 4.3 Geographical distribution of Italian arms exports

| Regions | % 2003-2008 | % 2009-2014 |
|---|---|---|
| EU | 41.4 | 27.8 |
| EUROPE NON EU | 14.4 | 4.9 |
| NORTH AMERICA | 7.0 | 10.0 |
| MIDDLE EAST AND NORTH AFRICA | 13.9 | 37.2 |
| ASIA | 18.3 | 14.4 |
| LATIN AMERICA | 2.7 | 4.4 |
| AFRICA | 2.2 | 1.3 |
| TOTAL | 100.0 | 100.0 |

Source: Italian Parliament, various years. *Relazione sulle operazioni autorizzate e svolte per il controllo dell'esportazione e transito dei materiali di armamento, (Report on the operations authorised and carried out for checks on the export, import and transit of war material),* Parliamentary Acts, Doc. CVIII, Rome Chamber of Deputies, Senate of the Republic.

The geographical distribution of Italian arms exports has changed during the last ten years. In fact, in the period covering 2003-2008 Italian arms exports were directed mainly to European and North American countries (63%), followed by Asian countries (18%) and Middle East and North Africa counties (14%).[242] During the following five years (2009-2014) the percentage towards Middle East and North African countries increased sharply from 14% to 37.2% reaching first place geographically, whereas the percentage of exports towards European and North American countries decreased to 42.7%[243].(see Tab. 3).

### *1.2 Societal Actors*

*NGOs*

Italy has been characterised by elevated electoral participation (higher than in most European countries) and by a strong tradition of participation in the political sphere and debate both via parties and NGOs, both by the left as well as by the moderate Catholic wing. During the cold war, the movement for peace and nuclear disarmament organised several demonstrations, which also included representatives from Italian trade unions. When in the Eighties scandals emerged about Italy's unethical role in exporting arms to belligerent countries, regimes with apartheid and to repressive

242 Processing from Italian Parliament (various years), *op. cit.*
243 *Ibidem.*

governments, there was fertile terrain for a social campaign designed to make exports more ethical.

The first network of NGOs and associations focused specifically on responsible arms exports was named “Campaign Against the Merchants of Death” and originated in 1986 from four organisations (*Associazioni Cristiane Lavoratori Italiani, Missione Oggi, Mani tese, Movimento Laici America Latina*) and later involved several other associations. The starting point was an article written in the *Missione Oggi* newspaper, denouncing Italian arms exports to apartheid South Africa, based on what had been revealed by those same workers.[244] Thanks to this capillarity and to active participation by Catholic and left-wing Members of Parliament, the campaign succeeded and led to the approval of Law 185/90 regulating arms exports, which was one of the most advanced in the European context at that time, and is widely regarded to be the result of this campaign. After the approval of the law, the NGOs created an observatory to monitor the application of the law, and constantly informed the public on Italian arms exports, thanks to the transparency they obtained in the annual report to the Parliament.[245] The information in the annual report also included the role of banks in arms exports and have supplied citizens with another instrument of pressure directly towards their credit institutes, as savers. This form of pressure has been shown to be extremely effective in checking and promoting the correct application of the law, and in maintaining a responsible arms exports policy. It has favoured approval by the same credit institutes (including the largest) of internal ethical Codes of Conduct, strengthening and expanding the bans and criteria listed in the law. [246]

Since 2003, Italian NGOs committed to arms transfers control and transparency (arms control and disarmament) directly or indirectly (Amnesty International for example) have been joined under the umbrella of the *Rete Italiana per il Disarmo* network.[247] The network includes twenty different NGOs and associations and independent research institutes at the national level and is part of European and international networks such

244 For a short history of the campaign see D. Cipriani (2013), “Contro I Mercanti di Morte”, *Mosaico di Pace,* Maggio 2013, available at the following address https://www.mosaicodipace.it/mosaico/a/38253.html (last accessed April 2019).
245 The Italian Observatory on Arms Trade was founded in 1990 and regularly published a newsletter called Oscar Report, reporting data on Italian arms exports. See F. Terreri (various years), “Le esportazioni italiane di armi nel 1999, 2000, 2001, 2002”, *Oscar Report nn. 18-20.*
246 For a complete picture of the role of the bank in arms exports and of their Ethical codes, see www.banchearmate.it.
247 Rete Italiana Disarmo, website: www.disarmo.org.

as ENAAT (European Network Against Arms Trade), Controlarms and Iansa, ICAN at the International level.[248]

Italian NGOs are characterised by three features: their transversal nature, meaning that they have roots both in the Catholic and left-wing electorate; their capillarity, meaning that they have a high level of territorial coverage and penetration; and the high degree of expertise that the people working in their campaigns have acquired on this difficult subject. These three strengths made these organisations prevail over strong industrial defence companies, as they were able to contribute to a law which gave priority to ethical principles over commercial variables, which they defended for over 20 years. However, interdependence, economic crisis, globalisation and Europeanisation (but also the changing balance between executive and legislative powers, the fragmentation of the law, the changing internal organisation of NGOs, and the growing gap in resources compared to their counterpart, the defence companies) have changed this balance of power.

*Defence companies*

Defence companies in Italy play a relevant role for the national economy and participate actively in the political debate. There are several associations of defence companies. The most important ones are *AIAD* (*Federazione Aziende Italiane per l'Aerospazio, la Difesa e la Sicurezza* - Federation of Italian Companies for Aerospace, Defence and Security), which is part of CONFINDUSTRIA (Confederation of Italian Industry).

The larger defence companies are considered particularly important players for the Italian economy, for their contribution in terms of high technology feedback and in terms of employment. Leonardo is always involved through the Italian government in meetings that analyse domestic political economy and Italian foreign policy. There is close collaboration between companies and government representatives which have

248 Among others ACLI - Archivio Disarmo - ARCI - ARCI Servizio Civile - Associazione Obiettori Nonviolenti - Associazione Papa Giovanni XXIII - Associazione per la Pace - Beati i costruttori di Pace - Campagna Italiana contro le Mine - Centro Studi Difesa Civile - Conferenza degli Istituti Missionari in Italia - Coordinamento Comasco per la Pace - FIM-Cisl - FIOM-Cgil - Fondazione Finanza Etica - Gruppo Abele - Libera - Movimento Internazionale della Riconciliazione - Movimento Nonviolento - Noi Siamo Chiesa - Pax Christi Italia - Un ponte per...(www.disarmo.org).

organised several initiatives and conferences, with the participation of the main think tank in the field, IAI (*Istituto Affari Internazionali*- Institute for International Affairs).[249].

Leonardo (and the whole AIAD) is regularly consulted at the national level on amendments or revising the regulation process on arms export control and transparency, and it is one of the few big European companies which has often been involved at the European level in several initiatives by the European Commission touching on the defence and armaments sectors. Finmeccanica/Leonardo representatives have actively participated in several initiatives by the EU Commission in the defence field. These range from the participation in the 2002 European Advisory Group on Aerospace, to the participation in the 2004 Group of Personalities on Security Research, to Finmeccanica's presence at the most recent Group of Personalities which was established in 2015 by the Commission, in order to advise it on establishing a Preparatory Action on Common Security and Defence Policy (CSDP)-related research.[250]

## *2.* Italian legislation on arms export control and transparency preceding the approval of Directive 2009/43/EC: Law 185/90 concerning new rules on the control of the export, import and transit of armament materials, as amended until 2008

This second section is devoted to the Italian regulation of arms transfers control and transparency *before* the approval of Directive 2009/43/EC: Italian Law n. 185 of 1990, concerning new rules on the control of the export, import and transit of armament materials as amended until 2008.[251] I will briefly illustrate the history of Law 185/90,

249 See for example a recent presentation of the study by P. Sartori, A. Marrone and M. Nones (2018) "Looking through the Fog of Brexit: Scenarios and Implications for the European Defence Industry", *Documenti IAI 18,* 16 July 2018, available at http://www.iai.it/it/eventi/brexit-scenari-e-implicazioni-lindustria-europea-della-difesa (last accessed September 2019).

250 In 2015, the European Commission invited key personalities from European industries, government, the European Parliament and academia to advise it on establishing a Preparatory Action on Common Security and Defence Policy (CSDP)-related research. The primary mission of this Group of Personalities was to help establish recommendations for a long-term vision for EU-funded CSDP-related research which can boost European defence cooperation. The group published its final report in March 2016 explicitly endorsing the establishment of a Pilot Project and Preparatory Action on military research (currently running with a €90 million budget until 2020) and setting out proposals on "the next steps" - likely to be a multi-billion euro European Defence Research Programme to run, initially, between 2021 and 2027, see James (2018) pp. 15-43.

251 Law n. 185 of 9 July 1990, *New rules on the control of the export, import and transit of armament materials* [LEGGE 9 luglio 1990, n. 185, Nuove norme sul controllo dell'esportazione, importazione e

which helps to explain the spirit of the law and the reasons for its prescriptiveness. Then I will detail the provisions of Law 185/90 in its fundamental pillars (principles and bans to exports, licensing procedures and transparency) and, lastly, I will refer to the debate for its revision before Directive 2009/43/EC.

### *2.1 The origin of Italian Law 185/90*

For a long time, arms trading in Italy was regulated by provisions which had to do with foreign trade in general. Arms were considered like any other goods and were therefore not placed under any restrictions or controls. Moreover, the entire subject of the purchase and sale of arms, as well as the regulations for the granting of export permits was covered by rules of military secrecy, and was not accessible to members of Parliament. A specific law did not exist, regulations were fragmentary and a general framework for reference was lacking.

The absence of legal, ethical, and political restrictions therefore resulted in a policy of arms exports where commercial variables weighed more than political, constitutional or ethical variables. From 1980-85, during the "golden years" of the Italian arms export, countries in conflict, or countries with human rights violations were among the recipients of Italian armaments. Among Italy's most regular customers were Libya ($850 million), Iraq ($490 million) and Iran ($410 million), as well as Somalia, South Africa and Saudi Arabia. In the same period, according to indicators developed by the Italian Observatory on Arms Trade, Italy exported 49.8% of the entire Italian export for that period to countries engaging in systematic repression of human rights, and 17.9% to countries perpetrating frequent repressions.[252] Finally, the recipients of Italian armaments were almost all countries of the global South engaged in difficult processes of reconstruction, self-determination and development (96.2% from 1978-82, and 94.5% from 1983-87).[253]

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transito dei materiali di armamento. (GU n.163 del 14-7-1990 ), note: Entrata in vigore della legge: 29-7-1990], Italian version available at the following address, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1990;185, last accessed 3 January 2020.

252 C. Bonaiuti and F. Terreri (2004). “Le esportazioni italiane di armi”. In C. Bonaiuti and A. Lodovisi (Eds.). *Il commercio delle armi: l’Italia nel contesto internazionale,* Primo Annuario La Pira Armi-Disarmo. Milano: Jaca Book, pp. 23-108.

253 *Ibidem.*

Despite the whole sector still being shrouded by military secrecy, the first scandals started to emerge in the Eighties and shed light on the unreliability of Italian arms importers and on illegal mechanisms including cases of corruption and collusion. The first case was reported by workers in a defence company and concerned Italian arms exports to South Africa's apartheid regime. Elio Pagani, an employee of Aermacchi- an Italian aeronautic company, announced and documented that Aermacchi supplied 70 HB-326K aircraft to the South African Air Force in January 1980, on an order of 140 aircraft, a delivery that violated the UN embargo signed by Italy in 1977.[254]

As a consequence, in January 1986 a social campaign started in order to "moralise" Italian arms exports and to introduce new regulation. The point of departure was an article written in a missionary review explaining Italy's unethical and irresponsible arms export policy citing the denunciation described above, and calling into question the decision-makers of that time. [255]The campaign was promoted by four NGOs working in developing countries which progressively aggregated a great number (hundreds) of associations and organisations.

A second important scandal which exploded in 1987 involved an Italian state-owned bank, *Banca Nazionale del Lavoro* (BNL) and Italian arms exports to Saddam Hussein in Iraq.[256] The FBI investigating the US branch of BNL discovered a series of financial transaction involving armaments and know how towards Iraq.[257] This scandal shed light on illegal practices, which had characterised Italian arms exports, including "clientelism", bribes and corruption and generated heavy debate in the Italian Parliament, which resulted in the creation of two Parliamentary Inquiry Commissions.[258]

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254 A second document was made up of three order forms for spare parts requested by Atlas Air Craft Corporation (the South African firm which produced Aermacchi aircraft under license) which would unequivocally demonstrate that relations continued at least until the date of issue of the bubbles, in 'April 1985. See. https://www.peacelink.it/disarmo/a/2386.html, and Giorgio Beretta, "In origine era il piazzista d'armi", https://www.osservatoriodiritti.it/2017/03/29/piazzista-di-armi.

255 For a clear synthesis see G. Beretta "In origine era il piazzista d'armi", *Osservatorio Diritti,* 20 marzo 2017, available at the following address. https://www.osservatoriodiritti.it/2017/03/29/piazzista-di-armi/ (accessed 20 April 2019).

256 For a wider analysis see C. Bonaiuti and G. Beretta (Eds.) (2013). *Boom economy: banche, armi e paesi in conflitto.* Online report for FISAC, available at https://www.fisac-cgil.it/33368/boom-economy-banks-arms-and-countries-in-conflict (accessed April 2019).

Among the several books written on BNL scandal see, G. F. Mennella e M. Riva (1993). *Atlanta Connection. Un grande intrigo politico finanziario*, Bari: Laterza; F. Tonello (1993). *Progetto Babilonia. I segreti della Bnl Atlanta e il Supercannone Saddam Hussein,* Milano: Garzanti Libri. These reports, together with other materials, are included in L. Palazzolo (2004). *Dossier BNL Roma-Atlanta-Baghdad*. Milano: Kaos Edizioni.

257 Bonaiuti and Beretta (2013).

258 Several Parliamentary questions that dealt with these issues must be mentioned. For example La Valle and Masina, proposed establishing a Parliamentary Commission of Inquiry on exports of Italian arms to countries in conflict see. Bonaiuti and Beretta (2015).

At the civil society level, several local initiatives were organised including meetings and conferences, discussions among workers in defence companies, manifestations, and peace marches.[259] At the parliamentary level, the campaign consulted and informed parliamentarians of all political parties and was audited in the Foreign Affairs Committee and the Defence Committee. [260]

The strong pressure applied by a large section of society in the Eighties to condemn the sale of arms to countries in a state of war such as Iran and Iraq, or subject to international embargo, such as South Africa, led the government to adopt new measures in 1986 to control exports. Several draft laws were presented by the Italian Parliament. In 1987, as many as five draft laws were presented mainly from Members of Parliament of the Catholic wing. [261] After five years of parliamentary debate a law was finally passed on 7th July 1990, Law 185, which brought in new rules for the control of export, import and transit of war material.

In essence, Law 185/90 was an organic system of rules placing Italy in one of the most advanced positions in the European and international context. The principle of responsibility permeated the whole regulation and was extended to all those involved from the ministries to parliamentarians to companies, from banks to individual citizens.[262] It profoundly innovated the regulation of the Italian arms transfers for three main reasons. First of all, it subordinated the decisions of arms transfer to the foreign policy and security of the Italian state, the Italian Constitution and to some of the principles of international law, thus bringing to an end the period characterised by a low degree of responsibility in arms trade, which had allowed Italy to sell arms to countries in a state of war or to governments guilty of serious human rights violations. Secondly, it introduced a system of controls by the government, setting out a clear procedure for granting licences, first, at the negotiations stage, then for the delivery of Italian arms, with a process for subsequent checks, thus ending the secrecy in arms trading and drawing clearly a distinction between legal and illegal trade. Finally, it

259 *Ibidem.*
260 *Ibidem.*
261 Stegagnini, *Atto Camera 1244* of July 28, 1987; Zangheri and others *Atto Camera 1419* of August 6, 1987; Martinazzoli and others, *Atto Camera* October 9, 1987; Ronchi and others *Atto Camera 1749* of October 22.
262 This paragraph widely draws on previous publications of the candidate. In particular, C. Bonaiuti and C. Corsi, (1999). *La legge italiana 'Nuove norme sul controllo dell'esportazione, importazione e transito dei materiali di armamento': i principi, la lettera e lo spirito.* Oscar Report 16. Florence: IRES Toscana, May-June; C. Bonaiuti (2003). "La legge n. 185/90, nuove norme sul controllo, esportazione, importazione e transito di materiale di armamento". In M. Brunelli (Ed.). *Produzione e commercio delle armi: industria militare e politiche per la difesa,* EMI, Bologna, 2003: pp.171-191.

accepted the need for transparency providing for a wide and significant explanation to Parliament and consequently, to public opinion, on the export and import of Italian arms, by means of an annual report to Parliament by the Prime Minister, which includes reports from the individual ministries involved and which relates to individual export, import or transit licences, deliveries, suppliers, the material exported, its value and the destination country.

### *2.2 Principles and export bans*

Law 185/90 stipulated the general principles that regulate the arms trade. The first paragraph of Article 1 states that trade in arms should comply with Italy's foreign policy and defence strategy and should be regulated by the state according to the principles of the Italian Constitution.

The meaning of this paragraph is that arms export policy should not follow the criteria of profit, but should be subordinate to the foreign policy of the country. Economic and industrial reasons should not be the only considerations guiding such decisions. Moreover, arms exports should conform to the principles of the Italian Constitution and, in particular, Article 11, according to which Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy shall promote and encourage international organisations furthering such ends. This means that the Italian Government has to conduct a foreign policy which aims to bring about international peace, which, in turn, entails that trade in war material cannot but be in line with this policy.

The principles of the first paragraph of Article 1 are immediately explained in paragraphs 5 and 6 of the same article. Paragraph 5 lists the criteria which should be followed in any arms transfer, as well as the granting of production licences confirming that this cannot go against the constitution nor against Italy's international undertakings nor against those fundamental claims of state security, the fight against terrorism and maintaining good relations with other countries. Furthermore, there must be adequate guarantees as to the final destination of the material.

Paragraph 6 introduces the following bans on the export of Italian arms:

*a) a ban on export to countries which are in a state of armed conflict, contravening Article 51 of the United Nations Charter,*[263] *except for any international obligations Italy may have or the different decision taken by the Council of Ministers, to be adopted only following the consent of the two houses of Parliament.* This first important ban tries to break with the bad practice which saw Italy in the Seventies and the early Eighties exporting arms to countries at war. Obviously, in accordance with the United Nations and customary international law, the ban allows for the possibility to supply arms to states undergoing an external attack and using the arms systems for self-defence;

*b) a ban on export to countries whose policies are at variance with Article 11 of the Constitution.* This regulation states more clearly what can be found in the Constitution, and that is the ban on arms exports to countries which would tend to use them in aggressive action against other countries to settle international controversies;

*c) a ban on export to countries which are under total or partial embargo, declared by the United Nations.* As stipulated in Article 39 of the United Nations Charter, the Security Council may decide to place an embargo on any state which threatens international peace and security. This regulation is meant to bring Italian legislation in line with decisions taken by the international community at the United Nations;

*d) a ban on export to countries whose governments are responsible for proven violations of international conventions relating to human rights;* this ban interprets the requirements of the new international law and which see the violation of human rights as a violation of international law, and not as an internal issue to be left to the competence of the individual state involved;

*e) a ban on export to countries which, while receiving aid from Italy as sanctioned by act n. 49 of 26th February 1987, spend more than necessary for defence; towards such countries aid is suspended in terms of the law and exception is made only to aid people if they are victims of a natural disaster.* In other words, there is a ban on arms export to countries which, while benefiting from aid through cooperation on the part of Italy,

263 United Nations Statute Article 51: “No provision in the present statute compromises the natural right of individual or collective self-protection in the case of an armed attack on a member of the United Nations, until the Security Council takes the necessary steps to maintain international peace and security (...)”.

spend on military equipment resources which could be used for the purposes of their own economic and social development.

Overall the law is guided by the Italian Constitution and by the principles of international laws regarding human rights, the ideals of prevention and settling of controversy and the cooperation and development which is slowly making headway in the international context.[264] The Italian export criteria and bans act as guidelines and place limits on the discretionary power of the executive. In fact, they are legally binding and established by the legislator through primary law, which is superior to any act of the government. They are wide-ranging, in the sense that they apply to all defence materials exported and not just to some kind of defence material or to a specific function of that material. Lastly these restrictions are not ambiguous or in conflict with each other (for instance, there is no explicit reference to commercial interests among the criteria for granting an export licence).[265]

### *2.3 The arms covered by the law*

The object of Law 185 is war material. Article 2 of the law defines war material as "material whose technical and structural characteristics are such that it can be taken to have been built primarily for military use and use by the armed corps and the police". This expression "primarily for military use", one of the most advanced internationally, refers not only to material used exclusively for military purposes, but also double (civil and military) use material. In particular, the law stretches to cover those materials which, while built specifically for military use, can also be used for civil purposes, if we take, for example, many instruments of high technology such as radar and software created specifically for military use. It does not apply to civil material which is subsequently painted grey-green (airplanes, trucks and sea craft), to be then used by the armed forces or by the police.[266]

From a general statement like the one above the law goes on to specify and list, in paragraph 2, the 13 categories of war materials which include nuclear, biological and

264 Bonaiuti & Corsi (1999).
265 Bonaiuti (2003).
266 Cespi Iai (1998) *Cinque anni di applicazione della legge n, 185/90,* unpublished report for the Ministry for Foreign Affairs, 1998.

chemical arms, firearms, bombs, torpedoes, mines, rockets, missiles etc. The same article specifies that, for export purposes, parts and specific components are considered arms, as well as drawings, plans and any type of information needed for the manufacture, use and maintenance of war material. The latter are also subject to authorisation. This list may also be updated and new categories added to it through a decree issued by the Ministry of Defence.

The law goes on to ban the manufacture, import, export and transit of biological, chemical and nuclear weapons, as well as any research leading to the production or transfer of such technology. With law 384/97 the production, trade and use of land mines have been banned.

On the other hand, small arms used for sport (hunting and shooting) have been excluded from this list (Article 1.10).[267]

### *2.4 Export licensing procedures and subsequent controls*

The law stipulates the procedure for the export licences, naming the competent authorities and setting the time limit by which the authority has to decide. This is important in two respects: on the one hand, it is a vehicle for greater transparency in this sector, in order to exercise greater control and try to limit illegal traffic, and on the other, it is a guarantee for those who work in this sector and who finally see a clear administrative procedure to obtain an export licence.

The Italian regulation indicates several stages in the complex procedure for export and control licences:

A preliminary stage was, until 1993, the responsibility of the CISD (Inter-ministerial Committee for the Exchange in Arms for Defence Purposes), which was based at the Presidency of the Council of Ministers and was made up of the ministers most involved in these matters. The CISD was responsible for formulating general guidelines for exchange policies in the field of defence, for dictating general instructions for export

267 The light arms that did not come under the controls of Law 185 were those which have a smooth internal part, used for sporting purposes, arms designed to be used with non-lethal bullets, arms which use cartridges without central percussion, common firearms and common short firearms, semiautomatic rifles, with a grooved barrel and manual loading, carbines and muskets with grooved barrels, semiautomatic pistols, revolvers, sport and hunting arms. (see M. Donati (1996), “Le armi leggere”, *Archivio Disarmo, Sistema Informativo a Schede,* year 9 n. 4, April 1996).

and supervising the activities of the bodies in charge of enforcing the law. The CISD was tasked to identify the countries which should come under the ban stipulated in Article 1.6. The CISD was dismantled in 1993, and its duties were transferred to the CIPE (Inter-ministerial Committee for Economic Planning).[268]

The first stage involves the creation of a national register of companies that operate in the arms sector, which is then passed on to the Ministry of Defence. In this way a complete set of information is obtained on the arms and the Italian companies that intend to put them on international markets. This enrolment has to be renewed every year.

The second stage requires companies to notify the Minister of Foreign Affairs and the Minister of Defence of any contractual negotiations which may lead to the export, import and transit of arms. The law establishes that, within 60 days, the Minister for Foreign Affairs, in agreement with the Minister of Defence, can ban the carrying out of this trade. In the case of commercial exchanges with NATO and EU countries, which fall within the range of special intergovernmental agreements, it is sufficient to transmit such communication to the Minister of Defence who, within 30 days at most, may issue conditions or restrictions. This more simplified procedure is valid for the transfer of spare parts and already approved components as well.

The third stage concerns the authorisation to export and depends on the Minister for Foreign Affairs; applications for a licence to export and import should be presented to this office and an investigation will be carried out before the licence is issued. This licence will be accompanied by other documents, including a certificate for the final use of the material issued by the government authorities of the destination country. The Minister for Foreign Affairs, in agreement with the Minister of Finance, has 60 days to decide.

The law explicitly provides for the obligation to suspend or revoke even the above permits when conditions for issuing the permit are not fulfilled, and it is important that the procedure for such a revocation or suspension is clearly indicated.

In order to defeat illegal arms traffic, the law provides for subsequent checks in order to ensure that the material has actually reached the authorised destination. Article 20 stipulates, in fact, that the firm should notify the Minister for Foreign Affairs at the

268 Italian Law, 24/12/1993 n. 537, *Interventi correttivi di Finanza Pubblica* and subsequently D.P.R. 20/4/1994 n.373.

conclusion (even though it may be partial) of the authorised operations. The firm should also send to the Minister for Foreign Affairs, within 180 days of concluding operations, the documents which prove the introduction of the goods into the country of destination.

Another important check against bribery and corruption is carried out with regard to banking transactions. According to Art. 27 of Law 185/90, all bank transactions relating to the export, import or transfer of arms supplies are controlled and require authorisation from the Treasury. The Italian banks must inform the Treasury of all such transactions. In response to a notification from a bank, the Ministry verifies that the transaction corresponds to an arms transfer authorised by the Ministry of Foreign Affairs and, on the basis of this verification, it allows for the banking operation. This norm was requested by civil society and NGOs and introduced following the above-mentioned scandals concerning the utilisation of funds to Iraq by the Atlanta branch of the *Banca Nazionale del Lavoro*.

### *2.5 The end-user certificate and subsequent checks*

Article 1, paragraph 5, bans the release of arms in the absence of sufficient guarantees with regard to the final destination of the arms, and paragraph 4 states that export operations may only be permitted if the transaction is directly with a foreign government or companies authorised to receive the material by the government of the destination country.

Italian law, in line with many other states, requires that there be an end-user certificate (EUC) attached to the application for an export licence. This certificate should be issued by the government authorities of the destination country, declaring that the material to be exported is for their own use and will not be re-exported without prior notice to the Italian authorities. It is significant that the law requires that the EUC be issued by the authorities of the importing country, and not only by the importing company. To avoid unauthorised traffic, the authorities of the importing country are involved in order to make them responsible for carrying out checks on the firms concerned. The EUC has to be authenticated by the diplomatic authorities or Italian consulates in the country where it has been issued to certify its authenticity. For countries which share common agreements with Italy in the field of arms export control

(NATO and WEU countries) the EUC is substituted by a Certificate of Import, issued by the government of the destination country.

In conformity with the principle of responsibility, national authorities were required to have full control and responsibility for the final destination of equipment including Italian parts and components assembled abroad. The Italian industrial partner was obliged to disclose at the beginning of a programme not only the partner company and country but also the potential buyer country, which was required to issue the EUC and was subject to scrutiny by the Ministry of Foreign Affairs. It was therefore the end-user that was disclosed in the annual report to Parliament.

In the case of international co-production within Europe or NATO, the rigorous authorisation procedures applied to each component to be exported to make sure that Italian parts and components were not assembled abroad and subsequently transferred to a third country considered not trustworthy or at risk according to Italian foreign policy and arms export regulation. Until 2003 there was only one kind of licence, the individual licence. However, after the ratification of the Framework agreement a new kind of licence was introduced in compliance with it: the Global Project Licence to be used between the six countries signatories of the Agreement and extended to NATO and EU countries.[269]

### *2.6 Transparency and the role of Parliament*

An important pillar of the Italian regulation is transparency. Article 5 of Law 185/90 stipulates that the government has to provide Parliament with its own report by the 31st of March of every year detailing the operations authorised and carried out by 31st December of the previous year. The report contains analytical information—concerning the types, quantities and monetary value—on the supplies relating to the operations

269 Framework Agreement Concerning Measures to Facilitate the Restructuring and Operation of the European Defence Industry presented during the Farnbourough Air Show on July 27, 2000. It was ratified in Italy in 2003. The provisions of the agreement apply to all collaborative armaments programmes involving industries from two or more countries parties to the agreement or trans-national companies with headquarters in countries parties to the agreement by only six countries, the United Kingdom, France, Spain, Germany, Sweden and Italy. The introduction of a new type of licence, the Global Project Licence (GPL), addresses the need to liberalise the procedures for the exchange of parts and components in the context of collaborative armaments programmes with the aim to accelerate the production process. In case of re-export to third countries, parties shall agree on a list of permitted destinations.

defined in the contracts and indicates the annual state of progress on exports, imports and transfers of arms supplies, on exports of services subject to controls and authorisations under this law, and the list of recipient countries. The data contained in the report corresponds to the information required by the authorisation process and by the subsequent checks. Each Ministry reports, according to its competence, all the information gathered during these stages: for example, the Ministry of Foreign Affairs reports on authorisations issued for the previous year's exports, with reference, for each individual licence, to the exporting company, the value of the exported product, the description of the type, quantity and final destination country of arms exported. The Ministry of Finance reports the same data collected by customs at the time of delivery; the Treasury reports on payments, details concerning supporting banks, export industry, arms, total value, any charges for financial intermediations, and the intermediate and final recipient.[270]

The Italian report, therefore, complies with a dual purpose. On the one hand, it provides effective controls with a high degree of inter-ministerial collaboration which limits the possibility of corruption and illegal traffic; on the other hand, it guarantees the effective control of the Parliament.[271] It represents an important instrument of transparency and may be consulted by any citizen. At the same time, it provides Parliament with a means of exercising control over foreign policy and a defence of the government in the matter of the transfer of arms. This, therefore, becomes a means of allowing Parliament to assess government action in foreign policy, thereby directing it as well.

The transparency of the Italian regulatory framework displayed two main characteristics. A first key feature was that transparency was not a concession by the government, but a legal requirement: the fact that the legislature laid down the quality and quantity of the data, which had to be reported to Parliament, and the reporting schedule, was particularly significant. A second characteristic was the high level of detail, which included sensitive data, such as the name of the companies and of the banks involved in arms transfers.

In conclusion, Italian Law 185/90, which regulated Italian arms exports *before* the transposition of Directive 2009/43/EC, was characterised by a clear priority of ethical and political values over commercial ones, a high level of transparency and information to Parliament, by strict formulation of arms exports bans. The legislature had the power

270 Bonaiuti and Beretta (2013).
271 *Ibidem*.

to control and direct the arms export policy, thus establishing its prerogative in this field.[272] The law was considered one of the most important conquests of civil society and revolved around the principle of responsibility (binding decision-makers, ministries, parliamentarians, but also banks, companies and citizens) in contrast with "irresponsible" arms export, which had marked the previous regulatory regime.

### 2.7 *Previous attempts to modify Law 185/90*

In the Nineties, there were also several attempts to modify or soften the law, which was judged too transparent and too rigorous, thus disadvantaging Italian companies over foreign ones. In particular, there were two bills proposed by Forza Italia members of Parliament, dating back to 1995 and 1997, which expressed the request from Italian companies.[273] Among the various amendments proposed was one which would have reduced restrictions on export to countries guilty of serious human rights violations, to be applied solely to arms used for repression, in order to bring our regulations into line with the more permissive ones of some other European countries. Another amendment reflecting another recurring proposal from military lobbies to streamline procedure and liberalise trade within Europe, was the recognition that members of the European Union are responsible for exporting defence systems produced with parts and components made in Italy, in cases where it is they, the other European countries, who assemble the finished product and who effect the sales of such products. [274] Nevertheless, all these amendment proposals to liberalise Italian arms transfers and to soften the rigorous control of Italian regulation were systematically blocked at an early stage by the Italian NGOs which had promoted Law 185/90 and which were able to mobilise large sectors of both the Italian Left and Catholic electorate and so the law was unamended for more than twenty years.

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272 Bonaiuti (2003).

273 Caputo ed altri, *Modifiche alla legge 9 luglio 1990 sulla esportazione importazione e transito dei materiali di armamento (1923)*, pagina 10. Available at http://www.senato.it/service/PDF/PDFServer/DF/40002.pdf (last accessed July 2017); E S. 1551 (2 assegnazioni)*; Ventucci ed altri Modifiche alla legge 9 luglio 1990, n. 185, sull' esportazione, importazione e transito dei materiali d' armamento e divieto di produzione delle mine anti – uomo,* 4 ottobre 1996.

274 A similar request was addressed by European Defense Industries, regrouped under the old association EDIG (European Defense Industry Group) since the early Nineties.

However, the Europeanisation and globalisation processes, especially the transposition of Directive 2009/43/EC, were responsible for bringing about a significant change to this regulatory framework.

## 3. The transposition of Directive 2009/43 in the Italian context: the main features of Legislative Decree 105/2012 concerning amendments and integration to Law n. 185 of 1990 and implementing Directive 2009/43/EC

In this third section I examine the changes of the Italian regulation *after* the transposition of Directive 2009/43/EC.[275] The main legal source to focus on is the Italian law transposing the Directive: Legislative Decree 105/2012 concerning amendments and integration to Law n. 185 of 1990, implementing EU Directive 2009/43/EC by simplifying terms and conditions for defence intra-Community transfers, as amended by Directives 2010/80 and 2012/10,[276] and Decree 19/2013 of the Ministry of Foreign Affairs and of the Ministry of Defence.[277] Despite being placed at a lower level in the hierarchy of sources, the latter contains crucial provision. To complete the picture, it is also necessary to consider six decrees of the Ministry of Foreign Affairs, corresponding to the six main general licences released by the Italian Government.[278]

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275 European Union (2009). *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.*

276 Legislative Decree n. 105 of 22 June 2012*, Amendments and integration to Law n. 185 of 1990, implementing Directive 2009/43/CE by simplifying terms and conditions for defence intra-Community transfers, as amended by Directives 2010/80/EU and 2012/10/EU as far as defence products concerns,* [Decreto Legislativo 22 giugno 2012, n. 105, Modifiche ed integrazioni alla legge 9 luglio 1990 n. 185, recante nuove norme sul controllo dell'esportazione, importazione e transito dei materiali di armamento, in attuazione della direttiva 2009/43/CE che semplifica le modalità e le condizioni dei trasferimenti all'interno delle Comunità di prodotti per la difesa, come modificata dalle direttive 2010/80/UE e 2012/10/UE per quanto rigaurda l'elenco dei prodotti per la difesa](12G0133) (GU Serie Generale n.169 del 21-07-2012) , Italian version available at: *https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2012-07-21&atto.codiceRedazionale=012G0133&elenco30giorni=false (*last accessed 8 May 2019 2020).

277 Decree n. 19 of 7 January 2013, of the Ministry of Foreign Affairs and of the Ministry of Defence, n, 19, of the 19 of January 2013, *Regulation implementing the Law n. 185 of 9th of July 1990, according to Article n. 7 of the Decree Law n. 105 of the 22 June 2012.* The decree was published in the Official Gazzette and came into force the 19 March 2013. (GU n.53 del 4-3-2013), [Decreto n. 19 del 7 Gennaio 2013, Regolamento di attuazione della legge 9 luglio 1990, n. 185, ai sensi dell'articolo 7 del decreto legislativo 22 giugno 2012, n. 105, pubblicato sulla Gazzetta Ufficiale n.53 del 4-3-2013, entrato in vigore il 19/03/2013], Italian version available at the following address https://www.gazzettaufficiale.it/eli/id/2013/03/04/13G00058/sg (last accessed 8 May 2020).

278 *AGT 1, 3352 DM, 1162, Decreto del Ministero degli Esteri (siglato dal Ministro degli Esteri) del 4 luglio 2012; AGT 2, 3552 DM 1163, Decreto del Ministero degli Esteri (siglato dal Ministro degli Esteri) del 4 luglio 2012; AGT3, Autorità Nazionale – UAMA 3352 DM 326/BIS, del 13 luglio 2016; AGT4*

As explained in the Introduction, the aim of Directive 2009/43/EC was to simplify terms and conditions of transfers of defence-related products within the Community, which in Italy's case, necessarily implied a formal review of the regulatory framework. In fact, the Directive introduced a basic distinction between intra-Community transfers and exports to non-EU countries. Secondly, it envisaged new types of licences: the general and global licences, neither of which existed under Italian law, which were to be used for intra-Community arms transfers within European borders with reliable partners. Thirdly, it introduces a new certification system for companies. In this way it tended to move the responsibility on export controls from the state to the companies, whose reliability would be verified by a certification system. Fourthly, it changed the perspective of the system of controls, creating a system of ex-post control founded upon inspections carried out by the authorities, which was very different from the highly complex and articulated systems of *ex-ante* control that had characterised Italian regulation since 1990. In other words, some pillars of the Italian law were put into question, at least as far as intra-Community transfers of defence material were concerned. Overall, Directive 2009/43/EC implied the need for amendments to Italian Law 185/90 and a change of approach for intra-Community transfers compared to that of the national regulation. The approach of the Directive was so different from that of the Italian regulation, the "misfit" between national and European law was so high, that members of the Italian Ministry of Foreign Affairs in favour of domestic change used the term "Copernican revolution" to explain the changes needed to adapt the Italian regulation to the new European one.[279] Furthermore, the Italian legislature went beyond what was prescribed by the Directive, interpreting some non-mandatory norms in the direction of further liberalisation.

### *3.1 The debate preceding the approval and transposition of Directive 2009/43/EC*

The debate preceding the approval and transposition of Directive 2009/43/EC is extremely interesting because new elements were introduced with respect to preceding debates revolving around the modification of Law 185/90. In fact, in this case

*Autorità Nazionale – UAMA 3352 DM 327/BIS, del 13 luglio 2016; AGT5 Autorità Nazionale – UAMA 3352 DM 328/BIS, del 13 luglio 2016; AGT 6 Autorità Nazionale -UAMA3352 DM 329/BIS, del 13 luglio 2016.*

279 Masson *et alii* (2010)*:* 22.

the revision process was obligatory and could not be blocked. Furthermore, it was promoted by the European Union (and in 2009 the Italian electorate was still pro Europe). These elements strengthened those actors in favour of a liberalisation of exchanges in the defence sector (both the Berlusconi and Monti Governments, together with the public administration and companies) and triggered a process which had remained blocked for decades.[280]

*3.1.1 The Italian Government*

The Italian Government had officially supported the "Defence Package" and all the initiatives of the Commission to simplify the rules of the European defence market and pressed for European regulation of the internal arms market, even before the Directive was approved.

The position of the Italian Government had already been clear and defined since 2007 when the Directive was still under discussion, as revealed in a paper presented to the Italian Parliament, by Nones and Marta in 2007 from the Italian Institute of International Affairs. The paper explains that "Italy has supported the initiatives aimed at creating a European defence market from the very beginning".[281] Awareness that the European market will be integrated and treated as an internal arms market "is widespread in the government, administration and industry".[282] As stated by a high-level Foreign Ministry official, the Italian Government took an even more "Europeanist" position, pressing for a Regulation (a legislative act which is directly applicable and binding in its entirety) instead of a directive (an act which binds the MS only for results, leaving them free to choose the means of achieving such results).[283]

Furthermore, a European directive was seen as an opportunity to open a revision process, and change the whole internal regulation, especially to re-centralize administrative export procedures: "On the institutional level a radical transformation of the administrative structure will have to take place. From this point of view we assess

280 M.Nones, and L. Marta (2007). *Il Processo di Integrazione del Mercato della difesa Europeo e le sue implicazioni per l'Italia.* Senato, XV legislatura, No. 82. Available online at: https://www.senato.it/application/xmanager/projects/leg16/attachments/dossier/file_internets/000/006/938/ 82.pdf (last accessed: 7 September 2016).
281 Nones and Marta, (2007), p. 2 (author's translation).
282 *Ibidem.* (author's translation).
283 Position expressed by a representative of the Presidency of Italian Government during a meeting with the representatives of Italian Network of Disarmament, *Incontro Rete Italiana Disarmo con l'Ufficio del Consigliere militare Presidenza del Consiglio – Uffici responsabili dati export militare* del 30 March 2009, *Report della riunione – Report of the meeting - internal minutes of the Italian Network of Disarmament.* The candidate was present at this meeting.

whether the time has not come to unify the control activities carried out in a new agency rather than random manner by many administrations"[284]

The European directive was seen as instrumental to achieving domestic changes, as a way of facilitating and expediting these changes, so as to avoid the long stalemate or traps from parliamentary debates, and from NGO opposition. In fact, the same paper explains that "The traditional sluggishness of the legislative process is one of the reasons for the propensity to privilege the Community initiatives that force the legislature to incorporate them into our legal system, while approval is slower for decisions taken at a political level. Instead support for the integration of the European defence market should be made a priority." [285]

The document reveals that the strategy of delegating to the executive the whole transposition of the Directive and circumventing the legislature was already a possible scenario even before the Directive was approved: "Italy will have to commit itself seriously to avoid the risk of delays in regulatory adjustments that could occur both due to the long parliamentary times as well as the significant changes that will have to be made to our export control system".[286] The fear of delays referred also to the possible role of Italian NGOs as veto players.

As predicted in 2007, when EU Directive 2009/43/EC was approved, the Berlusconi Government, in order to circumvent any possible vetoes or delays that may have emerged in a parliamentary debate, decided to introduce the transposition law through its powers to enact delegated legislation. Thus, in September 2010, the Berlusconi government communicated that the amendments to Law 185/90 would be effected through an "enabling law", i.e. an act of Parliament delegating legislative powers to the government. A subsequent winning move by the same government was to reduce the "enabling law" to just one Article and include it in the so-called "Community Law" of 2010—an annual law which transposes new EU legislative measures into Italian law.[287] This greatly facilitated the approval of this delegation to the government, as the pro-European consensus on both sides of the Italian Parliament, as well as in civil society, made it extremely unlikely that this law would be rejected.

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284 Nones and Marta (2007), p. 2 (author's translation and emphasis added).
285 *Ibidem*, p. 17 (author's translation).
286 *Ibidem*, p. 19 (author's translation).
287 Italian Parliament (2010). Senate Act n. 2322 containing *Disposals for the compliance with obligations for Italy as /member of the European Union. Communitarian Law 2010,* October 2010.

In particular, Article 16 of the "Community Law 2010" delegated to the government the power to adopt one or more Legislative Decrees to implement Directive 2009/43/EC. The executive would have a very wide margin of discretion in drafting the decrees transposing the law. In fact, according to paragraph 2 of Article 16 of the Community Law, the transposition would simply have to conform with the principles of Law 185/90. Given that these principles are enshrined at a very high level of generality, the margin of discretion enjoyed by the government would be equally wide.

*3.1.2 NGOs*

Italian NGOs were initially sceptical towards the Directive. They shared with other European NGOs and research institutes, the worries about risks in terms of decreasing transparency and controls on final destination that a transposition of the Directive could have entailed.[288] Furthermore, they perceived a "domestic" risk of using the Directive as a specious way to modify the entire Italian regulation, including some fundamental pillars such as transparency and responsibility, like a Trojan horse, allowing several amendments to pass. On the other hand they didn't want to oppose the Directive *tout court*, so as not to be considered anti-European Union. Italian NGOs have always been Europeanist and have worked for a common Code on European arms export.

After an internal debate, the Italian NGOs decided to support the Directive and at the same time, press the government and Parliament to limit changes to what was strictly required by the Directive, without compromising the level of transparency and responsibility of Law 185/90. In particular, they insisted on transparency and the overall priority of ethical and political principles and bans over economic industrial interests.

Another move that created difficulties for Italian NGOs was the delegation of the entire transposition to the government, whereas they had been prepared to deal with this difficult challenge in the context of a parliamentary debate. All the NGOs' efforts converged against the "enabling law" and were in favour of a parliamentary debate. They organised a campaign against delegating the executive this important task, contacted MPs and civil societies and organised demonstrations. This time, however, they did not find sufficient parliamentary support where right and left wing representatives agreed on the imperatives of efficiency and simplification and

288 Among others see, S. Depauw (2011). "Risks of the ICT-directive in terms of transparency and export control" in Alyson JK Bailes & Sara Depauw (eds), *The EU defence market: balancing effectiveness with responsibility*, Drukkerij Artoos, Bruxelles 15, pp.67-74. Mampaey and Tudosia (2008).

Europeanisation (in those years) and converged with the need to approve the decree quickly.

Overall NGOs were weakened by the fact that a revision process was unavoidable, and that opposing it could have been read as anti-European. They were furthermore distracted by other campaigns, such as the approval of the Arms Trade Treaty, which absorbed time and part of the resources at their disposal. The complexity of the transposition and difficulty in communicating the aim of the campaign to civil society were two other factors which created difficulties for Italian NGOs.

*3.2.3 The Italian defence companies*

The position of Italian defence companies—especially the stronger and more integrated ones—was generally favourable toward the Directive. According to Nones and Marta, Italian industry had supported the creation of a European defence market and the Directive from the beginning.[289] Furthermore, they also envisaged domestic gains. They realised that the impact at the European level may have been limited whereas the transposition process could have potentially changed domestic regulation. As we saw before, defence companies had criticised Law 185/90 from the beginning (because of its bans, bureaucratic burdens, and because of its complex system of end-user controls) and proposed several amendments to the Law. Given that the Directive would have entailed modifying national regulation, it was viewed as a way to introduce those amendments which they had been waiting for decades to be introduced but had been blocked by NGO opposition and a wide section of Parliament.

Defence companies actively participated in the transposition process. “Formal consultations were open with the AIAD, the Italian association representing aerospace and defence companies. […] These consultations were oriented towards understanding companies’ demands, sensibilities and concerns regarding the new role that they are called to play. Obviously big companies have an important say in this process but importance is also paid to SMEs.” [290] They saw the Europeanisation process as a way to update the regulation.

Overall, defence companies, especially the stronger and more integrated ones, were strengthened by the approval of the Directive in three main aspects. Firstly, a revision process was required, something that had been impossible in the preceding years.

289 Nones and Marta (2007), p. 7 (author's translation).
290 Masson *et alii* (2010):23.

Second, this revision process was required by the European Union, which at that time was considered in a favourable light by the majority of the Italian people. Thirdly, it introduced a new regulatory approach to the arms market focused on strengthening the defence industrial base, and a concept of harmonisation which was nearer to the companies' perspective than the previous architecture of the law, which was based on ethical principles.

In conclusion, the Community Law 2010 was approved by the Senate on 27 October 2011 (under the Berlusconi Government) and by the Chamber of Deputies on 1 December (under the Monti Government), and entered into force on 15 December 2011.[291] After six months, the Government (and the various ministers) [292] approved Legislative Decree n. 105 of the 22nd of June 2012, which transposed Directive 2009/43/EC.

### *3.2 New kinds of licences and licensing procedures*

The overall aim of Directive 2009/43/EC is to ease the exchange of defence material within European boundaries with reliable partners, and to promote the strengthening of the European Defence Industrial Base (EDIB). For this reason, the Directive makes a clear distinction between exports to third countries and transfers among EU partners. In order to make the cross-border movement of defence material in Europe easier and quicker, it introduces the new general and global transfer licence to be used only within the EU boundaries among EU partners.

In keeping with the letter and spirit of the Directive, Article 1 of Legislative Decree 105/2012 (which is devoted to definitions), introduces a distinction between exports to third countries and exports within the EU boundaries, as required by the Directive. Intra-Community transfers are defined as any transmission, movement of a defence material from a supplier to a recipient both located in a MS of the European Union. Whereas for all exports to third countries the preceding regulation remains valid, the

291 Italian Law n. 217 of 15 December 2011, *Disposals for the compliance with the obligations for Italy as part of the European Community [*Disposizioni per l'adempimento di obblighi dell'Italia alle Comunita' europee - Legge comunitaria 2010. (12G0001)], GU Serie Generale n.1, 2-1-2012**.**

292 According to Paragraph 3 of the same Article of the Community Law, the decrees were adopted on proposal of the Ministry for the European politics, in agreement with the Ministries for Legal Simplification, the Ministry of Foreign Affairs, the Ministry of Defence, the Ministry of Justice, the Ministry of Interior, the Ministry of Finances and Economy.

decree introduces a new licensing system for exchanging defence materials within EU boundaries which revolves around intra-Community general, global and individual licences.

*General licences*

Article 10-*ter* of Legislative Decree 105/2012 introduces and explains general, global and individual transfer licences (to be used for intra-Community transfers) which are a completely new tool for Italian regulation.

Italian transposition Law 105 introduces this new kind of licence in Article 10-*ter*. According to this provision, the Ministry of Foreign Affairs shall approve General Transfer Licences between MS of the European Union with a decree. Such licences shall directly authorise suppliers established in the national territory, who respect the terms and conditions specified in the same licence, to carry out transfers of defence material specified in the same authorisation to one or more recipient categories located in another MS (of the EU). The procedure appears significantly more simplified than the traditional individual licences. It is no longer necessary to specify in the application form the quantity, value, or typology of the defence goods exported, nor is it necessary to attach an end-user certificate, nor to send a certificate of arrival at final destination. Rather it is sufficient to communicate to the Ministry of Foreign Affairs and the Ministry of Defence the intention to use the general licence for the first time. However, each single licence will specify further terms and conditions.

*-Cases of application (wide range of cases for general licences)*

According to the Directive, MS shall use general licences at least in the four main cases listed in Article 5: if the recipient is part of the armed forces of a MS or a contracting authority in the field of defence; if the recipient is an undertaking certified in accordance with Article 9; if the transfer is made for purposes of maintenance or repair, for demonstration or exhibition. MS may also use general licences for coproduction. According to Article 4(6), MS shall determine the terms and conditions of transfer licences for defence-related products.

The Italian transposition is very faithful to the Directive. By 2016 the Italian Ministry of Foreign Affairs granted six general licences, thus introducing major changes to the Italian export system.

The first two general licences, which were granted on the 4$^{th}$ of July of 2012 (immediately after the approval of the transposition law and *before* the approval of the

implementing regulation) were limited to transfers related to specific intergovernmental programmes, which were listed in the decrees authorising these two general licences.[293] The first one (AGT1)[294] enabled transfers of defence material strictly concerning these programmes only for final use for armed forces of European Union MS. The second one (AGT2)[295] concerned transfers with certified companies of the European Union, strictly within the above-mentioned programmes.

The four new general licences issued in 2016 are broader because they are not limited to a specific programme. They are classified according to the four main typologies and purposes listed by the transposition law and the Directive: defence transfers for the purpose of maintenance and repair (AGT3),[296] for certified companies (AGT4),[297] for armed forces of a MS of the EU (AGT5),[298] for demonstration, evaluation or exhibition (AGT 6)[299], as shown in table 1.

Table 4.4 Italian General Licences classified according to their purpose and scope

| **Name** | **AGT1** | **AGT2** | **AGT3** | **AGT4** | **AGT5** | **AGT 6** |
|---|---|---|---|---|---|---|
| Number | 324 | 325 | 326 | 327 | 328 | 329 |
| ART.1<br>Purpose and object | Defence transfers for armed forces, concerning only the intergovernmental programmes listed in the licence | Defence transfers for certified companies concerning only the intergovernmental programmes listed in the licence | Defence transfers for the purpose of maintenance and repair for recipient which are the original sellers of the product | Defence transfers for certified companies (Certider) | Defence transfers for Armed forces of a MS of the EU | Defence transfers for the purpose of evaluation, demonstration or exhibition |
| Geographical extension (Art. 1.3 | EU countries | EU countries | EEA countries | EEA countries | EEA countries | EEA countries |
| Art. 3 duration/validity | | | No limit | No limit | No limit | Validity 12 months |

293 These intergovernmental programmes were the following: ATHENA, FIDUS , EFA, EH10, ESSOR, FREM FSAF, HAWK VIABILITY, IRIS-T, JSF, MEADS, METEOR MIDS, MLRS, MU90, NATO ACCS, NSP2K, NH90, ORIZZONTE PAAMS, SICRAL, STAND OFF, U-212, VULCANO.
294 AGT 1, 3352 DM, 1162, *Decreto del Ministero degli Esteri del 4 luglio 2012.*
295 AGT 2, 3552 DM 1163, Decreto del Ministero degli Esteri (siglato dal Ministro degli Esteri) del 4 luglio 2012.
296 AGT3 (Maintenance and repair), Autorità Nazionale – UAMA 3352 DM 326/BIS, del 13 luglio 2016.
297 AGT4 (Certified enterprises) Autorità Nazionale – UAMA 3352 DM 327/BIS, del 13 luglio 2016.
298 AGT5 (Armed Forces) Autorità Nazionale – UAMA 3352 DM 328/BIS, del 13 luglio 2016.
299 AGT 6 (Demonstration and exhibitions) Autorità Nazionale -UAMA3352 DM 329/BIS, del 13 luglio 2016.

Their interpretation is particularly broad. In fact, none of these licences indicates specific bans or restrictions for re-export to recipients situated in third party countries and end-user certificates are not required. However, for some of them, according to Article 10 of the implementing regulation, it is explicitly written that consent from the National Authority, which is the Unit for the Authorisations of Armaments Material of the Foreign Ministry (UAMA), will be necessary before re-export.

Overall, in Italy the transposition of the Directive concerning general licences is very wide and flexible, because it exploits and uses all the (binding and non-binding) opportunities offered by the Directive. In fact the Italian version permits the use of general licences also for intergovernmental and inter-company projects (which the Directive left to the discretion of MS); secondly it applies general licences to a very broad spectrum of categories of arms material (broader than in other countries); thirdly in the text of the six general licences issued by the Ministry for Foreign Affairs, there is no explicit reference to limitations, restrictions or bans concerning the final recipient and the end-user certificate has never been required (in the six licences granted until 2016). Despite the high degree of misfit between pre-existing national regulation and the text and spirit of the Directive, the Italian Government does not use the margin of manoeuvre and flexibility offered by the Directive to limit changes and remain in line with the national tradition, but, on the contrary, adopts one of the most liberal interpretations of the provisions envisaged by the Directive, thus using Europeanisation as a tool for liberalisation.

*Global licences*

As explained in Chapter 1, global licences authorise one supplier to send one or more shipments to one or more specified recipients, and MS with stricter legislation have detailed the defence material to be exported and the maximum quantity of each kind of armaments material that it is permitted to be exported within the three year period.
The Italian transposition of the Directive reflects an extensive and flexible interpretation of Article 6 of the Directive, because there is no limitation on quantity and value of defence materials exported with global licences. In fact, according to Art. 10-*quater* of the transposition law, which concerns global transfer licences, the Ministry of Foreign Affairs shall authorise the global transfer licence on a request from the single supplier for the transfer of specific defence material, without any limitations on quantity and

value, to authorised recipients located in one or more MS.[300] Global transfer licences may also be authorised to allow transfers related to equipping armed forces or national Police. In accordance with the directive, a global transfer licence is authorised for a period of three years which may be renewed.

The terms and conditions for granting a global licence are no longer specified, such as in the case of general licences, by primary law, but are relegated to secondary legislation.[301] The implementing regulation adds a list of information which must be provided when the company applies for a global licence *ex-ante*. These are the same as those required for individual licences, and include the identity of the recipient which must be a government or a company, possible conditions or limitations to transfers of the product in case of re-export, end-user certificate and, where required, information on the banking transaction. Significantly, however, there is no reference to quantity and value. Moreover, it is not clear whether it is necessary to declare the identity of the final acquirer of the product at the beginning of the authorisation procedure, or if it may be sufficient to communicate the identity of the intermediate recipient (i.e., the company with which the Italian enterprises coproduce). Indeed, a literal reading of the relevant provision suggests that it is sufficient to identify *only* the intermediate recipient.[302] In conclusion, even with regard to the formulation of global licences, despite the presence of a particularly strict national regulatory approach pre-dating the Directive, the transposition of the Directive is remarkably vague and flexible. However, according to the same above-mentioned article, the company applying for a global licence has to attach an import certificate or an end-user certificate when required by the Foreign Ministry.

*Individual licences*

Individual licences for intra-Community transfers must be considered as an exception with respect to general and global licences and are to be used only in specific and particular cases, linked to the protection of essential security interests or in exceptional cases of suspected unreliability of the recipient.

300 Art.10-*quater* of the Legislative Decree n. 105 of the 22 June 2012.

301 Decree of the Ministry of Foreign Affairs and the Ministry of Defence, n. 19, of the 7 of January 2013, op.cit.

302 According to Art. 9.1 letter (r) of Decree 19/2013, “The undertaking has to specify the final recipient **or** the intermediate destination”.

The Italian law is, again, very faithful to the Directive.[303] The implementing regulation [304] adds a list of information which must be provided when the company applies for an individual transfer licence. It is the same for global licences. In addition to those data, applicants for individual transfer licences should also indicate the value of the contract and the quantity of the material, with relative units of measurement.

### *3.3 End-user controls and re-export to third countries*

The Directive concerns only intra-Community transfers of defence material. However, it indirectly touches on the field of export to third countries where coproduction is concerned. The European Commission's impact assessment study identified two main reasons for retaining a licence regime: the “infancy” of Common Foreign and Security Policy and the coexistence of national and international control regimes. [305]

The aim of the Directive is to simplify the rules and procedures applicable to the intra-Community transfer of defence-related products in order to ensure the proper functioning of the internal market, in line with the previous ruling of the European Court of Justice, and with Interpretative Communication on the application of Article 296 [now 346 TFEU] of the Treaty in the field of defence procurement. However, EU law in this field aimed at reducing obstacles to the free movement of goods and services is constrained by the limits of EU competences, as arms export policies remain the domain of the nation states and of unanimity decision-making in Common Foreign and Security Policy : “While the rule on intra-union transfers […and on public procurement] are adopted on the basis of the Union’s market internal power, the rules on exports of armaments are set out in a measure adopted within the Common Foreign and Security Policy framework.”[306] The Directive clearly states that, in compliance with the EU Treaties, the norms apply only to the internal market and do not touch the discretion of the MS concerning their export policies.

In line with this distinction, Article 4(6) of the Directive states that MS shall determine all the terms and conditions of transfer licences, including any limitations on the export

303 Art. 10-*quinquies* of Legislative Decree n. 105 of the 22 June 2012.
304 *Decree of the Ministry of Foreign Affairs and the Ministry of Defence* n. 19 of the 7th of January 2013.
305 Unisys (2005).
306 Koutrakos (2013), p. 315.

of defence-related products to legal or natural persons in third countries having regard, *inter alia*, to the risk for the preservation of human rights, peace, security and stability created by the transfer. MS may, whilst complying with Community law, avail themselves of the possibility to request end-use assurances, including End-user certificates, or may not. In other words MS have full control on exports to third countries, on their export policy and on their foreign policy, in accordance with the spirit and letter of the Treaty of Rome. Each MS, on the basis of the characteristics and tradition of its national arms export control regulations, may decide whether to maintain full control or to delegate responsibility of re-export to the partner country.

However, the Italian legislator (the government, in this case) does not specify this formula, according to its national legal tradition but, on the contrary transposes exactly the same vague and optional formulation of the Directive. In fact, according to Art. 10 bis paragraph 2 of the transposition law, suppliers who effect an intra-Community transfer of defence materials shall use general, global or individual transfer licences. For subsequent re-export to recipients situated in third-party countries, bans, restrictions or conditions may be imposed, and guarantees concerning the final use of the material, including end-user certificates may be required.

The use of the verb “may” has enormous consequences on the final control of Italian arms exports. In fact, in cases of re-export to non-European countries controls on final destination of coproduced goods under Community licences and then transferred to third countries are no longer an obligation but an opportunity**.** The Italian authority may or may not maintain controls on the final destination, may or may not apply bans and export restrictions, may or may not ask for an end-user certificate. The criteria for maintaining controls or not are not clarified by primary law but remain vague and are delegated to secondary regulation or to a case-by-case analysis. What before was stated by the Italian Parliament and acted on as a limit to the discretion of the executive power, now is newly delegated to executive authority albeit in the framework of the Italian law as amended. This is the result of two different factors. The first is a legal factor. The Directive does not preclude a stricter approach with regard to third countries. The reason why it is not prescriptive with regard to exports to third countries is linked to the limitations of the legal basis, which is intrinsically linked to the internal market. If the Directive had taken a specific approach with regard to third countries it would have lent itself to legal challenge. It is nonetheless interesting to note that the Italian legislature saw the Directive’s limited scope as an opportunity to liberalise the

system in an area not covered by the Directive. Thus, a voluntary EU norm is able to change legislation in Italy. This is a norm that, despite being non-binding, and only introducing an opportunity in a liberal direction, is able to trigger a revision process and change national laws which seemed unmodifiable until then, and to empower the weight of some actors in favour of major liberalisation. This process is not limited to EU boundaries but is extended to EU exports.

However, the implementing regulation offers an important contribution to clarify this ambiguity and to maintain Italian controls on the final destination of coproduced goods re-exported to non–European countries. Implementing regulation 19/2013 specifies that in any case National Authority shall give its consent for re-export to third countries. According to its Article 10, devoted to general principles for authorisation of intra-Community transfers, for further re-export of defence materials transferred under intra-Community transfer licences towards recipients situated in third-party states, the consent of the National Authority shall be required. Furthermore, according to Article 11 par. 2 letter c of the same implementing regulation**,** companies using intra-Community transfer licences must inform the UAMA of any possible changes in the final and intermediate recipients following the release of authorisation.[307]

With this formulation, the Italian Government maintains control of the final destination of coproduced goods, realised under Community licences.

However, there are some limits:

1) The request for consent by the Italian authority is formulated not by primary law but by secondary law, i.e. an implementing regulation. This means another equivalent act from the government is sufficient to modify or eliminate this request, without involving the Italian Parliament;

307 According to Article 11.2, Companies using intra-communitarian transfer licences must respect the following conditions:
a) Inform their foreign counterparty of possible conditions and limitations to exports established by the National authority, including those concerning the final use and export to third-party states;
b) Respect the conditions and limitations, including restrictions concerning classified information;
c) Inform the National Authority (UAMA) on any possible changes in the final and intermediate recipients following the release of authorisation;
d) Provide, where required, documentation of article 20.1 of the law to the National Authority and inform it of any possible non-use of the authorised licences within the time limits specified in the licence;
e) Adhere to, at the time of the transaction requirements as to the types of material, recipients, the terms and all other prescriptions indicated in the license;
f) Deposit the authorisation with the customs office.

2) The request for consent is made to the UAMA which in an administrative office of the Foreign Ministry, without involving the Italian Parliament. Furthermore, it is not clear which procedures will be followed (and which bodies will be involved, which criteria will be applied) for the release of the consent to re-export.
3) It is not clear if and when the final destination of the coproduced goods will be reported in the annual report of the Government to the Parliament (if and when the final destination will be communicated to the Parliament) the degree of transparency and communication to the Parliament of the final destination of these kinds of transactions. It is not clear if and when and in which part all this crucial information will be reported in the annual report to the Parliament.

### 3.4 *End-user controls and re-export of components*

As regards components, the Directive encourages MS not to impose any export limitations (with only a few exceptions) and to leave the decision on the final destination to the partner country, in case they are integrated and re-exported as finished products. In fact, according to Art. 4(7), MS shall determine the terms and conditions of transfer licences for components on the basis of an assessment of their sensitivity of the transfer according to, *inter alia*, a) the nature of the component in relation to the products in which they are to be incorporated and any end use of the finished product and b) the significance of the components in relation to the products in which they are to be incorporated. Except when MS considers the transfer of the component to be sensitive, they shall refrain from imposing any export limitations on components where the recipient provides a declaration of use in which it declares that the components subject to that transfer licence are integrated or are to be integrated into its own products and cannot at a later stage be transferred or exported as such.

The spirit of the Directive is to liberalise transfers of components, in the perspective of mutual trust and to facilitate the creation of a defence industrial base, with only a few exceptions, which are linked to the nature of the component, the possible end use,

sensitiveness of the component and the percentage of this component on the final product. [308]

The Italian transposition of the Directive is even more liberal. In fact it liberalises the transfers of components *and* spare parts, without any limitations or reference to the nature of the components, to the possible end use (conflicts or human rights violation in the country of final destination), the weight of the component for the final product or its sensitiveness. The only exception to this liberalisation and delegation to the partner country, in line with the decision of the European Court of Justice and with the communication of the Commission, is represented by a serious threat to national security. In fact, the transposition law provides that: "Except in cases where their transfers may represent a serious threat to national security, transfers for components or spare parts cannot be subjected to any restrictions or export bans if the recipient provides a declaration of use testifying that transfer licences are integrated or are to be integrated into their own products and cannot at a later stage be transferred or exported as such, except for repair or maintenance".[309]

### *3.5 Reporting requirements*

The lightening of export procedures and reduction of information required *ex ante* when a company applies for general and global intra-Community transfer licence are counterbalanced by the information required *ex post* through the register in which companies must write all the information describing the defence-related product transferred, the quantity, value, date, name and address of the supplier, and attach proof that the recipient of the defence materials has been informed about export restriction. Thus, most of the information collected during the authorisation procedure, *before* granting a licence is now collected *ex post*, after the company has delivered the defence material. Similarly, most of the cross-checking controls that were carried out by comparing information collected *ex ante* and in the phase of delivery, are replaced by *ex post* inspections and control of the registers.

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308 There is a sort of ambiguity in the last part of the article according to which MSs shall refrain from imposing export limitations if the recipient declares that the components are in its own product and cannot be re-exported as such. In fact, it seems that, on the contrary, components can be re-exported as a final product.

309 Article 10-*bis* of Legislative Decree n. 105 of the 22 June 2012.

The Italian transposition adheres faithfully to the letter of the Directive concerning the minimum standard of information that must be collected according to Article 8 of the Directive.

In fact, according to Art. 10-*septies* of the transposition law, companies are obliged to keep a detailed and complete record of their transfer together with commercial documents containing the following information:

a) Description of the defence-related product in compliance with the list in Article 2.3;

b) The quantity and value of the defence-related product;

c) The date of transfer;

d) The name and address of supplier and recipient;

e) Where known**,** the end use and end-user of the defence-related product;

f) Proof that the recipient of defence material has been informed about export restrictions attached to the transfer licence.

In case of delivery using a general, global or individual transfer licence, brokerage, or grant of licences of production, intangible transfer of software and technology and delocalisation of production, the company is obliged to keep and provide for five years any documentation related to material exported which demonstrates arrival at the final destination**.** The register of comma 2 must be kept by the exporter for a period of at least five years from the last registration. It must be made available, upon request from the competent MS authorities from whose territory the defence materials have been transferred. In case of general licences these data must be transmitted to UAMA every six months**.**

Overall, the Italian transposition of the provision of the Directive is faithful and does not add any additional information, conditions or restrictions to those requested by the EU, despite the Directive allowing this possibility. However the transposition of the letter of the Directive may create some ambiguity. In fact, in case of export under general/global and individual intra-Community transfers, exporters have to specify the end use and end-user of the defence-related products, “where known”. These two words may create a sort of incompatibility with the principles of Law 185/90, in particular with Article 1, paragraph 5, which bans defence goods exports in the absence of sufficient guarantees with regard to the ultimate destination of the arms to be sent.

Another indirect consequence of the new formulation of reporting requirements concerns the timing of parliamentary oversight and its power of orienting and

controlling the act of the executive and the companies in this delicate field. In fact, whereas before Parliament was informed *ex ante* at the moment of the authorisation and often before the delivery, thus able to check and revoke or block an export before its deliveries, it is now informed once the defence material is delivered to the recipient. Furthermore, it is not clear when and if the Parliament will be informed of the final and real destination of coproduced goods in cases of general, global or individual transfer licences.

### *3.6 Certificate of reliability of companies*

Certification procedures play a central role in the architecture of the Directive. In fact, they are one of the main pillars for controlling the reliability of the companies and activating new forms of controls against illicit traffic and the possibility of re-export toward unreliable recipients. The spirit that clarifies the certification system is clearly explained by the Commission in its report to the Parliament and to the Council in 2012:

Certification is one of the core elements of the Directive and introduces a new approach in the system of control of defence transfers. The objective of the certification of recipients is to establish their reliability for receiving defence-related products under a general transfer licence published in another MS. It is a confidence-building measure and a tool to reinforce *ex-post* controls. It is intended as an alternative form of controls with respect to traditional *ex ante* controls, and as a means to reduce the risk of illicit transfers and enhance the traceability of the defence-related products transferred under a general transfer licence and mutual trust in compliance with legal requirements, with particular attention to re-export, and quality of internal control programmes.[310]

The Directive indicates (in Article 9) the procedures and the criteria to be followed at a national level in order to certify the reliability of a company. [311]

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310 *Report from the Commission to the European Parliament and the Council on transposition of Directive 2009/43/EC simplifying terms and conditions for transfer of defence-related products within the EU***,** Brussels, 29.6.2012, COM(2012) 359 final, p. 11.

311 Further details and clarification on criteria to be followed in the certification process, in order to favour national transposition and harmonisation in the certification process of different EU countries, have been enshrined in one further specific act of the Commission, namely Recommendation 2011/24/EU of 11 January 2011 on the certification of defence undertakings under Article 9 of Directive 2009/43/EC which provides guidelines on the certification criteria. Its main objective is to ensure a convergent interpretation and application of the certification criteria so that, for example, the certificates can be mutually recognised more swiftly.

The Italian transposition of Article 9 and of all verification norms, is very faithful to the Directive. Article 10- *sexies* of Italian Decree 105/2012 transposes word for word Article 9 of the Directive, just adding or specifying a few more aspects, as I will explain below. The period of validity (which according to Article 9 of the Directive shall not exceed five years in any case) is three years.[312] The competent authority designated by the Italian legislator to carry out the certification of the recipients in Italy is the Italian Ministry of Foreign Affairs. In particular the Unit, UAMA, in agreement with the Ministry of Defence, is responsible for issuing certificates of reliability.[313]

When the Ministry of Foreign Affairs, in compliance with the disposal of the law, finds that the holder of a certificate established on the territory of its MS no longer satisfies the criteria and conditions established by European and national law, appropriate measures may be adopted, including the possibility of revoking the certificate, and the Commission and other MS will be informed of its decision.[314]

Italy recognises the validity of certificates issued in accordance with the Directive in other MS. Further specification of all the information, material and attachments that shall be presented to the Ministry of Foreign Affairs in order to obtain certification, are listed in the long Article 12 of the implementing regulation, including, it is worth mentioning, the person responsible for the intra-Community transfer, the description of the company's industrial activity with reference to the integration of systems and subsystems, and a long list of paperwork, documents and acts to be attached to the application.

Lastly, certified companies must promptly communicate electronically with the Ministry of Foreign Affairs and must provide all information online related to each single shipment.[315] It is important to mention that the Commission created the database CERTIDER.[316] This system was designed in cooperation with a dedicated work group composed of MS representatives. The system was tested and validated by MS representatives who will feed the register with information about the certified recipient undertakings.

312 Art. 10-*sexies* par. 5 of the Legislative Decree n. 105 of the 22 June 2012.
313 Art. 10-*sexies* par. 6 of the Legislative Decree n. 105 of the 22 June 2012.
314 Art. 10-sexies par. 7 of the Legislative Decree n. 105 of the 22 June 2012.
315 Article 12, par. 9 Legislative Decree n. 105 of the 22 June 2012.
316 CERTIDER was available at the following address *http://www.ec.europa.eu/enterprise/sectors/defence/certider/*, (last accessed 6 May 2018).

Despite the Italian transposition law being very faithful to the text of the Directive, it does not envisage an obligation of certification for companies using general and global intra-Community transfer licences. It is interesting to note that none of the Italian companies have been certified until now. Italy is one of the few countries in the European Union without any certified companies. Despite this, general licences have been granted by the Italian Ministry of Foreign Affairs and these are widely used by Italian companies. How can we explain this gap? It is likely that the certification procedures and all the attachments required have discouraged some companies from embarking on such a difficult process, and imposing a heavy administrative burden. Secondly, Italian companies may apply for general and global licences and enjoy this simplified pathway to export without also being certified (there is no Italian law requiring Italian companies to be certified in order to use general and global Italian licences). Overall, this appears to confirm that the priority for Italian companies, and that of the government in transposing the Directive, has been to liberalise defence transfers and internal regulation for *national* aims, rather than to favour exchange in the European context, and offer guarantees to European partners looking for a stronger collaboration with Italian partners. One of the few instruments of positive integration has been formalised and transposed in the Italian transposition law but has never been applied.

### *3.7 Other controls on intra-Community transfers*

Considering the relaxing of *ex ante* controls in the authorisation phase, *ex post* controls, together with the reporting requirements, and the certification of companies are particularly relevant for this new authorisation system concerning general and global licences. The transposition law, in conformity with the spirit and letter of the Directive, on the one hand reduces end-user controls, end-user certificates and control on arrival at final destination, mainly in intra-Community transfers, but, on the other, envisages new forms of controls, introducing the certificate of company reliability and new forms of verifications and inspections. Furthermore, the Italian legislator also decided to maintain some traditional controls such as on banking transactions, despite changing from having to obtain an authorisation for banking transaction from the Ministry of Finance to a simple notification to the same ministry.

*Control upon arrival at final destination*. Despite the absence of a reference in the Directive, the Italian transposition law also dilutes the reference to the control upon

arrival at final destination. Whereas before, according to Article 20 of Law 185/90, it was necessary to send this kind of certification (certification of arrival at final destination, or the custom documentation) promptly once the defence good reached its recipient (it was a system to monitor the transfers of a component or finished product), now with regard to general licences, and also for certified companies using global and individual intra-Community licences, it is sufficient to keep this documentation for five years.[317]

*Verification and inspections***.** According to Article 20-*bis* of Legislative Decree 105/2012, the activities related to controls, inspections and verifications (checks and audit) both before and after the export of defence materials, are of particular relevance. It is a task of the Ministry of Foreign Affairs, in collaboration with other Ministries and administrations responsible for public security, order and custom authorities. Article 11 of the Implementing regulation, the UAMA of the Ministry for Foreign Affairs exercises activities of monitoring and controls intra-Community transfer licences, collects all the documentation concerning arms transfers contained in the registers of each company (deliveries) and can issue hearings for companies in order to collect more information.

*Activity of oversight/vigilance/supervision***.** Furthermore according to Article 20-ter of transposition Legislative Decree 105/2012, the Ministry of Foreign Affairs has powers of oversight and vigilance. In fact, it can gain access to all premises and collect copies of registers, data and internal regulations of the companies, in order to verify the adherence to legal obligations, normative prescriptions of the law, and implementing regulation as well as conformity with all conditions indicated in the certificate of the companies. It has the right to make visits to registered companies and send designated inspectors who can examine and acquire copies of records, data, and internal regulations concerning all the defence material produced, transferred and exported, or received on the basis of a transfer licence from another EU MS.

*Control on banking transaction***.** According to the transposition law, all financial transactions concerning Italian arms transfers and exports, thus including all movements covered by general, global and individual intra-Community transfer licences must be communicated to the Ministry of Economy and Finance (Art. 27 of

317 Article 20 paragraph 4.3 and Article 20*bis* of Legislative Decree n. 105 of the 22 June 2012.

the law). This means that whereas before it was necessary to obtain an authorisation from the above-mentioned Ministry before carrying out any banking transaction, now an *ex post* communication to the Ministry of Finance is sufficient. Thus, the Italian legislator is able to maintain a precious form of control against corruption and illicit traffic for intra-Community transfers as well. The limits of this new formulation are, as in other cases, that the banks and credit institutes have the responsibility but there is no obligation for companies to communicate this data to banks. Thus, financial institutions have complained about how difficult it is to obtain this kind of data to then pass on to the Government. All this information is included in the annual report to the Parliament. This aspect, albeit transformed in communication rather than authorisation, is essential for controls against corruption and collusion.

### *3.8 The institutional framework*

An important effect of the transposition law is represented by a new centralisation of different tasks and duties in the hands of the Ministry of Foreign affairs in general (for the general political guidelines) and in particular of the UAMA of a very wide range of new tasks contemplated by the Directive. The UAMA is an administrative body of the Foreign Ministry. It is directed by a diplomatic official (at least Minister Plenipotentiary appointed by the Minister of Foreign Affairs) and employs staff from other administrations including military personnel belonging to the Ministry of Defence. Article 11 of the implementing regulation details and clearly sums up the tasks of the UAMA:

a) It grants transfers licences, issues certificates for companies, carries out controls (licences and certificates);
b) it exercises monitoring and control activities (monitoring and subsequent controls);
c) it collects all documentation concerning arms transfers contained in the registers of each company (deliveries);
d) It can issue hearings for companies in order to collect more information;
e) When irregularities are discovered it may suspend or revoke a licence for transfers or export,
f) UAMA can impose fines and administrative sanctions;
g) It is responsible for tasks related to the activities of investigation.

h) It may revoke or suspend authorisation or company certificates (Art. 11 implementing regulation).

In case of re-export, consent from the UAMA must be requested again.

Thus, one single body has monopoly over a wide range of political, administrative and judicial tasks. If, on the one hand, it undoubtedly makes all the authorisation, subsequent checks and control procedures easier and quicker, on the other, there may be some disadvantages with respect to the checks and balances characterising the preceding legislation, in terms of risk of corruption and illicit transfers, which is higher if the number of subjects involved in different authorisation and control phases is lower. In the late Eighties the scandals about corruption and collusion in arms exports to Iraq led decision-makers to opt for collegiality over centralisation in arms export control procedures.

It is important to emphasise that this kind of domestic change was not explicitly required by the Directive.

### *3.9 Transparency*

The Directive does not make any reference to transparency and reporting to national Parliament of the data concerning defence material transferred under general, global and individual intra-Community transfers. The only reference to a form of communication of data transparency in the Directive is laid down in point 41 of the long Preamble of the Directive, according to which the Commission should regularly publish a report on the implementation of this Directive, which may be accompanied by legislative proposals where appropriate.

This lack of reference created strong criticism from European NGOs acting in the field of arms transparency and disarmament and among researchers from independent research institutes.[318]

The Italian transposition law fills the gap opened by this lack of reference very clearly, by offering an example of good practice in line with the Italian tradition of arms transfers

318 By favoring a market approach that completely sidesteps the foreign and geopolitical policy dimension of the arms trade, and in the absence of a harmonized and legally binding mechanism for the control of arms exports, the "Defense Package" risks reducing the EU's arms export policy to its lowest common denominator is a step back in terms of transparency and could increase the risk of unwanted re-exports to third countries, Depauw, (2010); Mampaey and Tudosia (2008).

regulation. In fact, one of the three main pillars of the previous regulation is represented by transparency intended as a means of mutual trust among countries and preventing the development of conflicts. Article 5 of the previous Law 185/90 stated that the government had to give Parliament its own report by the 31st of March every year detailing the operations authorised and carried out by 31st December of the previous year. The report details the type of material exported, its monetary value, the end-users and the name of the exporting firm, the name of the bank involved and the transaction amount. The report represented an important instrument of transparency and could be consulted by any citizen. At the same time, it provided Parliament with a means of exercising control over foreign policy and defending the government in the matter of arms transfers. This, therefore, becomes a means of allowing Parliament to assess government action in foreign policy, thereby also directing it.

The Italian transposition law fills the lack of reference in the Directive to transparency extending the whole Article 5 of Law 185/90 also to the new global and general licences and adds a paragraph to Article 5 devoted explicitly to transparency of data concerning general and global intra-Community licences. In fact, Article 5, paragraph 3 of the law states explicitly that exporters who use global project licences (and general, global transfer licences), must provide the Ministry of Foreign Affairs with an annual analytical report on the activities performed on the basis of the licences obtained, accompanied by data concerning all operations performed. This documentation is an integral part of the report**.** Furthermore, Article 5 specifies and explicates that the government report to the Parliament must contain information concerning global project licences, global or general transfer licences.

Overall the Italian transposition of the law offers a very good practice for other MS in extending all the transparency norms to intra-Community transfers as well. It is equally important that these norms, which are strictly linked to the power of the Parliament to address and control arms export policies, are stated by primary law and are not delegated to any sub-legislative instruments. In this aspect, the Italian approach stands as unique with respect to the other two case studies (Hungary and UK).

There are, however, some practical problems regarding *when* and *how* this information will be communicated to the Parliament. The first concerns the timeliness of information to the Parliament, considering that it is no longer possible to know all the data *before* the transfer, at the time of the authorisation, but on the contrary, this data is collected in the register of the companies and communicated, only *after* being exported and

*delivered*. Thus, the Parliament will be necessarily informed *ex post* and not *ex ante*, eliminating the margin for the Parliament to block or prevent an authorisation considered non-compliant with the law. The timeliness of reporting appears even more delayed and opaque in cases of re-export to third countries of a defence material falling under general or global intra-community licences: given that the company shall communicate the final destination only *where known* at the beginning of the authorisation process, the Italian Government will probably be informed of a re-export only at a later stage. It is not clear *if, when and where* this crucial information will be reported physically in the report, in which section and how each data will be linked with the previous general or global licence of reference.

Secondly, there is only one source of information - the company register filled in by the same companies and based mainly on their good faith/auto-certification, whereas before it was possible to cross-check data coming from different sources and different ministries (Ministry of Foreign Affairs for the authorisation phase, the Ministry of Finance and customs data for the deliveries, and the Treasury for the banking transactions).

Thirdly, instead of simplifying, in practice one effect of the transposition of the Directive risks creating more complexity and fragmentation. Whereas the law laid down only one kind of licence (the individual export licence) before, with only one way to report to Parliament, now there are four kinds of licences with different ways to be reported and different sections in the national report.

In conclusion, Legislative Decree 105/2012, which transposed Directive 2009/43/EC, first of all, introduces some fundamental, and necessary, amendments. These concern the introduction of new kinds of licences (global project licences and general licences), amendments to a new certification system for companies, and new forms of *ex post* controls, such as reporting requirements and inspections.

However, the Italian Government went beyond what was required by the Directive, and went further in the direction of liberalisation. In fact, it adopted a comprehensive formulation of general licences, covering a wide range of military categories, and allowing the executive to decide when and if to apply an end-user certificate.

Secondly, in some cases, it transposed the same flexible/voluntary formulation of the Directive that at the supranational level is intended as a means of leaving MS free to choose a formulation which adheres better to their legal tradition, but that at the national level increases the discretion of the executive and administrative bodies.

Thirdly, the opportunity to review Law 185/90 has also been used to introduce a major degree of centralisation as required by some representatives of the public administration and government, centralising in one single administrative body a wide range of political, administrative and judicial tasks and the power of the executive in arms export policies. The Italian legislator saw the Directive's limited scope as an opportunity to liberalise the system in an area not covered by the Directive.

## 4.Comparing the Italian regulatory regime before and after Directive 2009/43/EC: domestic change along the eight dimensions

This last core section is devoted to assessing the direction and intensity of domestic change in Italy after the approval and transposition of the ICT Directive. In order to do this, I compare the Italian regulatory regime before the approval of Directive 2009/43/EC with the architecture resulting from the transposition of the Directive. I do this along eight political-institutional dimensions: (a) balance between political strategic variables and economic-industrial variables; (b) balance between legislative and executive power in regulating arms exports; (c) degree of details of the primary law; (d) transparency and degree of Parliamentary control; (e) national responsibility on the final destination of co-produced goods; (f) checks and balances in the authorisation and control procedures; (g) role and weight of the state with respect to the role of the companies; (h) balance between common standards and fragmentation in arms export control rules.

As explained in Chapter 3, each of these dimensions is assessed on a scale of intensity (from 0 to 5). A detailed explanation of the taxonomy of each dimension is presented in that chapter. Overall, lower marks are associated with a pro-industry oriented model, whereas higher values are associated with a more responsible and highly regulated model where ethical concerns play an important role. The comparison between the marks of the Italian regulation *before* the approval of the Directive with those of the Italian regulation *after* the transposition of the Directive permits an assessment of the policy and institutional change along these six dimensions and the degree and direction and intensity of change of the domestic system of arms export control regulation.

### *4.1 Political and strategic variables versus economic and industrial variables*

*The Italian regulatory regime before the Directive 2009/43*

The principle underlying Law 185/90 is of a political nature, whereas economic and industrial motivations are subordinate to this political principle. In fact according to Law 185/90, Italian arms trade and economic and industrial motivation must be in compliance with the Italian foreign and security policy, which is guided by the Italian Constitution (namely Article 11) and by the principles of international law regarding human rights, the ideals of prevention and settling of disputes and cooperation, and development, which are slowly making headway in the international context. Starting from this principle, Italian law enshrined several bans on exports. Arms trade was not forbidden but was subject to these political principles.

Italian Law 185/90 preceding the transposition of the Directive did not make any reference to economic or industrial variables**.** Thus, the value assigned to Italian Law 185/90 *before* the approval and transposition of the Directive is 5 (see synoptic table of the first dimension in Chapter 3).

*The Italian regulatory regime after the transposition of the Directive 2009/43/EC*

The principle underlying the Directive is of an economic nature (assuring proper functioning of an internal market and competition) whereas national regulation on arms transfers are considered possible obstacles to free movement of goods and services, in this delicate matter. Free movement of goods (extended to defence goods with some caveats) is the principle, whereas political principles of national regulation (foreign policy, security policy and international law principles concerning respect for human rights, conflict prevention) in this sensitive field of arms exports, are exceptions which must be used only in extraordinary cases, if the essential security interest is at stake, under certain conditions (necessity and proportionality), with MS holding the burden of proof (in line with the interpretative Communication of the Commission and the following decision of the European Court of Justice).

This reversal of perspective is never explicitly formalised in the Italian transposition law and the fundamental principles of the law are not modified.[319] Thus, formally, the

319 This is because of pressure by the non-governmental organisations dealing with arms export control and transparency, which asked the government to introduce only the technical modifications strictly required by the Directive, without changing the principles and spirit of the law.

principles remain the same as in the previous regulation and the mark for the Italian regulation after the transposition of the Directive is still 5. [320]

### *4.2 Legislative branch versus executive branch*

*The Italian regulatory regime before the Directive 2009/43/EC*

With Law 185/1990, Parliament had established its prerogative in this field, which had, until then, remained the exclusive preserve of the government. In fact, in 1990, it was the legislator that by assuming power over the control and direction of such a delicate matter as the arms trade, dictated primary law and wrote the regulation; the principles to be followed by the competent bodies in the decision-making process on licences, their subsequent controls and the level of transparency. All these aspects acted as guidelines, and limited the discretionary actions of the executive power. Secondly, Italian Law 185/90 introduced a system of governmental controls by providing clear procedures for the authorisation of Italian arms at the negotiation and then at the time of sale, as well as subsequent control mechanisms. All these steps were detailed in primary law. Lastly, considering that the Italian Parliament had to be informed both on authorisations and deliveries by 31 March of the following year, its power was *ex post*, but could also be exercised to block several authorisations which had not been concretised in deliveries within the 31 March deadline. Thus, Italian law on arms export control and transparency before the transposition of the Directive scores 4.5.

*The Italian regulatory regime after the transposition of the Directive 2009/43/EC*

With the transposition law the executive power newly reacquires power, in line with the claim in the literature that national parliaments are the “losers” of Europeanisation. [321] The role of the Parliament diminished for three fundamental reasons. Firstly, it is the executive power that thanks to the very broad delegation given by Parliament with the so-called Communitarian law, is delegated to transpose the Directive, and write the new transposition law, despite final approval resting with the

320 However, *de facto the new perspective* inspires all the articles related to general and global intra-Community licences and creates several problems of compatibility between principles of the first articles and norms concerning general and global licences.
321 Graziano (2013), pp. 725-742.

Parliament. Secondly, the requisites, terms and conditions for using general, global and individual intra-community licences, are delegated to the executive. Thirdly, the very crucial assessment concerning whether, and in which cases, re-export will be delegated to the partner country, and when it is necessary to maintain national control and request an end-user certificate, is treated in the implementing regulation and delegated to the executive branch. Thus, with the transposition law the executive power reacquires power in this field. As a result, the overall mark of the Italian regulation after the transposition of the Directive is 3.

### *4.3 Primary law versus secondary law*

*The Italian regulatory regime before the Directive 2009/43/EC*

The Italian law was characterised by a high level of detail in enshrining the three fundamental pillars of any arms export control regulation: bans; licensing procedures and transparency.

In fact, firstly Article n. 1 of Italian Law 185/90 states that the Italian arms trade must be in compliance with Italy's foreign and defence policy, the Italian Constitution, and the principles of international law. Then it details criteria regulating arms transfers and bans, which are legally binding and superior to any act of the government, and that apply to war materials as a whole without exception. Secondly, Law 185/90 stipulated the procedure for the application and granting of licences, and clearly specified the competent authorities and time limit in which each authority has to decide. It is intended to encourage greater transparency, as well as offer stricter controls against illegal traffic, cases of corruption and diversion. Thirdly it specifies the quality and quantity in details of the information on transparency. Thus, the score before the transposition of the Directive was 5**.**

*The Italian regulatory regime after the transposition of the Directive 2009/43/EC*

After the transposition of the Directive there is a clear decrease in the area regulated by primary law. In fact, the procedures for authorisation including terms and conditions for using the two new kinds of licences - general and global licences - are regulated by secondary law which also disciplines whether or not to require end-user certificates, to delegate the partner country with the choice for the final destination, and thus whether

to apply bans and restriction of Italian Law 185/90. Thus, the score for Italian regulation drops to 3.

### *4.4 Transparency versus opacity*

*The Italian regulatory regime before the Directive 2009/43/EC*

Before the transposition of the Directive, Article 5 of Law 185/90 stated that the President of the Council (the Prime Minister) must inform Parliament about the arms transfers authorised and delivered in the previous year by March 31st of each year. The annual report was intended as a means of allowing Parliament to control and direct the government's foreign policy in the matter of arms trade. The report was composed of several annexes written by the various ministries involved in the arms trade. Individual ministers must provide data classified according to the type, quantity and financial value of the weapons and their recipients. By comparing the various annexes and reports, it was thus possible to obtain information on the transfers and to establish the connection (at least for the main transactions) between the exporting company, bank, kind of material, quantity, value and country of final destination. Transparency was not a concession by the government, but a legal requirement: it is of particular relevance that the legislator laid down the quality and quantity of the data, which had to be reported to Parliament, as well as the reporting schedule.

In conclusion in Italy all data on export was detailed in primary law and binding. It included information on basic data (kind of material, value, quantity, final destination) and on sensitive data (bank and companies). Information on sensitive data offered the opportunity for citizens and NGOs to control and orient export policy also by pressing, not just on the government but also directly on companies or banks. Italian report data was not aggregated. The information concerned all kinds of exported arms (including small arms), and all licences (and deliveries), including co-productions and global licences. However, it was not always possible to connect and cross check all the export data. Thus before the transposition of the Directive, Italian regulation scores 4.

*The Italian regulatory regime after the transposition of the Directive 2009/43/EC*

With the transposition law, transparency, one of the pillars of law 185/90, has substantially remained the same. One of the main concerns expressed in particular by

NGOs with respect to Directive 2009/43/EC was the lack of reference to transparency, accountability and report to the Parliament for general and global licences, that could have decreased the level of transparency at the domestic level. Conversely, the Italian transposition law fills a lack of reference in the Directive by clarifying that all data concerning intra-Community licences (global, general and individual) shall be reported in the annual report to Parliament. Thus, the transposition law faithfully extends the norms on transparency in detail to these three new kinds of licences as well. In this way, Italy establishes an example of best practice. This specification was the result of the pressure of Italian NGOs that generated an amendment which formally extended the same details of transparency to general and global licences as well. Thus, formally, the Italian regulation after the transposition of the Directive maintains a score of 4.

However *de facto*, the degree of transparency and the role of the Parliament are slightly reduced because with general and global licences the Parliament can be informed in detail only *after* the delivery and not *before* the authorisation to export (as partially happened before). Furthermore, it is not clear how these data should be reported in the annual report to the Parliament. Lastly, the very delicate aspects of final destination of coproduction and re-exports and the report to the Parliament are treated vaguely and thus indirectly affect the article concerning transparency.

### *4.5 Responsibility versus delegation*

*The Italian regulation before the Directive 2009/43/EC*

Italian Law 185/90 was originally based on the principle of responsibility for the final destination of every defence good including the smallest component exported by Italy to other countries. This chain of responsibility concerned all the actors involved in the authorisation and control process (ranging from the Ministry of Foreign Affairs, to all the other ministries, Italian Parliament, customs authorities, banks and single citizens).

National authorities were required to assume full control and responsibility for the final destination of all equipment including any with Italian parts, components, technologies and licences. In cases of international coproduction, rigorous authorisation procedures applied to each component exported out of Italy (including end-user certificates), in order to ensure that Italian parts were not assembled abroad and transferred to a third country which was considered unreliable or at risk according to Italian foreign policy

and arms export regulation. When they applied for an individual licence, Italian exporting companies were compelled to disclose not only the partner company and country but also the potential buyer country, which was required to issue the end-user certificate and was subject to scrutiny by the Ministry of Foreign Affairs. The end-user was always disclosed in the annual report to Parliament. Thus, the score for Italian regulation was the highest at 5**.**

*The Italian regulatory regime after the transposition of the Directive 2009/43/EC*

The ECJ promotes the mutual recognition principle as a way of achieving negative integration (which has the advantage of facilitating cross-border trade, but the disadvantage of triggering and favouring harmonisation toward the lowest common denominator or a "race to the bottom").[322] The field of arms exports is a different case because it is an area characterised by the responsibility and discretion of each MS.

With the Directive, MS are encouraged to reduce the principle of responsibility on final destination of parts and components transferred under general and global licences and re-exported to a third country, in favour of a delegation to a partner country, and of the mutual recognition principle. This aspect is implemented in the Italian transposition law. Furthermore, responsibility on the final destination of defence materials containing Italian parts or components to non-European countries is indirectly diluted. In fact for subsequent re-export to recipients situated in third-party countries, of a defence good previously transferred under global or general licence, bans and restrictions concerning the final use of the material, including end-user certificates are no longer an obligation but a possibility, whose application depends on the discretion of the executive power. Thus, the score for Italian regulation after the transposition of the Directive drops to 3**.**

### *4.6 Checks and balances versus centralisation*

*The Italian regulatory regime before the Directive 2009/43/EC*

What marked the Italian authorisation and control procedures envisaged by Law 185/90 was the degree of intrusiveness and the involvement of different authorities in

322 F. Scharpf (2010). “The asymmetry of European integration, or why the EU cannot be a ‘social market economy ”.*Socio-Economic Review*, 8 (2): 211-250.

different phases of the authorisation and control procedure (Ministry of Foreign Affairs, Ministry of Finance, Treasury, custom authorities and so on). The licence granting and control procedure was run by different ministries (Ministry of Foreign Affairs, Ministry of Finance, Treasury, custom authorities and so on), each responsible for a different phase of the authorisation and control procedure 1) licence granting, 2) delivery controls, 3) banking transactions, 4) end-user controls data, and 5) audit and inspections. Political, administrative and judicial tasks were clearly subdivided and managed by different autonomous subjects. The high number of actors was introduced in order to limit corruption which had caused serious scandals in Italian arms exports to countries under embargo as well as limit waste of public sources. The cross-checking collaboration among different ministries reduced the risk of collusion and guaranteed efficient controls through a comparison of financial, fiscal, customs and economic data. Thus, the mark for Law 185/90 before the transposition of the Directive is 5.

*The Italian regulatory regime after the transposition of the Directive 2009/43/EC*

The Directive and consequently the Italian transposition law changed the perspective of control completely from an *ex-ante* collegiality to a certification process for companies and *ex post* controls, including verification and inspections. Furthermore, since 2007, representatives of the Italian government advocated a "radical transformation of the administrative structure"[323] in the direction of a "unification of the control activities carried out in a new agency by numerous administrations (Foreign, Defence, Customs, Economy and Finance, Internal) within a new agency."[324] The Italian transposition law tried to put together both European and domestic aspects of controls.

In particular, a collegial administrative body of the Italian Foreign Ministry UAMA (the Unit for Authorisation of Armament Material) centralised a wide range of tasks from the main responsibility for the authorisation procedure and for issuing licences, to granting certification to companies and to carrying out successive controls, to collecting and verifying all the data reported by companies, to holding hearings, conducting inspections, visiting companies, and imposing sanctions when irregularities are found. UAMA has a collegial nature and at the political level different ministries doing various

323 Nones and Marta (2007), p. 12.
324 *Ibidem.*

tasks remains valid. Therefore, the score for Italian regulation after the approval of the Directive falls to 3.5.

### *4.7 Common standards versus fragmentation and ambiguity*

*The Italian regulatory regime before the Directive 2009/43/EC*

Law 185/90 stipulated the procedures for applying for and granting licences, and clearly specified the competent authorities and the time limit in which each authority has to decide. It detailed all the information required to be attached to the licence application. There was substantially only one fundamental kind of export licence, the individual export licence which followed the same procedures with only a few exceptions for NATO and EU countries. The ways of reporting to the Parliament was the same for all individual licences. This high level of precision in the text was intended to reduce cases of illicit traffic, corruption and diversion, but it was also addressed to offer clarity and legal certainty to Italian companies. Furthermore, the law was quite clear in all its three parts concerning export criteria and provisions on transparency. In fact, political and constitutional principles were put clearly above the economic variables and none of the restrictions were ambiguous or conflicting. They were legally binding and established by primary law. Thus, the mark for Italian regulation was 4.

*The Italian regulatory regime after the transposition of the Directive 2009/43/EC*

The main aim of the Directive is to simplify exchanges of defence material authorisation procedures. However, in practice, one effect of the transposition of the Directive in Italy is the risk of increased complexity and fragmentation. Whereas before, the law laid down only one kind of licence (the individual export licence), with only one way to report to Parliament, now there are five kinds of licences (general, global, individual transfer, global project and individual export). Each of these licences follows different authorisation procedures, which are further differentiated if the company is certified (global licences, for example). These licences are also reported in different ways to the Parliament and are found in different sections in the national report. If we focus on the general licences, it is not clear when the End-user certificates will be requested and each of the six general licences issued covers a different range of defence materials. The situation appears even more fragmented if a comparison at the European level is

made. Thus the score for Italian regulation after the transposition of the EU Directive drops to 3.

A side aspect which is worth mentioning concerns ambiguity. Law 185/90 was characterised by a high level of precision and specified all the pillars of an arms export control regulation. On the contrary, the Directive is necessarily vague and sometimes ambiguous or flexible when it deals with political principles, or responsibility of final destination of coproduced and re-exported goods, whereas economic principles concerning the reduction of the administrative burden in general and global licences are very well detailed. This reflects the approach of the Directive which is focused on removing obstacles to trade in defence goods, whereas political variables are treated in a general way and delegated to MS. Foreign and security policy objectives are formulated in a vague and anodyne way.[325] This "ambiguity" is a necessary consequence of the differences existing between MS arms export policies and of the Commission's caution in dealing with such a delicate matter. The Italian transposition law maintains all the national political principles enshrined in pre-existing Italian law, and all the criteria and bans on exports detailed in it. However, when dealing with norms in general and global licences, the licensing procedures are less detailed and, at times, the Italian legislator transposes this ambiguity wholesale at the national level. This ambiguity also touches on some crucial details, such as those concerning cases in which the Italian authority applies restrictions on exports to third countries, and when they are not applied, which are once again delegated to the executive power and to the implementing agreement. This may create some problem of incompatibility with some principles and criteria laid down in Law 185/90 (for example that national authorities are required to take full political responsibility for the final destination of arms). Furthermore, this increases the discretion of executive bodies and allows for case-by-case assessments, but at the same time diminishes legal certainty.

### *4.8 State versus companies*

*The Italian regulatory regime before the ICT Directive*

The original version of Italian Law 185/90 on arms export control and transparency allowed a high level of intrusion by the state into companies. Companies were

325 Koutrakos (2013).

controlled by the state in a wide range of tasks: a) the authorisation procedure collecting all the necessary information *ex ante*; b) final delivery (collecting all the information); c) end-user certificates, which had to be signed not just by the importing company but also by the importing government; d) payment in order to limit cases of corruption and collusion. And, more importantly, bans and criteria were applied, assessed and directly controlled by the state. The Law allowed the operations of export and transit only with foreign governments or companies authorised by the government of the destination country. In this way, the legislator had attempted to make the governments of the receiving countries responsible in order to have stronger guarantees as to the destination and ultimate use of the war material. In order to stamp out illegal arms traffic, as well as provide strict national regulation, it was considered essential to involve the authorities of the importing countries, who should feel responsible and prevent any further export of the purchased material. These controls were undertaken systematically for all arms or components exported, thus the mark of the Italian regulation before the transposition of the Directive was 5.

*The Italian regulatory regime after the transposition of the ICT Directive*

With the Directive and the new transposition law, companies are made much more responsible. They must keep their registers in order and communicate *ex post* all the data concerning transfers and exports under general and global intra-Community licences. These registers contain information on quality, quantity, data, and final destination. They are responsible for communicating all export conditions and restrictions dictated by their governments to partner companies from other EU MS. Companies are responsible for some tasks such as checking the reliability of the partner in coproduction and communicating any national bans which must be respected for exports to the coproducing partner company. Overall, the transposition law strengthens the responsibility and auto-certification of companies, as regards the intervention of the government or of an independent authority. Thus, the mark of the Italian regulation drops to 3.

## 5. Conclusion

The aim of this chapter was to analyse the effects of the Directive on the Italian polity and policy, in order to verify if Italy has changed its arms export model as a result of

its implementation. In order to assess the degree and direction of domestic change, I used two ideal models of domestic regulation on arms export control along eight dimensions. The first ideal model is an “ethical” one, characterised by clear priority given to ethical variables such as the respect for human rights, peace, development and the rule of law, over commercial and economic variables. The second is a pro-industry oriented model, which gives priority to commercial variables, particularly those linked with the profit of their domestic companies, including measures aimed at expanding exports.

In order to identify and distinguish each “ideal” model, I used eight fundamental dimensions: (a) balance between political strategic variables and economic-industrial variables; (b) balance between legislative and executive power in regulating arms exports; (c) balance between primary law and secondary law in regulating arms exports; (d) balance between transparency and opacity in arms transfers data; (e) balance between national responsibility on the final destination of co-produced goods and mutual recognition principle/delegation to partner country; (f) balance between centralisation and checks and balances in authorisation and control procedures; (g) balance between the role and weight of the state with respect to the role of the companies; (h) balance between common standards and fragmentation in arms export control rules.

Each dimension was articulated along a scale ranging from 0 to 5 described in a synoptic table, which helped to identify the direction and assess the entity of domestic change. Lower values for each dimension corresponded to a commercial arms export regulation model, whereas a higher value indicated an ethical arms export legislation model. Not all these dimensions, however, are interdependent in practice and thus hybrid combinations of higher values for some dimensions and lower values for others are not excluded.

### *5.1 The Italian regulation before the approval of Directive 2009/43/EC*

The starting point of my comparison was Law 185/90 as amended until 2008 - the years before the approval of the Directive. Law 185/90 was found to be very close to an ideal “restrictive model”, characterised by high values for most of the eight dimensions. Italy’s initial marks for the eight dimensions before the approval of the Directive were high, between 4 and 5. As explained at length, the Italian law was the

result of strong pressure exerted by civil society and it is considered one of the main conquests of the campaign to “moralise” Italian arms exports. It revolves around the principle of responsibility, placing constitutional and ethical principles over commercial interests. It was approved at a time (1990, first disarmament agreements and end of bipolarism) and in a place (Italy, where civil society participated actively in peace and disarmament themes) which were extremely favourable to those supporting disarmament, peace and the prevention of conflict.

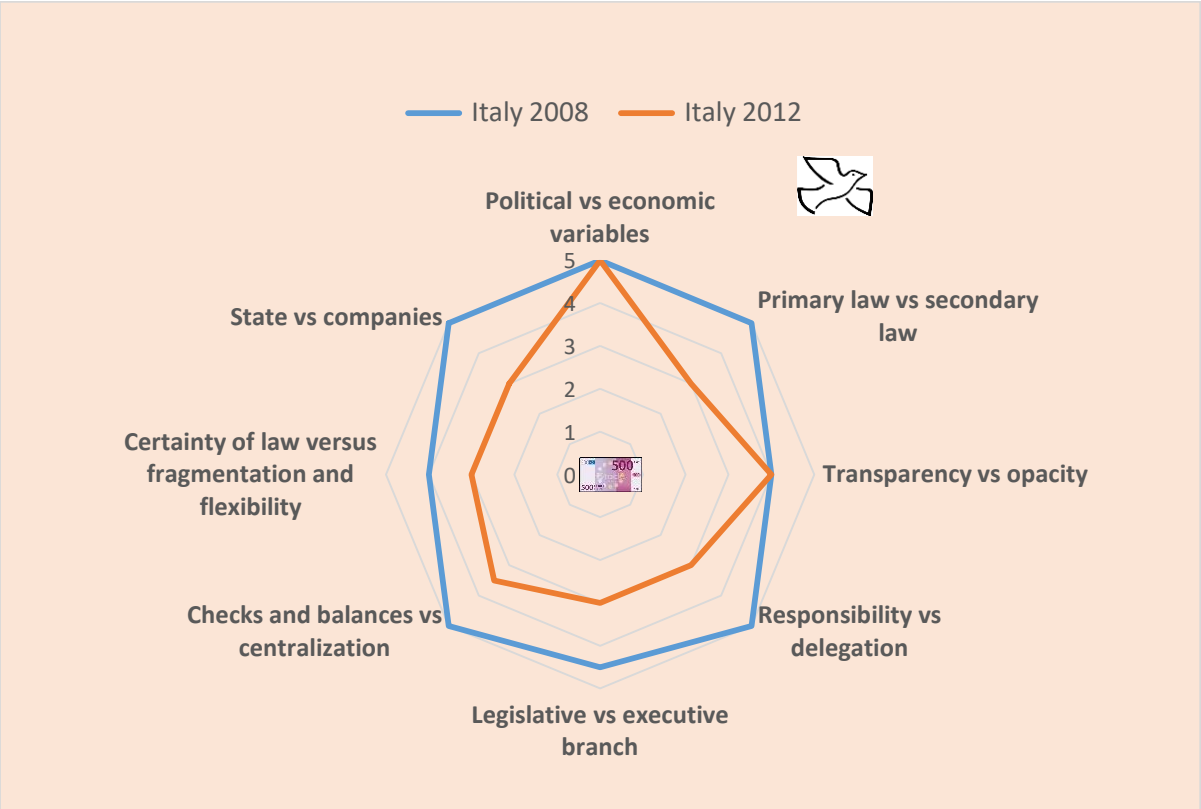
What happened after the creation of a European Defence Market with the implementation of Directive 2009/43/EC? Did the values of the eight dimensions change? In which direction? Where and how great has domestic change been in Italy?

### *5.2 Empirical findings*

Overall, my empirical findings for the Italian case-study show a clear and consistent domestic change towards a pro-industry model. In fact, six of the eight dimensions consistently lose points after the transposition of the Directive, whereas only two of the eight dimensions remain stable.

The graph below summarizes the “marketisation” process which has characterised Italian regulation, with values attributed to each of the eight dimensions *before* and *after* the Directive. The blue line indicates the marks of the Italian regulation in 2008, before transposition, the orange line indicates the points of the Italian regulation after transposition. The centre of the graph corresponds to a pro-industry model (Euro symbol) where commercial variables have priority, while the periphery represents a restrictive ethical model (dove symbol), where ethical and political variables have priority. As explained before, Italy starts off close to a restrictive model. In fact, this model scores high (between 4 and 5) in all eight dimensions. However, after transposition, most of the dimensions shift and narrow towards the centre of the graph, towards a pro-industry model.

Figure 4.2 Direction and intensity of domestic change along eight dimensions with the transposition of Directive 2009/43/EC: the Italian case (changes from 2008 to 2012)




restrictive model

pro-industry model

### *5.3 The eight dimensions*

In particular, by comparing the previous with the new Italian regulation I found that (a) the balance between legislative and executive power changed in favour of the executive branch which reacquired power, unlike the Parliament, the so-called “loser” of this Europeanisation process; (b) the area covered by primary law decreased in favour of secondary law or discretion of the executive and administrative authorities, particularly concerning general and global licences; (c) that the national responsibility on the final destination of coproduced goods was reduced in favour of the mutual recognition principle; (d) collegiality and decentralisation in the decision-making process was reduced in favour of new centralisation; (e) the ambiguity and vagueness of the primary law norms increased, readdressing the specification of several crucial details at a secondary law level or at an administrative level; and (f) the power of the

state decreased in favour of the power of the companies and their capacity of autoregulation. Some of these changes concerned not only intra-Community transfers, but also indirectly touched exports outside EU boundaries.

Only two dimensions remained, at least formally, at the same level: these are (g) the level of transparency and information contained in the annual report to the Parliament and (h) the weight of political and constitutional variables compared to economic ones in the enucleation of the spirit and principles of the law. In both cases the NGOs promoting Law 185/90 have played a determinant role, by pressuring Members of Parliament and the Italian government to maintain the same spirit, principles and level of transparency for the new kinds of general and global licences as well.

Table 4.5 Intensity of domestic change along eight dimensions with the transposition of Directive 2009/43/EC: the Italian case (changes from 2008 to 2012)

| | **Italy 2008** | **Italy 2012** |
|---|---|---|
| Political vs economic variables | 5 | 5 |
| Primary law vs secondary law | 5 | 3 |
| Transparency vs opacity | 4 | 4 |
| Responsibility vs delegation | 5 | 3 |
| Legislative vs executive branch | 4.5 | 3 |
| Checks and balances vs centralisation | 5 | 3.5 |
| Certainty of law versus fragmentation and flexibility | 4 | 3 |
| State vs companies | 5 | 3 |

### *5.4 The scope of domestic change*

Overall, the domestic change also affects some fundamental aspects which are not directly and explicitly required by the Directive, but which constitute the pillars of any arms export control regulation, such as the balance between legislative and executive, between primary and secondary law, and impact the same principle of responsibility on which the whole Italian regulation is built.

Despite formally maintaining the spirit of the law and principles, the norms concerning general and global licences implicitly introduce a new perspective, a new aim: whereas before the main objective was to regulate arms exports, limiting economic dynamics and placing commercial variables under constitutional political and ethical principles, with the transposition law, the intention is to strengthen the defence industry basis, by

removing some administrative and legal obstacles to arms transfers (albeit with some exceptions due to the sensitivity of the field).

Therefore, in origin the starting point of Italian Law 185/90 was represented by constitutional principles in the field of foreign policy, security and defence, under which economic variables were subordinated. Instead, according to the ICT Directive, the starting point is represented by the principle of freedom of movement (extended to defence goods with some caveats), whereas political principles of national regulation (foreign policy, security policy and international law principles concerning the respect for human rights, conflict prevention) are exceptions to the principle of free movement which must be used only in extraordinary cases, if essential security interests are at stake, under certain conditions (necessity and proportionality), with MS bearing the burden of proof (in line with the interpretative Communication of the Commission and following the decision of the European Court of Justice).

This change in functions and objectives of the law recalls the differences existing between the Italian Constitution and EU Law. Whereas according to the Italian Constitution, the law is a way to intervene and correct unequal and unfair consequences due to the free movement of defence material, the Directive (and the Treaties) intervenes in order to remove internal lawful barriers and obstacles to the free movement of goods to allow the "invisible hand" to operate freely. Using the terminology and parameters of Peter Hall, this change does not just involve settings of the basic instruments (first order change), and the techniques or policy to attain the goals of a law/policy (second order change), but the same overarching goals that guide policy.[326]Thus, in Italy there is a "third order" change modifying the goals that guide policy and its "philosophy", its paradigms, after the transposition of EU Directive 2009/43/EC.

These empirical findings support the European integration theories which identify a marketisation trend in the Europeanisation process. The literature contains several references to the Europeanisation trend. Starting with the specific defence and armaments field, Malena Britz analyses the Europeanisation of defence industry policies and focuses on one case study: Sweden.[327] Using the Europeanisation

326 Hall (1993).

327 M. Britz, (2010). K. Hartley, (1998) "Defence procurement in the UK", *Defence and Peace Economics,* 9(1): 39–61; C. Hoeffler, (2008) "La réforme des systèmes d'acquisition d'armement en France et en Allemagne: un retour paradoxal des militaires?", *Revue Internationale de Politique Comparée* 15(1): 133–50; C. Hoeffler, (2012) "European Armament Co-operation and the Renewal of

literature as a theoretical framework, and a process-tracing analysis as methodology she concludes that in Sweden Europeanisation has gone hand in hand with marketisation, intended as a process by which national authorities adopt liberal norms such as privatisation and an open defence market. According to Hoeffler- who picks up from different scholars -"this trend is indeed observable to varying degrees in the UK, Germany, France and Sweden"[328]. Likewise, Lucie Béraud-Sudreau, focusing on the French case, also finds a trend towards a neoliberal economic paradigm among those which have characterised the adaptation of the French arms export controls to the international arms market.[329]. This author's studies also shed light on other similarities between the French and the Italian case. French defence industry representatives called for a "change in philosophy" of the arms export control system, and requested a reduction in administrative procedures for intra-EU exchanges of military goods.[330] Similarly to Italy the ICT Directive was accepted because it was seen as a way to reform its own domestic export regime.[331] According to Béraud-Sudreau, [..] "the French Government used the ICT directive to overhaul (revision) the entire domestic arms export control regime, instead of only export controls towards EU member-states as required by the directive. Indeed, the government '*took the opportunity*' to reform the entire export control procedure."[332].

### *5.5 Side findings*

*a) The role of societal actors*

Another side finding concerns the balance between societal actors in Italy. Some scholars state that the Europeanisation process has *generally* increased the power of non-state actors and interest groups with regard to the power of the state, or party system, and that decision making has become more inclusive. [333] However, with the Italian case, not all the societal actors gain ground; some win and some lose. NGOs dealing with arms control, disarmament and human rights are the losers and defence

Industrial Policy Motives". *Journal of European Public Policy*, Vol. 19, No. 3, pp. 435–51; Mawdsley, (2000).
328 Hoeffler (2012): 437
329 Béraud-Sudreau (2014).
330 *Ibidem.*
331 *Ibidem.*
332 *Ibidem,* p. 35.
333 Graziano (2013).

companies are the winners. Whereas in the early Nineties the balance shifted clearly towards NGOs which were extremely active, and had the support of both left-wing and Catholic Members of Parliament, and were able to easily obtain consistent results from a normative/legal standpoint; *with the transposition of the Directive,* in 2009 NGOs were bypassed by defence companies in alliance with some governmental and administrative sectors which were able to easily and consistently modify Italian Law on arms export control and transparency.

The Italian case appears to adhere closely to what is theorised by some Europeanisation scholars who claim that the Europeanisation process may empower a specific group of actors, particularly those actors in favour of liberalising the market, which is especially true for Europeanisation with negative integration. According to Radaelli and Featherstone, "the misfit between European and domestic processes policies and institutions provides societal and political actors with the new opportunities to pursue their interests." [334] Two other Europeanisation scholars, Knill and Lehmkul, write about the Europeanisation of the transport sector, "Europeanisation may empower a specific group of actors.[…]The European liberalisation of the transport sector empowered societal and political actors in highly regulated MS, which had been unsuccessfully pushing for privatisation and deregulation."[335]. According to Scharpf, Europeanisation strengthened those actors in favour of greater liberalisation.[336] More radical but along the same lines was the claim by Seikel, that "[t]he market-liberal thrust of integration through law has considerable consequences for the balance of power between social groups. Actors having an interest in liberalisation can use European law in order to legally bypass previously insurmountable political opposition within the national arena. By contrast actors interested in social regulation such as trade unions [and NGOs in our case concerning foreign policy], do not have this option".[337]

The same neo-functionalists, despite their optimistic "win-win" vision of European integration, identified a differentiation of winners and losers among the various visions and actors. They recognized a "relative dominance of the neo-liberal project and a relative failure of social democratic vision of Europe" [338] and explained that "supranational governance serves the interests of those individuals, groups and firms

334 K. Featherstone and C. M. Radaelli (2003). *The Politics of Europeanization* Oxford; New York: Oxford University Press, 2003: p. 58.
335 C. Knill & D. Lehmkuhl, (1999).: 14.
336 Scharpf (2010).
337 Seikel (2016): 7.
338 Sweet & Sandholtz (1997): 297.

who transact across borders and those who are advantaged by European rules, and disadvantaged by national rules, in specific policy domains."[339] They conclude as follows: "If integration is driven fundamentally by private transactors, and if capital is the group with the clearest immediate stake in intra-EC transactions (not to mention the resources required for political influence), it is not surprising that the major steps in integration should be congenial to those segments of business." [340] In terms of relationships between states and transnational companies the same authors claim that "the long term interests of MS governments will be increasingly biased toward the long-term interests of transnational society, those who have the most to gain from supranational governance". [341]

*b) The role of bureaucracies and methodological caveats*

Focusing on the role of Italian Government bureaucracy and civil servants, another empirical finding is that they *appear* to be actors in favour of a change. Since 2007, they have appeared to have supported the Directive as a way to introduce global reform to Law 185/90, especially as regards a new centralisation process. They had the expertise to understand that the Directive would have opened an opportunity for change in the directions of centralisation and simplification. [342] Similarly in France, according to Béraud-Sudreau, "French civil servants in charge of arms export support eventually argued for harmonisation, in order to reach simplification." [343] In particular, "civil servants responsible for export promotion viewed the ICT Directive as an opportunity for the simplification of control processes. They convinced the newly arrived Ministry of Defence and the Elysée in 2007-2008 that simplification of French export controls could be reached thanks to the ICT Directive". [344] In the same way, moving from the national to the European level but still in the defence field Edler and James claim that the Commission's initiative concerning defence research were the result of the entrepreneurial role of middle ranking officials in the Commission.[345]

In conclusion, in response to the original fundamental question: "What is the direction of the Europeanisation process in the field of arms export control and transparency?" The answer, limited to the Italian case and to Directive 2009/43/EC, and based on the

339*Ibidem*, p. 299.
340 *Ibidem*, p. 309.
341 *Ibidem*, p. 315.
342 Nones and Marta, (2007); Masson *et alii* (2010).
343 Béraud-Sudreau (2014): 30.
344 Béraud-Sudreau (2014): 32.
345 Edler and James (2015): 1252–1265.

empirical findings of this research is that the direction of the Europeanisation process is skewed towards a pro-market, pro-export, pro-industry model rather than towards an ethical and politically regulated one. This offers important insights on the profile of the European arms export policy and overall on the European Common Foreign and Security Policy which will be discussed in the conclusions.

# Chapter 5. The impact of Directive 2009/43/EC on Hungarian regulation on arms export control and transparency

## 1 Introduction

This second case study, Hungary, has been chosen because of the dimension and characteristics of its defence industry. It is small and made up of medium and small companies, which act as subcontractors. Furthermore, as representative of the Central and Eastern European Countries (Czech Republic, Poland, Romania, Slovakia and Bulgaria), which all experienced a shift from a communist political and economic system to a parliamentary democracy and a free market in the early 1990s. During this transition, the defence industry of most of these countries was reduced sharply as a consequence of the end of the Cold War and the consequent drastic fall in demand both from the Soviet Union and domestically. The entry of liberal market rules, together with the decrease in internal demands for armaments, induced some of these countries to liberalise their defence sector as well, and consider arms as a commodity like others. For these reasons, particularly in the Nineties, regulation was considered lax during this period. What has the impact of Directive 2009/43/EC been on Hungary?

The chapter starts by explaining the context of domestic defence industry and then briefly describes the role and weight of the two fundamental societal actors in this sector: defence companies and NGOs.[346] The second section thoroughly analyses Hungarian regulation on arms export control and transparency, before the approval of the Directive, in its main three pillars a) licensing procedures and controls, b) principles and export bans, and c) transparency. The third section describes the Hungarian law transposing the Directive in its main features. In the fourth section, I compare the earlier regulation with the transposing regulation, in order to investigate the direction and intensity of domestic change along my eight fundamental dimensions. Lastly, I draw the final conclusions on this specific study chapter in order to assess the impact of the ICT Directive.

346 Hall and Soskice (2001).

### *1.1 The main features of the Hungarian defence industry*

*Arms production*

According to Yudit Kiss, "The Eastern Central European (ECE) countries arms industry does not represent a large segment of the world's arms production and is marginal to the global arms production networks that have come to dominate the sector. Neither is the arms industry a prominent economic engine in any of the ECE countries. At present the arms industry represents only a modest share of gross domestic product (GDP) industrial production and employment in the ECE countries. None of these countries ranks among the major producers or exporters". [347] This aspect is even more accentuated in Hungary which has one of the smallest defence industries of Central and Eastern European countries.[348]

Overall, since the late Nineties, the main characteristics and most relevant sectors of the defence industry in Hungary have been represented by light weapons and ammunitions, pyrotechnic products, land systems, electronics, radar technology, communication and telecommunications equipment, software, advanced security systems, clothing and equipment, and electronics. "The electronics sector has traditionally been the 'driving force behind the defence industry' in Hungary, with past exports of military communications equipment and other systems to countries such as India, Libya and Syria."[349]

According to the 2014 Hungarian report to Parliament, in 2013 496 firms were registered with authorised military industry activity and 205 of these were foreign trade companies.[350] There were 1777 people employed in the field of defence industry.[351]

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347 Y. Kiss (2014); SIPRI Arms Transfers Database, https://www.sipri.org/databases/armstransfers, last accessed 10 October 2017*op. cit.:* p.3.
348 J. Black *et alii* (2016). *Central and Eastern European countries: measures to enhance balanced defence industry in Europe and to address barriers to defence cooperation across Europe. Technical Annex to* RR-1459-EDA, prepared for the European Defence Agency, April 2016, p. 51- 64.
*349 Ibidem,* p. 55.
350 Hungarian Trade Licensing Office- Authority on Military Industry and Export Control (2014), *National Report on Arms Export Controls of the Republic of Hungary***:** p. 3 English version, http://www.sipri.org/research/armaments/transfers/transparency/national (accessed April 2019)
351 ,*Ibidem.*

The total value of production and provision of services of controlled military equipment in 2013 totalled 82.5 million euro.[352]

A recent report from the Rand Corporation for the European Defence Agency describes the following defence industrial actors as major defence industrial companies in Hungary:

- ArmCom: Supplies and repairs electronic and communications equipment.
- Arzenál: Missile repair facility for AGM-65 Maverick (with US firm Raytheon).
- CURRUS: MRO of tanks and other armoured vehicles, as well as producing emergency vehicles (e.g. fire trucks) for the Hungarian military Milipol: Privately owned producer of specialist platforms (e.g. Cougar explosive ordnance (EOD) vehicle), small arms (AK-63) and software.
- MOD Electronics, Logistics and Property Management Co: Supplies electronic communication and navigation devices.
- Pannox-Flax NyRt: Specialist textiles for military kits.
- RÁBA: Manufactures truck components and other vehicles for both military and civil use.[353]

Despite the panorama being very variegated, the state-owned Raba still dominates in terms of employment with about 1500 employees. [354]

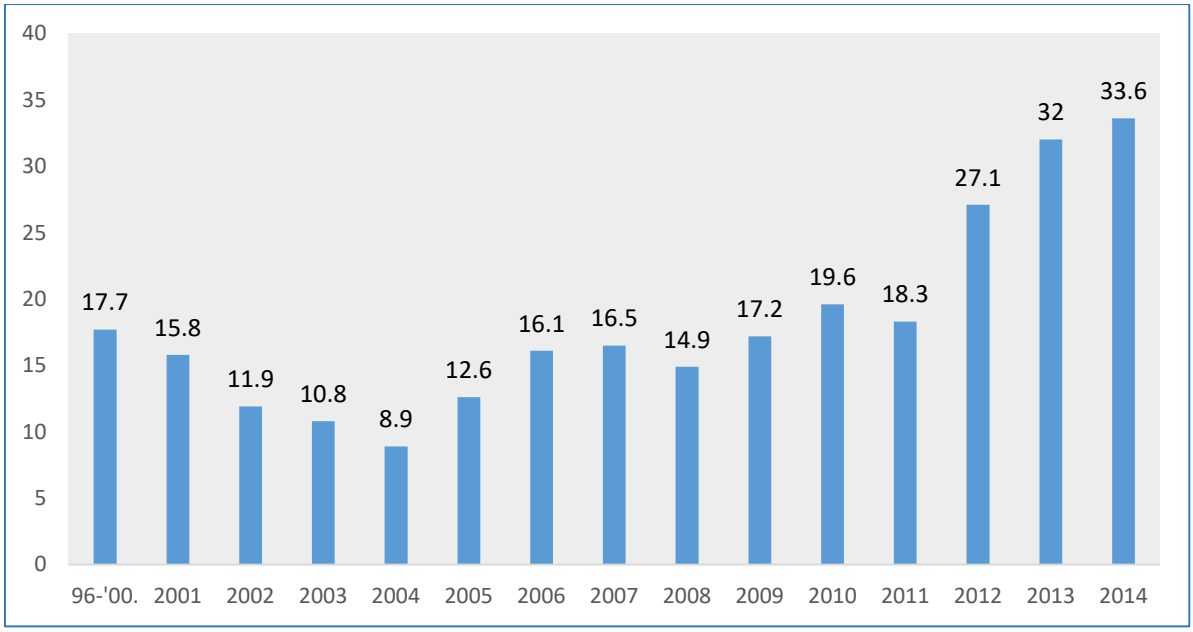
*Arms exports*

Kiss observes that none of the top 100 arms producers in 2000 were based in Eastern Europe. This gap is even more marked for exports data. According to the SIPRI database on international arms exports, Hungarian arms exports in the 2000s cover from 0% to 3% of the UK arms exports in the same period.

Thus, the global value of Hungarian arms exports is marginal with respect to its European partners, however there has been a rise since the early 2000s. In fact, the value of Hungarian exports in 2014 reached 33.6 million Euros, showing an upward trend, compared to the 8 million Euros in 2003, 17 million Euros in 2010, and nearly doubling in 2014, following approval of EU Directive 2009/43/EC.[355]

352 *Ibidem*.
353 Black *et alii* (2016), p. 56.
354 *Ibidem,* p. 51.
355 Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, *National Report on Arms Export Controls of the Republic of Hungary* (2016), p.13. Available at

Figure 5.1 -Trend of Hungarian arms exports since 2001 (millions euro)




Source *Annual Reports according to Article B (2) of the Council Common Position 2008/944/CFSP defining Common Rules Governing Control of Exports of military technology and equipment*, (years 2004-2016) http://www.sipri.org/research/armaments/transfers/transparency/EU_reports, consulted on 30 March 2015.

The geographical distribution of Hungarian arms exports indicates a prevalence in the Northern Hemisphere (excluding re-export cases) and especially to the European Union and America (mainly the United States), covering together the majority of Hungarian exports or 82.79% of the global annual value. It is worth underlining that the whole African continent acquired just 0.85% of the global Hungarian arms exports in 2014, followed by Asia with 16.35% of the total value, and preceded by Oceania with merely 0.01%.

http://www.sipri.org/research/armaments/transfers/transparency/national (last accessed 30 March) 2016: p 13.

Table 5.1 Hungarian arms exports (deliveries): geographical distribution

| | 2012 | 2013 | 2014 |
|---|---|---|---|
| Oceania | 0% | 0.05% | 0.01% |
| America | 17.69% | 31.66% | 46.37% |
| Europe | 51.29% | 47.97% | 36.42% |
| Africa | 10.7% | 9.17% | 0.85% |
| Asia | 29.95% | 11.5% | 16.35% |

Source: Hungarian Trade Licensing Office - Authority on Military Industry and Export Control (years 2013-2014), *National Report on Arms Export Controls of the Republic of Hungary***,** http://www.sipri.org/research/armaments/transfers/transparency/national, consulted on 30 March 2015.

Among the top ten recipients from 2003-2013, in fact, the United States ranked first receiving nearly one third (29.1%) of all Hungarian arms delivered, followed by Germany with 14% of the global export value, the Czech Republic (6.2%), Slovakia (5%), Italy (4.7%), Ethiopia (4.5%), the United Kingdom (3.6%) and India (3.3%).

Table 5.2 Hungarian arms exports: % on the total of the top ten importers from 2003-2013

| Licences 2003-13 | % | Deliveries 2003-13 | % |
|---|---|---|---|
| United States | *51.1* | United States | *29.1* |
| Germany | *8.5* | Germany | *14.0* |
| Ethiopia | *7.1* | Czech Republic | *6.2* |
| Czech Republic | *6.7* | Slovakia | *5.0* |
| United Kingdom | *4.8* | Italy | *4.7* |
| Italy | *3.2* | Ethiopia | *4.5* |
| Austria | *2.2* | United Kingdom | *3.6* |
| Ukraine | *1.7* | India | *3.3* |
| Switzerland | *1.5* | Austria | *3.1* |
| Slovakia | *1.5* | Cambodia | *2.9* |

Source: Annual Reports according to Article B (2) of the Council Common Position 2008/944/CFSP defining Common Rules Governing Control of Exports of military technology and equipment, (years 2004-2016), available at http://www.sipri.org/research/armaments/transfers/transparency/EU_reports, last accessed 30 March 2018.

The kind of arms exported is mainly small arms and ammunitions. In fact, from 2003 to 2013 nearly half of all Hungarian exports (41.3%) were ammunitions, followed distantly by vehicles and tanks (10.6%) and small arms (10.1%) aircraft (8.6%), explosive devices (6.9%), and software (4.6%).

Table 5.3 - Hungarian arms exports: % of military category from 2003-2013

| **Licences 2003-13** | **%** | **Deliveries 2003-13** | **%** |
|---|---|---|---|
| Ammunition | *56.3* | Ammunition | *41.3* |
| Aircraft | *9.4* | Vehicles. Tanks | *10.6* |
| Small arms | *9.1* | Small arms | *10.1* |
| Vehicles. tanks | *5.5* | Aircraft | *8.6* |
| Explosive devices | *4.5* | Explosive devices | *6.9* |
| Imaging eqpt. | *3.4* | Miscellaneous | *5.9* |
| Software | *3.3* | Software | *4.6* |
| Miscellaneous | *3.1* | Weapon firing eqpt. | *3.7* |
| Light weapons. Artillery | *1.6* | Imaging eqpt. | *2.5* |
| Weapon firing eqpt. | *1.6* | Electronic eqpt. | *2.3* |
| Electronic eqpt. | *1.2* | Light weapons, artillery | *19* |
| Manufacturing eqpt. | *0.3* | Chemical agents | *0.8* |
| Chemical agents | *0.2* | Explosives | *0.4* |
| Explosives | *0.2* | Technology | *0.2* |
| Technology | *0.1* | Armour | *0.1* |
| Warships | *0.1* | Warships | *0.0* |
| Armour | *0.1* | Manufacturing eqpt. | *0.0* |
| Unfinished goods | *0.0* | Unfinished goods | *0.0* |
| **TOTAL** | ***100.0*** | **TOTAL** | ***100.0*** |

Source: Annual Reports according to Article B (2) of the Council Common Position 2008/944/CFSP defining Common Rules Governing Control of Exports of military technology and equipment, (years 2004-2016), available at http://www.sipri.org/research/armaments/transfers/transparency/EU_reports, last accessed 30 March 2018.

### *1.2 Societal actors*

*Defence companies*

As far as characteristics of defence companies are concerned, Hungary, like other CEES, offers a completely different picture to the other two case studies, Italy and the UK which are characterised by strong national champions and prime contractors. That is the panorama of small and medium companies which are mainly subcontractors. Kiss (2015) claims that these companies are dynamic, able to move in a free market and establish strategic networks with peers and also with transnational companies. "Companies in subcontractor networks tend to be smaller than prime contractors (a contractor that has a direct contract for the entire project), but they are often more advanced technologically and more efficient. Cutting edge technologies, innovations, new products and methods are often developed at the lower echelons of the supplier chain. Defence companies (…) tended to be diversified and to move easily from the military to the civil sector. They made efforts to have all the certification required by NATO and UE standards."[356] As I will explain, the Hungarian defence companies obtained the certification envisaged by Directive 2009/43/EC whereas neither big Italian nor UK companies undertook the process of certification, complaining about onerous bureaucratic procedures. "Following reorganisation and restructuring (including several high profile bankruptcies of large firms) what remains of the sector is fairly competitive in the EU market".[357] However this has not always been sufficient to survive in a market with high entry barriers and dominated by prime contractors with strong subsidies and political support from their government.

There were different obstacles to the Hungarian defence sector's survival and growth, which in a recent report written by the Rand Corporation for the EDA (European Defence Agency) are subdivided into two categories: internal and external obstacles.

As far as internal obstacles go, defence companies have reproached the succeeding governments of different political parties (from 1990 until now) about the lack of clear defence industrial policy guidelines, and the lack of reliability in following commitments

356 Kiss (2014), p. 32.
357 Black *et alii* (2016), p. 55.

by the Ministry of Defence to invest in defence, because more than once the MoD cancelled orders making it more difficult for companies to plan their activities.[358]

As for external obstacles, domestic companies have perceived a growing asymmetry between prime contractors and subcontractors, between big transnational companies and small and medium enterprises. The first ones are perceived as having more economic and political support from the state and all the EU institutions, whereas small and medium companies are left to market forces. The big companies (especially the first three or four) are consulted regularly by the Commission and can influence the decision-making process in the initial phase, whereas the others are consulted only rarely.[359] According to the representatives of Hungarian defence companies, the "Large scale of NATO or EDA cooperative programmes means that contracts are seen to be ultimately geared towards large prime contractors, rather than small firms from CEE countries".[360] Prime contractors are overrepresented in the EU institutions, namely the Commission, whereas SME are not involved in EU governance and in that important initial phase of the decision-making process, leading to EU acts of a different nature. They perceive a "double standard", where small and medium companies are left alone to market forces while prime contractors are protected, hugely subsidised and supported by the domestic government, and by EU institutions.

This perception generated an initial scepticism from firms but also from the Hungarian Government about EU initiatives on procurement, and in particular with the first attempt represented by the Code of Conduct on defence procurement.[361] However, in 2007

358 Among the internal obstacles, domestic companies quote that, in addition to a sharp decline in overall Hungarian defence spending and the lack of investments, a large proportion of the procurement budget is directed towards imports of foreign goods or international programmes, with limited involvement from Hungarian industry. The lack of funding is also perceived to cause difficulties in taking R&D ideas through to commercialisation and eventual export, creating a disconnect between the country's research base and defence sales, the lack of clear and reliable guidelines: for example "Recent ambitious modernisation efforts have been subject to repeated budget revisions, delays or cancellation, with a further concern that the military requirements-setting process has not been adequately coordinated with defence industrial or R&D policy." Policy guidelines, procurement decisions and measures to downgrade or upgrade weapons [have] usually [been] the result of interaction between various, often contradictory political forces [and] have frequently been chaotic and short-lived.'277 The resultant degree of uncertainty about the forward programme makes it difficult for Hungarian industry to plan ahead or make investments with the limited internal resources available, given the risk attached." See Black *et alii* (2016), p. 57.

359 "They perceive an asymmetry between the ability of large countries, e.g. the UK, France, Poland, to assert national sovereignty in defence industrial or procurement decisions compared to smaller actors like Hungary. They perceive a lack of incentive for prime contractors to use SMEs from foreign countries as suppliers, when it is more low-risk to use existing networks and proven supply chains. Black *et alii* (2016),

360 *Ibidem*.

361 Black *et alii* (2016), pp. 51- 64.

Hungary abandoned this policy, pledging to align with European directives, liberalise trade, make its MOD procurement plans public and promote Hungarian participation in international industrial programmes.

Overall, the Hungarian defence firms have a marginal influence on government decisions and EU institutions.

*Non governmental organisation*

It is extremely difficult to find information on NGOs committed to peace, arms control and disarmament in Hungary after the collapse of the Soviet Union. A few studies describe a peace movement before the end of the Cold War as being mainly focused on nuclear disarmament.[362] It is equally difficult to find NGOs participating in networks of European associations working on these subjects. Even during the Nineties and following years, when the Hungarian Government developed a multilateral attitude and participated in several meetings and forums organised by governmental and non-governmental organisations, the main links were with foreign NGOs such as the UK's Saferworld. Thus, in essence, Hungary is characterised by a very marginal role when considering the two main non-state actors in arms export control and transparency on opposite sides: NGOs and defence companies.

362 Weber (1995).

## 2. Hungarian legislation on arms export control and transparency preceding the approval of Directive 2009/43/EC: Decree 16/2004 (II.6.) regulating the licensing of the export, import, transfer and transit of military equipment and technical assistance

This second section is devoted to the Hungarian regulation of arms transfers control and transparency *before* the approval of Directive 2009/43/EC. The Hungarian legislation preceding the Directive 2009/43/EC is mainly contained in Government Decree 16/2004 (II.6.) of 16 April 2004, regulating the licensing of the export, import, transfer and transit of military equipment and technical assistance.[363] In the description of rules, procedures, criteria and bans concerning the authorisation procedure I also refer to the National Report on Hungarian Arms Exports, which integrates legal information, explaining the current legislation and the main changes that occurred during the year, and some sub-legislative orders.[364]

### *2.1 The origin of Government Decree 16/2004*

Similarly to other countries of this region, Hungary has experienced different phases in its recent economic and political history. During the Cold War, Hungary had a one-party dominated political system and state controlled economy. Hungary was a member of the Warsaw Pact and its arms production and exports were highly centralized, controlled by the State and functional to the whole Eastern Block. Arms export procedures were highly centralized. Before 1990 the control of foreign trade of conventional arms was exercised by the individual decisions of the Defence Committee of the Council of Ministers.[365] The 5-year term Agreements and annual Reports of the Warsaw Pact Member States tackled the values and quantities of trade in the various

363 Hungarian Government (2004). Decree 16/2004 (II.6) of 2004 on the licensing of the export, import, transfer and transit of military equipment and technical assistance, Hungarian version available at http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top (last accessed March 2019).
364 Hungarian Trade Licensing Office- Authority on Military Industry and Export Control (years 2004-2014), *National Report on Arms Export Controls of the Republic of Hungary***,** various years, Hungarian version, available at http://www.sipri.org/research/armaments/transfers/transparency/national, (last accessed March 2019).
365 Hungarian Trade Licensing Office- Authority on Military Industry and Export Control (2009), *National Report on Arms Export Controls of the Republic of Hungary***,** p. 3 English version, http://www.sipri.org/research/armaments/transfers/transparency/national, (accessed April 2019).

military equipment categories. The licenses were issued by the Technical Department of the Foreign Trade Ministry, based on decisions by the Defence Committee of the Council of Ministers. Foreign trade was carried out by Technika Foreign Trade Company.[366]

The end of bipolar system and of the Soviet Union opened up a new phase. Hungary moved to a parliamentary democracy and free market rule, developing a multilateral attitude and the will to participate in the western European political and military organisation, by adapting domestic standards. In this period two main guidelines and policy goals of the Hungarian Government in this sector coexist, in order to understand the context within which the Decree is placed: 1) From an economic perspective the attitude of the government is to leave the defence companies to the forces of the market. It is a pure neoliberal attitude that characterises this former communist country. Subsidies and help to the domestic industry are circumscribed and in any case they are subordinated to the needs of the civil companies and to the overall Hungarian economy. Arms are considered commodities like others and this process pushes towards a "secularisation" of the defence sector and to a liberalisation of exports. 2) From a political perspective, this period is still strongly characterised by the will of Hungarian representatives to participate actively in Western political and military organisations such as the European Union and NATO, to learn from best practices and to adjust their standards to those required by these supranational bodies. In this period Hungarian representatives participated in several meetings, conferences, multilateral agreements and forums with the aim of improving its national standards in terms of control, transparency, marking and tracing defence material. This second trend pushed in the direction of strengthening controls particularly end-user controls, improving transparency and making the national regulations stricter and more rigorous.

Government Decree 16/2004 is mainly an expression of this second goal and represents another step toward making regulation stricter.[367] It is organic, prescriptive and well organised. It is worth specifying that it was approved just three years before

366 *Ibidem*.

367 The first step in the direction was represented by the approval in 1991 of the first *Government Decree 48/1991 (III.27.) on the export, import and re-export of military equipment and related services*. This first Decree already (a) introduced a first form of collegiality in the decision-making procedures, (b) introduced clear bans to export to countries in conflicts or under embargo. The decree also (c) envisaged an annual report from the Government to three Parliament committees, but this report was not public yet.

the Directive, when the discussion about the role of the Commission in the defence field and on creating an internal defence market had already begun.

### *2.2 The institutional framework: increasing collegiality*

After the high centralisation which had distinguished the communist period, the new Hungarian regulation of arms export was collegial and characterised by the participation of several ministries in the licensing export procedures and controls.

In particular, there were two Committees that were responsible for licence granting and drawing export criteria, the first one with political tasks and the second with more technical tasks. Both were composed of members from a wide range of ministries, at different levels (bureaucrats and politicians) all involved in the authorisation procedure.

The first one is the Inter-ministerial Committee on the Foreign Trade in Military Equipment, which has the central task of elaborating the criteria and setting policies related to licensing of international trade of military equipment.[368] Its composition is high level political. It is composed of state secretaries of the Ministry of Defence, Ministry of Justice and Security, Ministry of Foreign Affairs, Ministry of Economy and Transport and a person appointed by the minister without portfolio directing civilian national security. The chair of the Committee is appointed by the Prime Minister, whereas the Secretary is appointed by the Minister of Economy and Transport.

The second one is the Committee on the Licensing of Foreign Trade in Military Equipment, which has a more technical nature, as explained by Article 4 of Decree No 16/2004. Its tasks are to formulate expert opinions related to trade/activity, negotiation and transfer licences, taking into account the criteria elaborated by the "political" committee. Its members are appointed by the minister without portfolio directing the civilian national security, the Ministry of Defence, Ministry of Justice and Security, Ministry of Foreign Affairs, Ministry of Economy and Transport. The Committee is inter-ministerial in its composition but independent in its power of proposal.

368 See Art. 3.1 of the Hungarian Government Decree 16/2004 (II.6) of 2004 on the licensing of the export, import, transfer and transit of military equipment and technical assistance, Hungarian version http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top, last accessed 15 March 2016; see also. Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, *National Report on Arms Export Controls of the Republic of Hungary***,** 2009, English version, available at http://www.sipri.org/research/armaments/transfers/transparency/national, (last accessed March 2019): p. 19.

Lastly, the administrative body which represents the main reference for all the administrative tasks concerning arms export licensing procedures and controls is the “Office”. The Office carries out several tasks ranging from licence granting and withdrawing, (Art. 12), to collecting all the information the companies are obliged to transmit on the licence portfolio and deliveries (Art. 6.2), to *ex post* controls, collecting End-user certificates (Art. 12). The office may also order the company to submit the Delivery Verification Certificate in order to certify that the equipment arrived at the customs area (Art. 14.2).

### *2.3 Export licences procedures*

The system for licence granting and successive controls was articulated and detailed by primary law. There was only one kind of transfer licence, the individual transfer licence.

In order to obtain it, exporters must have already obtained the activity licence – which can be general or specific, and which allows undertaking preparatory activities such as market research, preparatory discussion and so on related to export, import or transfer of military equipment – that is, the result of registering as a trader (Art.7). Among the conditions and documentation to obtain this activity licence, the articles also quote banking information provided by the credit institute where the company has the bank account. The aim is to reduce cases of illicit activity and corruption (Art.7.par.4, point b). The validity of the activity licence is 24 months which can be prolonged for another 24 months, ensuring periodic checks on the legal and financial situation of the company.

Secondly, to start negotiations, a negotiation licence is necessary which allows negotiations to proceed and contracts to be concluded. A negotiating licence authorises the applicant to prepare a contract. It lasts 12 months and it can be renewed once for a further period of 12 months. In cases of long-term production or cooperation programmes, a special negotiation licence valid for 24 months can be issued (Art. 9).

Finally, in order to sign the contract and export the defence material, the defence company has to obtain a transfer licence, which is the classical authorisation for export and import of military equipment. This can be requested only by those with a

negotiation licence. Hungarian primary law does not specify all the information required to obtain a transfer licence but readdresses to a format established by the Office and delegates the definition of these crucial aspects to the Office. A transfer licence is valid for 12 months and can be extended once for 12 more months. For long-term contracts, a special negotiation licence valid for 2 years can be issued (Art.10).

### *2.4 End-user controls and reporting requirements*

Overall according to Article 10, any application for a licence for the export or outward shipment of military equipment or for the provision of technical assistance shall be accompanied by a copy of three kinds of end-user documentation: an Import Licence, an International Import Certificate ("IIC") and an End-User Certificate by the customer ("the EUC"). Regarding exports, the office may prescribe the acquisition of a Delivery Verification Certificate (DVC).

Article 13 provides more details concerning the content of the International Import Certificate that must contain a declaration that the imported military equipment and service will be utilised solely with the terms and conditions stipulated in the Declaration. However, the conditions and terms in the Declaration of the End-User Certificate, and the formats of all these documentations are not detailed by primary law. Thus, there is still a veil of uncertainty on the behaviour of the Hungarian Government in cases of re-export of defence material.

According to Art. 6.2, "the companies shall be obliged to provide monthly information to the Office about the licence portfolio and the trade transacted, until the 15th day of the month after the month concerned, on the form implemented by the Office. This duty, established by primary law, is a precious tool in the hands of the Hungarian Government to follow and control all trade operations carried out by companies with regularity. On the basis of the information collected, the Office maintains a registry of licence holders, including their regular data reports, and possesses the tether of controlling and forfeiting. Appeals against the first instance administrative resolution of the HTLO are judged by the Minister of National Development and Economy."[369]

369 Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, *National Report on Arms Export Controls of the Republic of Hungary***,** 2009, English version, p. 6.

### *2.5 Bans and criteria for exports*

Article 5 is dedicated to restrictions and embargoes. It explains both national bans and criteria for arms export and European and international criteria, followed by Hungarian authorities in granting arms export licences.

Starting with national bans, according to paragraph 1 of Article 5 of the Decree, export and transit of military equipment shall not be licenced to:

- countries where there is armed conflict,
- countries where armed conflict threatening international peace and security is expected to take place and where the UN Security Council, the Council of the European Union or the Organisation for Security and Cooperation in Europe have called upon the parties concerned about resolving the conflict through peaceful negotiations or have declared an embargo on the shipment of military equipment, military technical assistance and related training.

It is important to note that the list of national criteria is not particularly long, and it is limited to political principles, whereas economic reasons are not included and the criteria are formulated clearly and unambiguously. This is probably due to the weak influence of two contraposing non-governmental actors of the sectors (defence companies and associations for disarmament and peace) which made it easier to reach an agreement in this delicate field.

Focusing on European bans, Hungary is one of the first countries to have introduced the European Code of Conduct criteria in its regulation, with the status of annex to primary law regulation, making them legally binding at the national level. In fact, according to Article 5, the export and transit of military equipment and services shall not be licenced if the transaction contradicts the relevant requirements of the Code of Conduct on arms exports accepted by the Council of the European Union on 8 June 1998. The relevant parts of the Code of Conduct are included in Annex No. 2 of the Decree. The binding role of the European Code of Conduct criteria are reaffirmed in the last article of the Hungarian regulation, according to which the decree shall serve compliance with the European Union Code of conduct and with the Common Military list of the European Union Art. 19. Para 2).

This gave the European criteria on arms exports a binding force according to Hungarian regulation, even before it became legally binding with the transformation of the European Code of Conduct into a Common Position in 2008 and before the other MS with stronger defence industries.[370]

According to the criteria adopted in the Code of Conduct and included in the Hungarian arms export control regulation, the Hungarian authorities must observe the following requirements:

- Respect for the international commitments of EU MS, in particular the sanctions decreed by the UN Security Council and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations.
- Respect for human rights in the country of final destination. MS shall not issue an export licence if there is a *clear risk* that the proposed export might be used for internal repression.
- The internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts. MS will not allow exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.
- Preservation of regional peace, security and stability. MS will not issue an export licence if there is a *clear risk* that the intended recipient would use the proposed export *aggressively against another country* or assert by force a territorial claim.
- The national security of the MS and territories whose external relations are the responsibility of a MS, as well as that of friendly and allied countries.
- The behaviour of the buyer country with regard to the international community, as regards in particular its attitude on *terrorism*, the nature of its alliances and *respect for international law*.
- The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions.
- The compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that states should

370 In respect to the other two case studies, for example, it is worth to remember that Italy included the criteria of the Code of Conduct only in 2008 when the Code was transformed in Common Position, and the UK included the criteria in its regulation in 1998 but with the status of guidance and thus modifiable by the executive power.

achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources.

Overall Hungarian prohibition is legally binding and established by the legislator through primary law. Hungarian restrictions are extended not only to major conventional arms system but also to small arms and light weapons (see arms covered by the Decree).

According to Article 5.5, if an application of identical contents with the rejected licence application is submitted within 6 months, it shall have to be rejected. In this way a case by case assessment is discouraged, in favour of the uniformity and certainty of law. The same article also foresees that export licences may be withdrawn if the conditions change (for example if a conflict blows up or an embargo is declared by the UN). In fact, prior to delivery, the licence shall have to be withdrawn and the performance prohibited if there is such a change in circumstances causing the performance of the contract to contradict the contents of bans and criteria of the Hungarian regulation.

Furthermore according to Article 5. ”The Office shall withdraw the issued licence if such a change occurs after the issuance of the licence on the basis of which the rejection of the application would be in place, or if the company violates the provisions included in the decree, the terms and conditions specified in the licence or the rules related to trade.” Equally if the circumstances change.

### *2.6 Transparency*

Transparency has been the Achilles’ heel of the Hungarian regulation, similar to other countries of the region. In fact, in the Nineties there was a report from the Hungarian Government concerning arms export policy, but this was kept secret.[371] However, important steps towards an increase of transparency were taken from the late Nineties to the date of approval of the decree.

The 2004 Decree lists two kinds of reports. The first is the report required by the European Code of Conduct, concerning arms exports broken down by military

371 B. Mariani (2002*). Hungary. Arms Production, Exports and Decision-Making in Central and Eastern Europe*, Saferworld, June. Available at: https://www.saferworld.org.uk/resources/publications/68-arms-production-exports-and-decision-making-in-central-and-eastern-europe (last accessed 16 October 2016).

category. According to Article 4.8, the Ministry of Foreign affairs and the office shall provide a summary about the distribution of military products exported. The report gives the total value of arms exports broken down by military list categories and by destination and military list categories. This information is offered both for licences and deliveries and includes both main weapons systems and small arms and light weapons. This summary is addressed to the international community and to the domestic public. It is extremely important that for the first time Hungarian regulation refers to public opinion.

The second document envisaged by Decree 16/2004 is the annual national report about arms trade licensing activity. According to Article 4.9, the Ministry of Economy and Transport shall prepare a report once a year about the military foreign trade licensing activity to the following committees of the National Assembly: the Defence Committee, the Foreign Affairs Committee, and the National Security Affairs Committee. This report was first presented behind closed doors, but since 2009, probably as a consequence of another EU act coming into force, the Common Position on European arms export, it was published and made available to the whole Assembly and the public as well, being published both on the website of the Hungarian authority and the SIPRI website.[372] The annual report contains data and figures concerning trends on Hungarian arms exports, arms exports broken down by principal importers, articulation of exports according to geographical destination and military category of arms exported. This information is introduced by data on the value of defence production and employment for the year concerned. The same report offers clarification about the last update on the national regulation on arms export control and transparency and on the participation of the Hungarian Government in multilateral export control regimes at the regional and international levels.[373]

However, there were three main limits to transparency. The first limit to transparency is of a legal and formal nature. The primary law does not specify which information must be reported to the three Parliamentarian Committees, neither the quality nor quantity of transparency, but merely specifies the time limit (each year) to report to the Parliament. Thus, the executive is free to choose what information to pass on to the

372 www.sipri.org/databases/national-reports/Hungary.

373 Hungarian Trade Licensing Office - Authority on Military Industry and Export Control (various years), *National Report on Arms Export Controls of the Republic of Hungary***,** http://www.sipri.org/research/armaments/transfers/transparency/national, last accessed 30 March 2016.

Parliament and whether to communicate this information to the whole Assembly or just to three committees behind closed doors, as envisaged by the letter of the law.

The second limit to transparency concerns all the information that companies are obliged to transmit to the Office about their trade activities once a month. These data must be considered *classified information and may be used only in the course of its official procedure* (Art. 6.3).

Thirdly, according to Article 4.7, information about the international trade distribution and transit of military equipment and services may be revealed publicly solely by persons with separate authorisation. The chairman of the Committee may provide authorisation. The Office and the Ministry of Foreign Affairs may perform, without separate authorisation, related data provision.

## 3. The transposition of Directive 2009/43/EC in the Hungarian context: the main features of the Government Decree 160/2011 (VIII. 18.), on the authorisation of the export, import, transfer and transit of military equipment and services and the certification of enterprises[374]

In this third section I am going to examine the changes of the Hungarian regulation *after* the transposition of Directive n. 2009/43/EC, focusing in particular on the Hungarian Government Decree 160/2011 on the authorisation of the export, import, transfer and transit of military equipment and services and the certification of enterprises, which is the law transposing the Directive in Hungary. [375]
The transposition of the Directive required a change to the previous regulation because Government Decree 16/2004 did not make a distinction between transfers among MS

374 This third paragraph widely draws from a previous work of the candidate for the Flemish Parliament and the Flemish Peace Institute "Hungarian report" which has been used to realise a benchmark study assessing how European regulatory initiatives (with particular attention to *Directive 2009/43/EC and the Council Common Position 2008/944/EU)* have impacted national legislation in six European countries: Sweden (S. Bauer), UK (M. Bromley); Germany (M. Bromley), France, Portugal and Hungary (C. Bonaiuti). Final publication: Cops D., Duquet N., Gourdin G. (Eds), *Towards Europeanised arms export control systems?: comparing control systems in EU MSs, report of the Flemish peace Institute*, Artoos, Bruxelles, 2017.

375 Hungarian Government Decree No. 160/2011 (VIII. 18.), of 18 August 2011, on the authorisation of the export, import, transfer and transit of military equipment and services and the certification of undertakings [160/2011. (VIII. 18.) Korm. Rendelet a haditechnikai eszközök és szolgáltatások kivitelének, behozatalának, transzferjének és tranzitjának engedélyezéséről, valamint a vállalkozások tanúsításáról] Hungarian version,available at http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top (last accessed 7 May 2020).

and exports to third countries, applying the same procedures for both types of transactions and envisaged only one kind of export licence, the individual export licence. Secondly, there was no certification system for companies according to the Directive rules enabling them to export under a simplified regime and use general licences. Thus it was necessary to change the preceding regulation.

However, the new Decree 160/2011 is not limited to the changes strictly required by the Directive. It covers all the aspects related to arms export control regulation in a clear and organic way and substitutes completely for the previous regulation. Also on this occasion, the decree is the result of the two opposing goals that reflect two opposing perspectives/trends of the Europeanisation process, as explained before. On the one hand, the trend towards the liberalisation of defence material exchanges mainly within EU boundaries, and on the other, the trend towards a stricter regulation of defence material exports. Directive 2009/43/EC embodies mainly the first perspective, but the new Decree No 160/2011 also implements the second perspective as a result of an ongoing learning process from the MS arms export control regulation and the implementation of the European Code of Conduct on Arms Exports. These two different trends are absorbed in the decree which in most cases is able to conjugate together in unforeseen and interesting ways.

Government Decree 160/2011 on the authorisation of the export, import, transfer and transit of military equipment and services and the certification of enterprises ("Government Decree") became effective on 1 January 2012. In order to better explain the changes that the new regulation has introduced with respect to the previous one, I will also refer to some executive decrees and orders specifying further the primary law, particularly the three decisions, detailing the three general licences released in Hungary which were issued by the Hungarian Trade Licensing Office, Authority on Defence Industry and Export Controls, Department of Defence Industries and conventional arms trade control.[376] In the description of rules, procedures, criteria and

376 Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, Decision HU3FAE1200694 of 2 July 2012, issuing General Transfer Licence HU3FAE1200694 – End-user armed forces, law enforcement entities and intelligence agencies - Budapest 2nd July 2012, English version,; http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top (accessed April 2019).
Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, Decision HU3FAE1200703, of 2 July 2012, issuing General Transfer Licence –Temporary transfers for the purpose of repair, exhibition, presentation, Budapest 2nd July 2012, English version, http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top (accessed March 2019).
Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, Decision HU3FAE1200699 of 2 July 2012, issuing General Transfer Licence HU3FAE1200699 – End-user

bans concerning the authorisation procedure I will also refer to the National Report on Hungarian Arms Exports, which has been released annually since 2004 (only in Hungarian with the exception of the 2009 report), for the first descriptive part which is devoted to explaining current legislation and the main changes that occurred during the year. [377]

### *3.1 The debate preceding the approval of Directive 2009/43/EC*

It is extremely difficult to find material concerning the parliamentarian debate, given the obstacle of the language. Via secondary sources, it is known that the Hungarian representatives were originally sceptical towards the European Code of Conduct on Defence Procurement [378]. The Hungarian representatives, giving voice to the defence sector initially feared exposing Hungarian defence firms to open international competition and limiting offset. [379] They feared that asymmetries between prime contractors and small and medium companies would be heightened rather than reduced. However, since 2007 Hungary has changed position, pledging support to the European directives liberalising trade, making its Ministry of Defence procurement plans public and promoting Hungarian participation in international industrial programmes. [380]

certified companies of another EU MS, Budapest 2nd July 2012, English version, http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top (accessed March 2019).

377 Hungarian Trade Licensing Office- Authority on Military Industry and Export Control (years 2004-2014), *National Report on Arms Export Controls of the Republic of Hungary***,** various years, Hungarian version, http://www.sipri.org/research/armaments/transfers/transparency/national, (accessed April 2019).

378 "After the creation of the EDA in 2004, Hungary initially opted to stay out of the European Code of Conduct on Defence Procurement amid concerns over the risks of exposing Hungarian defence firms to open international competition or the limitation of offsets. However, in 2007 Hungary abandoned this policy, pledging to align with European directives, liberalise trade, make its MOD procurement plans public and promote Hungarian participation in international industrial programmes" (Black et alii (2016): p. 52). IHS Jane's.( 2006) "Hungary and Spain reject new EU defence procurement code" *Jane's Defence Industry*, May 22.; S. Lakatos, (2007) "An overview of the system of defence procurement". *AARMS* 6(1): 97-108.

379 Black *et alii* (2016), p. 52.

380 Defense Aerospace (2007). "Hungary accepts EU code regulating military procurement." *Defense Aerospace*, May 15, available at http://www.defense-aerospace.com/articlesview/release/3/82267/hungary-accepts-eu-military-procurement-code.html (last accessed 5 May 2018).

### *3.2 The institutional framework*

The Hungarian Authority designated to perform export control tasks is the Authority of Defence Industry and Export Control of the Hungarian Trade Licensing Office, operating under the supervision of the Ministry for National Development and Economy (in collaboration with the Ministry for Foreign Affairs). The Authority is divided into two departments: the Department of Arms Trade Control (subdivided in dual use, chemical and bacteriological, international sanctions and nuclear weapons), and the Department of Defence Industry and Foreign Trade Department (which is subdivided into the Defence Industrial activities department and Conventional Arms Trade Control).

The responsibilities of the Authority of Defence Industry and Export Control of the Hungarian Trade Licensing Office are extensive and structured and range from (a) issuing licences, *(b)* performing controls and monetary sanctions, (c) having jurisdiction to control and impose fines, (d) registering and managing data and reports on licences.

The two inter-ministerial Committees that were envisaged by the previous Decree 16/2004 disappeared and the system became more centralised. However, at the same time there is also a form of collegiality with other ministries involved in the procedures for licence authorisation. In fact, according to Article7 of the 2011 Decree "The Authority shall issue the licences requesting the expert opinion of the Minister responsible for Foreign Affairs, the Minister responsible for Foreign Trade and the Economic Development of the Economic Zone of the Carpathian Basin, the Minister responsible for Security, the Minister responsible for National Defence, and the respective leaders of the Constitution Protection Office, the Information Office, the Special Service for National Security, the Military National Security Service, the National Police Headquarters, and the National Tax and Customs Administration of Hungary."[381]

The main tasks of the Authority, as reported in the annual report to the Parliament, are the following:

The Authority issues licences for the export of military equipment on the basis of

381 Article 7 of the Hungarian Government Decree 160/2011 (VIII. 18.), of 18 August 2011.

national legal regulation. However, it takes into account the directives on EU foreign and security policies, the provisions of the “Council Common Position 2008/944/CFSP on defining common rules governing control of exports of military technology and equipment.” It performs its Authority activity based on the “EU’s Common Military List”. It supervises military industry production and services brought under licensing, on the basis of the same list, the activity of Hungarian military industry manufacturers and service providers, and controls the obligations of the licences for product marking and registration.

It performs control. The Authority registers and manages the data and reports of the licencees; moreover, it has jurisdiction to control and impose fines.

The Authority controls the export of dual-use items and performs controls of export of products under foreign trade restrictions ordered by international sanctions. The Authority fulfils the obligations and tasks of the national Authority stemming from the Chemical Weapons Convention, in the framework of which the Authority supervises the production and trading activity of chemical companies under the scope of the Convention. It is also the Authority that fulfils the obligations and tasks of the national Authority stemming from the Biological and Toxin Weapons Convention, in the framework of which the Authority registers the activity of the legal entities under the scope of the Convention, and compiles the country’s annual confidence-building report.[382]

According to the provisions of the legal regulations related to the licensing of defence industry foreign trade, the Authority of Defence Industry and Export Control (Authority) of the Hungarian Trade Licensing Office (HTLO) complies with its reporting obligation on the foreign trade licensing activity of the military industry to various parliamentary committees (on defence, security, foreign affairs and national security affairs) every year. In fact, according to Article 23 of the Decree 160/2011 the Minister responsible for Foreign Trade and Economic Development of the Carpathian Basin Economic Zone shall report once a year about the military foreign trade licensing activity to the parliamentary committees dealing with defence, security, foreign affairs and national security affairs, respectively.

382 Hungarian Trade Licensing Office - Authority on Military Industry and Export Control (2013). *National Report on Arms Export Controls of the Republic of Hungary***:** p. 3, http://www.sipri.org/research/armaments/transfers/transparency/national (last accessed 30 March 2018).

Moreover, the Authority regularly provides data to various international forums [European Union (EU), United Nations (UN), Organisation for Security and Co-operation in Europe (OSCE), Wassenaar Arrangement] about the foreign trade activity of the defence industry and the export data of dual-use items and technology. Hungary takes part in the implementation of the Program of Action and submits annual reports to the UN on the export-import data of SALW and developments of the legal background of the UN Program of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons (SALW) in All Its Aspects determines principles and provisions to eradicate and prevent the illicit trade of SALW; the HTLO delegates an expert to the COARM working group, operating on the basis of the EU Council Common Position 2008/944/CFSP on defining common rules governing control of exports of military technology and equipment where besides general agenda items (preparation of a published annual report, updating the EU CML, organising outreach seminars to third countries to promote export control mechanisms), actual questions of export controls are discussed (i.e. country evaluations).
Furthermore, the Authority co-operates with professional interest groups, and organises seminars and issues newsletters to fully inform the partners involved in the field of military foreign trade and military production and the provision of services. The Authority consists of two organisational units: the Defence Industry and Conventional Arms Trade Control Department, and the Export Control Department. [383]

### *3.3 Arms covered by the Decree*

The Authority performs its licensing and control activity on the basis of the EU's "Common Military List" ("EU CML"), with the difference that the Hungarian regulation supplements the CML list of 22 chapters with *another four chapters*. The Hungarian regulation brought the following under its jurisdiction: other equipment specially designed for military purposes, services specially designed for military purposes, instruments of coercion and crime surveillance, and secret service devices. The list

383 Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, *National Report on Arms Export Controls of the Republic of Hungary***.** (2014). Hungarian version, http://www.sipri.org/research/armaments/transfers/transparency/national, p. 13 (last accessed 21 October 2018).

of military equipment and services subject to licensing is included and detailed in Annex 1 of the Government Decree.

The Government Decree determines the provisions necessary for carrying out the *Council Regulation (EC) No. 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment* (EC Regulation). Chapter XXV of the Government Decree (instruments of coercion and crime surveillance) includes the instruments subject to licence in the Annex 1 of the EC Regulation (handcuffs used for keeping people in captivity, materials used for self-defence, electric shock devices used for curbing rebellion, etc.), thus these are subject to the same licensing procedure as military equipment. However, the EC Regulation prohibits the export and import of gallows and guillotines; electric chairs used for the execution of human beings; chambers used for the execution of human beings; automatic drug injection systems and electric-shock belts designed for restraining human beings through administration of electric shocks.

The prohibition does not apply to applications where the goods are used for the exclusive purpose of public display in a museum.[384]

### *3.4 Export licensing procedures*

*Individual licences*

The new decree envisages three kinds of licences: individual, global and general licences, as required by Directive 2009/43/EC.

Individual transfer licences are the only ones that are not new for Hungarian exporters, in that they are very similar to those used with the previous regulation (Government Decree 16/2004 (II.6)). However, they assume residual character with respect to the other two. One change from the past is also that all the information requested from the companies in the application for export licence is detailed by primary law in an annex to Decree 160/2011.

384 Hungarian Trade Licensing Office - Authority on Military Industry and Export Control (2013). *National Report on Arms Export Controls of the Republic of Hungary***:** pp.12-13 English version, available at: http://www.sipri.org/research/armaments/transfers/transparency/national, last accessed 21 October 2018: pp. 12-13.

Obviously, individual licences are the most detailed and controlled type of licence, both because of the number of stages in the licensing procedures and the amount of information and documents required. All individual licences (with the exception of those directed to EEA countries and Switzerland) are released only after having obtained the activity and negotiation licences.

The first step is comprised of firms (business entities, sole entrepreneurs, publicly financed institutions, trade offices) acquiring an Activity Licence. This licence can be either general (covering any product, country or transaction) or specific, covering only a particular product, country or transaction.

Secondly, a negotiation licence (for export, import, inward or outward shipment for military equipment and/ or for the provisional acceptance of technical assistance) authorises the applicant to prepare a 12-month contract which can be renewed once for an additional 12-month period. (In cases of long-term production or sales co-operations, a special 24-month negotiation licence can be issued). The negotiation licences are only necessary for individual transfers licences with non-EU countries, whereas it is no longer required for global and general licences. An individual transfer licence is required for contracts involving the export, import or transfer of military equipment and technical assistance.

Thirdly, the application for the individual transfer licence related to the export or outward shipment of military equipment and the provision of services shall be submitted to the Authority with data content specified in Annex No. 7 of the Decree.

The enterprise shall make a declaration vis-à-vis the Authority about the reliability of the buyer, the end-user and the broker. The declaration shall include that the buyer, the end-user and the broker are registered as enterprises in their own respective states that they may perform their activity and operate there in accordance with legal regulations.

Furthermore, as with the other two kinds of licences, the Authority may determine ad hoc terms and conditions related to the completion of the transaction with respect to end use, re-sale or passing on, in connection with the contents of Article 8, for national security or national economy interests or for the purpose of control of the end-user and end use, taking all circumstances into account.

If further data are necessary to assess the case, the Authority may also request other documents used to certify end use. If the Authority ties the issuance of the individual

transfer licence to the subsequent submission of a Delivery Verification Certificate, the enterprise shall be obliged to send the Delivery Verification Certificate to the Authority within one month of receipt of the goods in the customs area of the end-user country.

The companies must also include with their application form an International Import Certificate and/or an End-user certificate, which contains a non-re-export clause by which the end-user has to certify that arms will not be re-exported, generally either at all or without the prior written approval from the original exporting State. Furthermore, the Authority may request a Delivery Verification Certificate. If further data are necessary to assess the case, the Authority may also request other documents used to certify end use. [385]

*Global licences*

Global licences are a new type of licence which have been introduced by the Hungarian Government. According to Article 14, upon request, the Authority can issue a global transfer licence for military equipment and services, and permanent production and sales connection, in cases of contracting parties and end-users settled in EEA states (the EU MS, Liechtenstein, Norway and Iceland) or Switzerland, in cases of both outward shipment/export and inward shipment/import.

The website of the Hungarian Government offers further details: global transfer licences cover military equipment and services under the umbrella of permanent production and sales connections, with a maximum limit of 4 foreign partners/end-users located in an European Economic Area States or Switzerland and for a maximum of 7 pieces of military equipment or military services in cases of permanent and long-term business.

The period of validity for this type of licence is 3 years, and can be prolonged by 12 months (see Article 14.5). The conditions under which a global licence is released by the Hungarian Government can be divided into two main groups.

385 Article 15 and Annex no 7 of the Hungarian Government Decree No. 160/2011 (VIII. 18.), of 18 August 2011, on the authorisation of the export, import, transfer and transit of military equipment and services and the certification of enterprises, Hungarian version, http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top.

1) The first groups of *general conditions* for releasing a global licence are listed in Article 14 and in its Annex 5 and are similar to those for obtaining an individual licence. They must be fulfilled *ex ante* when applying for the authorisation to export.
The applicant should also enclose the end-user certificate or International Import Certificate or other document used for certifying end use, as done for individual licences. The details requested for a global licence application are the same as those for the classical and traditional individual licence, with a single exception: the information on the value.

The conditions for granting global licences are similar to those concerning the individual ones. According to Article 14.5, the enterprise shall make a declaration vis-à-vis the Authority about the reliability of the buyer, the end-user and the broker. The declaration shall include that the buyer, the end-user and the broker are registered as enterprises in their own respective states, they may perform their activity and that they operate there in accordance with legal regulations. Furthermore, like the other two kinds, global licences are subjected to the bans and criteria of Article8 of the decree, and the Authority may determine ad hoc terms and conditions related to the completion of the transaction with respect to end use, re-sale or passing on, in connection with the contents of Article 8, for national security or national economy interests or for the purpose of end-user control and end use, taking all circumstances into account.

Overall global licences are very well defined in their use. Hungary is the only one, in contrast to the other two case studies, to define a ceiling both in number of pieces to be exported and in the number of partners. This makes controls much easier by the Hungarian state and at the same time simplifies, by regrouping more transfers under a unique licences. Secondly, it is also obligatory to attach an end-user certificate to the global licence.

*General licences*

The main novelty with respect to the past is the introduction of general licences, which are the most flexible kind of licences. However, according to Government Decree 160/2011, they are valid only for trade in defence material within EU boundaries, only in three main cases (described below).

According to Article 13 of Decree 160/2001, in order to simplify the security of supply, permanent industrial and inter-governmental co-operation, and the procedure, the Authority may issue general transfer licences for the transfer—within EU boundaries—of certain product ranges for facilitating deliveries in the area of the European Union, in the following three main cases (see Table 4).

This type of licence is valid until withdrawal. Website publication of the licences took place as of 1 July 2012. The licence does not have a physical licence, however, the number of the general transfer licence must be stipulated on the documents accompanying the shipment. The control of end use is the responsibility of the licence. Moreover, it has to keep up-to-date registration on products shipped inward or outward. Control by the Authority is subsequent.

Several conditions for granting general licences are included both in Article 13 of the decree and Article 21, and in the text of the decisions corresponding to each of the three general licences.

1) They must be preceded by an activity licence for foreign trade (such as in the case of individual and global licences) whereas a negotiation licence is not necessary, unless it is a re-export case; (see Article 13.2);
2) For general transfer licences, much like for global and individual licences, the Authority may determine ad hoc terms and conditions related to the completion of the transaction with respect to end use, re-sale or passing on, in connection with the contents of Article 8, for national security or national economy interests or for the purpose of control of the end-user and end use, taking into account all the circumstances. (Article 13.5);
3) Further conditions are explained/added in the single decisions relating to the three fundamental general licences as follows, and differ according to the scope, the end-user and the military material which is possible to transfer, as indicated in the following table.

Table 5.4 General and specific conditions according to the kind of general licences.

| **HU3FAE1200694** | **HU3FAE1200699** | **HU3FAE1200699** |
|---|---|---|
| July 2nd 2012 | July 2nd 2012 | July 2nd 2012 |
| Authorise transfers to end-user being armed forces, law enforcement entities, or intelligence agencies. | Authorise transfers to end-user being certified companies. | Authorise temporary, free of charge transfers to another MS of the EU, for the purpose of repair under warranty, exhibition, presentation, test and trial. |
| These must be of another MS of the European Union | These must be of another MS of the European Union | These must be of another MS of the European Union |
| ML 1c, 2c, 2d, 5,6,9,10, 11, 13,14, 15 e 17 | ML3 note 1 a),b),c) d). ML 4a, ML6 note 1 b,c,d; ML6 note 2 a,b,c,d, ML11, ML 13, ML 15 a,b,c,d,e, ML 16. | ML 3/note 1 a),b,c,d, ML 4°, ML5, ML6, ML9, ML10, ML11, ML 13,14, 15 AND16 |
| The goods involved can exclusively be used by the above specific end-user for its own purpose. | The goods involved can exclusively be used by the above specific end-user for its own production. | The goods involved can exclusively be used for the above specified temporary, free of charge, purpose. |

*Source: Hungarian Trade* Licensing Office - Authority on Military Industry and Export Control, Decision HU3FAE1200694 of 2 July 2012, issuing General Transfer Licence HU3FAE1200694 – End-user armed forces, law enforcement entities and intelligence agencies - Budapest 2nd July 2012, English version,; http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top, consulted on 21 October 2018.

Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, Decision HU3FAE1200703, of 2 July 2012, issuing General Transfer Licence – Temporary transfers for the purpose of repair, exhibition, presentation, Budapest 2nd July 2012, English version, http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top, consulted on 21 October 2018.

Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, Decision HU3FAE1200699 of 2 July 2012, issuing General Transfer Licence HU3FAE1200699 – End-user certified companies of another EU MS, Budapest 2nd July 2012, English version, http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top, consulted on 21 October 2018.

Overall in all three cases, the users of the present general transfer licence have to make sure to communicate to the foreign buyer/end-user the special terms and conditions prescribed by the Hungarian Authority, including limitations regarding end-use, re-export and re-transfer. For confirmation, end-user certificates must be obtained at the latest when the contract is signed. In case of re-transfer intentions, the Hungarian Authority must be informed by the general transfer permit user about the limitations of the original owner/its competent Authority. The number of the relevant general transfer licence and name of the issuing Hungarian Authority must be indicated on the shipping documents (invoice, bill of freight, packing list, etc.).

The implementation of general licences (together with the certification process) has been smooth in Hungary and relatively quick. In fact the Authority published the general licences on its website both in Hungarian and English a few months after Decree 160 of 2001 entered into force.

### *3.5 End-user controls*

Government Decree 160/2011 in Article 1 gives three key definitions concerning end-user:

*-End-user certificate:* upon request of the exporting country, the declaration of the end-user or the country of the end-user that the equipment purchased will be used in the country of the end-user as intended; moreover, the goods will not be used to develop, produce and use nuclear, biological and chemical weapons, or to aid in the delivery of such weapons; it *may* prohibit re-exporting, and include a declaration that it may not be re-sold without approval from the original exporting country;

-*International Import Certificate:* upon request of the exporting country, the importing country issues an International Import Certificate, which is a statement from the competent Authority of the importing country that the imported equipment or technologies will be delivered in the specified value and for the indicated end use purpose, and will not be re-sold without the knowledge of the competent authorities of the importing country;

*-Delivery Verification Certificate:* the certificate from the competent Authority of the end-user country that the equipment exported to the third country or delivered to another MS, and imported from the third country or coming from another MS arrived at the customs area of the end-user country; the enterprise shall be obliged to send the Delivery Verification Certificate to the Authority within one month of receipt of the goods in the customs area of the end-user country.

For global and individual licences, the companies must also include with their application form an International Import Certificate and/or a copy of the buyer's import licence and/or an End-user certificate, which contains a non-re-export clause by which the end-user has to certify that arms will not be re-exported, generally either at all or without the prior written approval from the original exporting State. Furthermore, the Authority may request a Delivery Verification Certificate, verifying that the goods arrived at the custom territory of the recipient country. If further data are necessary to assess the case, the Authority may also request other documents used to certify end

use. [386] According to the letter of the law, the end-user controls are extremely pervasive in Hungary and export under global and general licence require *in any case* a non-re-export clause.

For general licences, controlling end use is the responsibility of the licencee; the users has also to keep up-to-date registration about the products shipped inward and outward, whereas governmental control is subsequent (national report 2014). However, even for general licences, secondary law, that is the Hungarian formulation of the specific decisions on issuing the three general licences, is particularly strict and requires equally strict end use documentation. Thus, Hungarian regulation is one of the few requiring end-user certificate also for general licences, albeit this request is placed in the realm of secondary law. In fact, in all three cases of general licences, the users must make sure to communicate to the foreign buyer/end-user the special terms and conditions prescribed by the Hungarian Authority, including limitations regarding end-use, re-export and re-transfer. For confirmation, end-user certificates must be obtained at the latest when the contract is signed. In case of re-transfer intentions, the Hungarian Authority must be informed by the general transfer permit user about the limitations of the original owner/its competent Authority. Also the ban on used defence goods for purposes linked to unconventional weapons (chemical, nuclear, and biological) is extended to general licences.

The second innovative aspect that concerns global licences is the ban to re-export Hungarian defence materials, unless specifically authorised by prior written approval from the Hungarian Government, and the prohibition to use the material for purposes in connection with chemical, biological or nuclear weapons.

The Hungarian Government maintains full control and responsibility on the final destination of material under the general licences by requiring the user to attach an end-user certificate. Furthermore, all three general licences that have been released by the Hungarian Government contain the same clear clause (stated as follows): “The goods involved in the present general transfer licence can exclusively be used by the specified end-users for their own production. Unless specifically authorized by prior written approval from the Hungarian Authority - except for the purposes of repair and

386 Article 14 and Annex no 5 of the of the 2011 Hungarian Government Decree No. 160/2011 (VIII. 18.), of 18 August 2011, on the authorisation of the export, import, transfer and transit of military equipment and services and the certification of enterprises, Hungarian version, http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top, last accessed 21 October 2018.

maintenance - the end-user is not allowed to re-export/re-transfer the goods."[387] Lastly, according to the wording in the three licences "The goods cannot be used for any purpose in connection with chemical, biological or nuclear weapons, or missiles capable of delivering such weapons. Goods cannot be re-exported or otherwise re-sold or re-transferred to any destination subject to UN, EU or OSCE arms embargo where the act would be in breach of the terms of that embargo." [388]Thus the Hungarian formula is able to combine effectiveness and ease in the exchange of war material, with control over the final destination, particularly third countries. In conclusion, on the one hand general licences offer a relevant simplification of exporting procedures, but on the other the effectiveness and governmental controls on final destination and re-export is maintained.

However the letter of the law is different from the practice. According to what is reported by Hungarian officers of the Authority, it might happen that a general licence be released without knowing the final use and destination of this licence.[389] This puts a veil of indeterminacy over all the strict and clear norms concerning end use.

### *3.6 Reporting requirements*

Government Decree 16/2004 obliges companies to collect and send to the Hungarian authority data concerning defence trade transacted on the basis of individual, global and general transfer licences. Article 21 lists in detail by primary law all the information that must to be reported and the time limit to report. In fact, according to paragraph 3 of this Article:

"The enterprise shall be obliged to keep up-to-date registration with the following data:

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387 Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, Decision HU3FAE1200694 of 2 July 2012, issuing General Transfer Licence HU3FAE1200694 – End-user armed forces, law enforcement entities and intelligence agencies - Budapest 2nd July 2012, English version; http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top, last accessed 21 October 2016. Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, Decision HU3FAE1200703, of 2 July 2012, issuing General Transfer Licence – Temporary transfers for the purpose of repair, exhibition, presentation, Budapest 2nd July 2012, English version, http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top, last accessed 15 March 2016. Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, Decision HU3FAE1200699 of 2 July 2012, issuing General Transfer Licence HU3FAE1200699 – End-user certified companies of another EU MS, Budapest 2nd July 2012, English version, http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top, last accessed 21 October 2016.

388 *Ibidem.*

389 Interview with a Hungarian officer, August 2016.

*a)* type of military equipment,

*b)* quantity and value of military equipment,

*c)* dates of delivery,

*d)* name, address and registered office of the recipient and the end-user,

*e)* end use of the military equipment, if known, and

*f)* certifying that the recipient of the military equipment was informed about the export restriction included in the transfer licence.

The enterprise shall be obliged to retain the data recorded in its registration according to Paragraph (3) and the related documentation for 5 years. The enterprise may provide data from its registration to the organisations specified in Paragraph (1) of Article 24."

Companies are also obliged to report the crucial information about the value of the military equipment transacted in all three cases of individual, global and general licences.

Paragraph 2 specifies the time limit of data reporting obligation that shall be 30 April, 31 July and 31 October of the subject year and 28 February of the year after the subject year. It is important that the time limit is established by primary law. The frequency of communicating data gives the government the tools to exercise effective controls. The enterprise shall be obliged to retain the data recorded in its registration and the related documentation for 5 years. The enterprise shall be obliged to send the Authority the duplicate copy of the paper-based global transfer licence documents, used or not effective.

The Hungarian regulation envisages for general licences the same reporting requirements as for the other two kinds of licences, with the difference that they have to be done *ex post* and not *ex ante*. Thus, all the licences are obliged to keep the same records and data and to communicate to the Hungarian authority quarterly these data.

In summary, the 160/2011 Decree also requires the companies to collect data concerning the value of military equipment (unlike the UK case which will be examined in Chapter 6). Furthermore, it obliges by primary law the companies to communicate all these data every three months to the Hungarian authority, thus enabling the government to exercise timely controls also for general licences where the information must be communicated, albeit *ex post*, within the three months. This offers the Hungarian authorities the instruments to carry out effective controls and all the

information to be potentially communicated to the Parliament via the annual report.

However, Hungarian Decree 160/2011 (like the Italian and British transposition laws) transposes the ambiguous formulation of the Directive concerning the obligation of communication about the end-user, “where known”, which offers a leeway to the exporters who are now no longer formally obliged to be aware of the final destination of their material that they are going to export.

### *3.7 Certification*

Hungary complies with the Directive in introducing new certification for companies using general or global licences.

The criteria and conditions described by the Hungarian law for companies to become a certified company are described in article 19 of Decree no 160/2011. They faithfully reflect what the Directive required. A company is considered reliable and can obtain a certification if (a) It has had an activity licence for foreign trade of military equipment as per Government Decree 160/2011 and an activity licence to produce military equipment as per Act CIX of 2005, both valid for at least two years; (b) In the course of its military foreign trade activity, it has fully complied with the legislative provisions of Hungarian regulation concerning arms production and transfers; c) its executive in charge undertakes a written obligation that the enterprise shall perform all necessary measures to comply with and fulfil any special terms and conditions related to the end use of a component or military equipment delivered; d) its executive in charge undertakes a written obligation that, when/if questions and examinations arise, he/she shall inform the competent authorities in detail about the end users and end use of military equipment exported, transferred, or received on the basis of the transfer licence of another member state; e) its executive in charge stipulated in the Internal Compliance Programme declares in writing that the military equipment received shall be used for their own production or activity.

The certification is valid for 5 years. The deadline to evaluate an application for certification is 90 days. The Authority monitors the compliance of the certified company with the criteria described in Gov. Decree 160/2011 at least every three years in the form of an on-site control.

However it is possible for the Hungarian Authority to also withdraw a company's certification. In fact, according to the following Article n. 20, if a certified enterprise does not comply with the terms and conditions of the certification, the Authority shall suspend the certificate, taking into account all the circumstances of the case and the requirement of proportionality. Concurrently with the suspension of the certification, the Authority shall oblige the enterprise to take corrective measures. The Authority shall examine the fulfilment of the corrective measures. If the enterprise does not take the prescribed corrective measures within 3 months after the suspension, the Authority shall withdraw the certificate. The Authority publishes and regularly updates the list of Hungarian certified companies on its own website and on the European Commission supported CERTIDER (the European commission database for this purpose) on the Europa website.

Hungary was one of the first countries to certify its enterprises. Whereas big companies complained about the administrative and financial costs of certification procedures, small Hungarian companies applied for and obtained certification. Since 2012, four companies have been certified, which is a relatively high number compared with that of other two case studies, Italy (1) and UK (0).

### *3.8 Principles and export bans*

Like in the previous regulation, Hungarian authorities in granting arms exports licences follow both national and European criteria.

Article 8 of Government Decree 160/2011 lists the domestic criteria and bans on arms exports that need to be taken into account before releasing a licence procedure. In particular according to Article 8, an export application shall be rejected if it:

*a)* is contrary to the international obligations of Hungary,
*b)* is contrary to the interests of national economy of Hungary,
*c)* is in violation of national security interests,
*d)* would hinder or make impossible the performance of activities of defence, security, and national security affairs determined in the legal regulations, or
*e)* is contrary to the criteria determined in Annex No. 2, which are the assessment criteria for the Common Position.

The list is longer than that envisaged by the previous decree and includes also a

criterion of economic nature in line with the perspective of Directive 2009/43/EC.

The Hungarian legislation implements the common criteria of Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment. Government Decree 160 of 2011 contains in Article 8 an explicit reference to the criteria of the Common Position. These criteria are then listed and included in Annex n. 2 of the Decree making them legally binding in the Hungarian territory as well. Their formulation is practically identical to the Common Position. What changes is just that they refer to Hungary and sometimes they are united together, but in substance they are not even minimally different.

According to the National Report on Arms Export Controls,[390] Hungary was one of the MS that first applied the Code of Conduct related to the export of conventional weapons, approved by the European Union on 8 June 1998, which thus has become one of the approval criteria for applications, and became then a legally binding document, valid for all the MS namely the Council Common Position 2008/944/CFSP of 8 December 2008, on defining common rules governing control of exports of military technology and equipment on 8 December 2008.

The government, and specifically the Authority, shall withdraw the issued licence, if the situation changes and thus it violates one of the criteria listed in Article 8. It is also possible to withdraw a licence if the enterprise violates the provisions included in this decree, the terms and conditions specified in the licence or the provisions of legal regulations related to trade. It is obligatory to justify the refusal of a licence application if it is contrary to national security interests or would hinder or make impossible the performance of defence activities and national security affairs determined in the legal regulation.

Overall, the Hungarian prohibitions are legally binding, and established by the legislator through primary law. Hungarian restrictions are also extremely wide-ranging, in the sense that they apply to war materials as a whole, without exception, including small arms and light weapons and dual-use products. They cover individual, global and general licences.

390 Hungarian Trade Licensing Office - Authority on Military Industry and Export Control (2013). *National Report on Arms Export Controls of the Republic of Hungary***,** p. 3 English version, http://www.sipri.org/research/armaments/transfers/transparency/national.

### *3.9 Transparency*

The references to transparency are circumscribed in one article. According to Article 23 of Government Decree 160/2011, the Minister responsible for Foreign Trade and the Economic Development of the Economic Zone of the Carpathian Basin shall report once a year on the military foreign trade licensing activity to the Parliamentary Committees dealing with Defence, Security, Foreign Affairs and National Security Affairs, respectively.

The Article concerning transparency is very similar to that of the previous decree, with the difference that Decree 16/2004 stated that the Minister responsible for Foreign Trade shall prepare a report, instead of shall report (Art. 4.10 of Decree 16/2004). Furthermore the reference to the report to be prepared annually by the Ministry of Foreign Affairs for the domestic public and the international community disappears (Art. 4.10 of Decree 16/2004).

However *de facto* there is an important step forwards, because from 2010, one year before the approval of the Decree transposing the ICT Directive, the Hungarian Government started to publish its reports and put them on the Hungarian website. The annual report is subdivided into two main parts: the first part is devoted to the legal and political aspects. In this part the current legislation is explained in detail and also the main activities undertaken by Hungary to implement the main international treaties and European instruments on trade in conventional, and non-conventional arms are illustrated. The second part of the report, instead, is devoted to data and figures concerning arms imports and exports both within and outside the EU. These data cover individual, global and general licences; they offer information and import and export trends, the whole list of importers and the relative value of deliveries that year, subdivided per military list, according to the kind of material exported or imported, and distribution per macro geographic areas. These data are completed with a list of countries under the UE, UN, and OSCE embargos. Similar information is communicated to the Council for the annual consolidated report on European arms exports.

As in the past, the main limit to transparency is that the report is still formally circumscribed to the three Parliamentary Committees and not to the whole Assembly. Secondly, there is no written legal requirement - by primary and secondary law - concerning the level of qualitative and quantitative data to be reported to the Parliament

and to the public. However, international and European obligations, such as the Arms Trade Treaty and the same Common Position on European arms export, together with praxis confirm the direction towards greater transparency.

## 4. Comparing the Hungarian regulatory regime before and after Directive 2009/43/EC: domestic change along the eight dimensions

### *4.1 Introduction*

In this last section of the chapter, I compare the Hungarian regulation before the approval of Directive 2009/43 EC (Hungarian Government *Decree 16/2004)* with the Hungarian Decree transposition of the Directive (Hungarian Government decree 160/2011).

I do not measure the degree of fit or misfit between European rules and existing institutional and regulatory traditions by comparing the European disposal in the Directive with the national transposition measures, but the direction of change in national transposition measures under European pressure, by comparing the old regulation with the new one introduced with the national transposition laws.

As with the other two case studies, I focus on the policy and institutional domestic change along eight dimensions: (a) balance between political strategic variables and economic-industrial variables; (b) balance between legislative and executive power in regulating arms exports; (c) balance between primary law and secondary law in regulating arms exports; (d) balance between transparency and opacity in arms transfers data; (e) balance between national responsibility on the final destination of co-produced goods and mutual recognition principle/delegation to partner country; (f) balance between centralisation and checks and balances in the authorisation and control procedures; (g) balance between the role and weight of the state with respect to the role of the companies; and (h) balance between common standards and fragmentation in arms export control rules.

In order to measure the direction of change more precisely and also the intensity of change at the domestic level, I use a scale of intensity for each of the eight dimensions. The scale is based exclusively on the disposal and legal formulation of the regulation of arms export control and transparency. Overall lower values are associated with a

pro-industry model of European arms exports whereas higher values with a restrictive model, where ethical and political values prevail.

### *4.2 Political and strategic variables versus economic and industrial variables*

*Hungarian regulation according to Government Decree 16/2004 (II.6.) before the approval and transposition of Directive 2009/43/EC*

The 2004 Hungarian regulation did not make any reference to economic and industrial variables in assessing the granting of export licence. All the criteria and bans to exports were of a political nature.

In fact, according to Article 5 of Government Decree n. 160/2004, “The export and transit of military equipment and the provision service shall not be licenced: a) to countries in armed conflict; b) to countries under military embargo by the UN Security Council, the Council of the European Union and to organisations and individuals forbidden by the EU and international provisions against terrorism. Furthermore, export licences shall not be released if the transactions contradict the EU Code of Conduct Criteria. According to Article 19, the Decree shall be in compliance with the criteria of the European Code of Conduct, adopted by the Council of the European Union on 8 June 1998. These criteria are part of Government Decree n. 160/2004 as an attachment, but not Article 10 of the Code of Conduct, which refers to economic principles.

The words linked to economy were absent from the whole Decree. Even in the case of an explicit limit to transparency and the diffusion of information, the official motivation is not of a commercial nature (“commercial confidentiality”) but once again of a political nature because it is linked to the necessity to classify information for security reasons. *Thus, the rank of the Hungarian regulation before the transposition of Directive 2009/43/EC is 5.*

*The principles introduced by Directive 2009/43/EC and Hungarian regulation after the transposition of the Directive with Decree 160/2011*

On the contrary, the approach informing Directive n. 2009/43/EC is of an economic and industrial nature. The aim of the Directive is to strengthen the defence industry at

the European level, by reducing obstacles to the exchange of parts, components and finished arms systems within the EU boundaries among commercial partners and thus as a consequence contribute to the Common Foreign, Security and Defence policy. The starting point for arms trade regulation is no longer represented by political principles in the field of foreign policy, security and defence, under which economic variables are subordinated. On the contrary, the freedom to move goods (extended to defence goods with some caveats) is the principle, whereas political principles of national regulation (foreign policy, security policy and international law principles concerning respect for human rights, the prevention of conflicts) in this sensitive field of arms exports, are exceptions which must be used only in extraordinary cases, if the essential security interest is at stake, under certain conditions (necessity and proportionality), with MS holding the burden of proof.[391] This different functional approach which has allowed the circumvention of political obstacles reflects a different paradigm and attitude towards arms export policy and even a different function of law.

As a consequence, the new Decree No 160/2011 transposing the Directive introduces for the first time an explicit reference to economic variables. In fact, according to Article 8 devoted to criteria and bans an application shall have to be rejected if it is a) contrary to the international obligations of Hungary and b) it is contrary to the interests of Hungary's national economy (national economy interpreted widely). There is no hierarchy between political and economic variables**,** thus the rank assigned to Hungarian regulation after the transposition of Directive 2009/43/EC is 3.

However, the economic principle has a wide interpretation, covering the whole national economy of Hungary and not just the profit of defence companies, in the awareness that these two aspects cannot always coincide. This is in line with the approach of both the left and right wings of the Hungarian Members of Parliament, which were oriented to give priority to national economy and employment issues, over the interest of the defence sector, particularly during the economic crises which have shocked the countries several times after the collapse of communism in 1989. And this is equally in harmony with the overall approach of the Hungarian Government which, for example,

391 Koutrakos (2013).

has chosen to use the offsets concerning one of the biggest contracts with Sweden all in the civilian sector. [392]

### *4.3 Primary law versus secondary law*

*Hungarian regulation according to Government Decree 16/2004 (II.6.) before the approval and transposition of Directive 2009/43/EC*

In Hungarian regulation preceding the approval of Directive 2009/43/EC, the primary law detailed precisely a) the export control licensing procedures and b) export criteria, but c) norms on transparency were treated in a vaguer way and mostly delegated to the executive for the details. In fact, firstly the export licence procedures were enshrined by primary regulation, explaining in detail all three phases in which it was articulated (activity licence, Art. 7, negotiation licences, Art. 9, and export licence, Art.10), including the obligations to attach End-user certificates (Art. 10) and Delivery Verification Certificate (Art.14). Furthermore, Decree 16/2004 clearly states the obligation of monthly reporting on licences and deliveries for companies (Art.6): it is important that primary law details time limit, information and attachments and reporting requirement necessary for all companies applying for activity, negotiation and export licences. All these aspects acted as a limit to the discretion of the executive.[393]

Secondly, Hungarian regulation listed the criteria and bans to exports in a clear and unambiguous way, making them easy to apply, in Article 5 of the 2004 Decree. The criteria of the European Code of Conduct are also included in the Hungarian Regulation (see Article 19.2 according to which the Decree shall be in compliance with the EU Code of Conduct on arms export of 8 June 1998 and annex n.2 of the 16/2004 Decree). Thus Hungary was one of the first countries making the Code criteria legally binding

392 In December 2001 Hungary signed a contract to lease 14 Gripen JAS 39 fighter aircraft for 12 years from the Swedish Government, at a cost of HUF130–140 billion ($479–516 million). Sweden offset 100 percent of HUF108 billion ($400 million) value of the lease, 30 percent of the nine-year package will be re-invested in Hungary and the remainder in the form of Hungarian exports to Sweden and other countries. With the signing of the lease in December 2001, Swedish investment is calculated at 48 million euros for the first nine years of the contract, an investment that is expected to create 9,000 jobs, see B. Mariani (2002), p 3.

393 In order to be more precise, in reference to point a) and b) there are some aspects which could be better explained by primary law, such as sanctions and penalties, the lacking definition of International Import Certificate, and other end-user documentation such as Delivery Verification Certificates, leaving a marge of ambiguity over the delicate cases of re-export. Lastly, all the information required for transfer licences are not listed in the Decree but once again delegated to the Office which establishes the format.

by primary law, whereas other western partners only transposed the criteria of the Code of Conduct with the status of guidance, placing them at a secondary law level.

Thirdly, however, the references by primary law to c) transparency remains generic. Albeit the Hungarian regulation embodies important steps forward with the introduction of Article 4.3 - according to which the Minister of Economy and Transport shall prepare a report once a year - this report is restricted to three parliamentary committees and is not extended to the whole Assembly. Furthermore, the 16/2004 Decree does not specify the quality and quantity of data to be reported to the three inter-ministerial committees. It is a choice of the government to decide the level of information to report to the Parliament and to the general public. Thus, the primary law in Hungary regulates in detail only two of the three pillars of any arms export control regulation and as a consequence, the overall mark assigned to the Hungarian regulation before the transposition of the Directive is 4**.**

*The principles introduced by Directive 2009/43/EC and Hungarian regulation after the transposition of the Directive with Decree 160/2011*

Overall Hungarian Decree 160/2011 transposition of the Directive maintains the same level of details specified by primary law as in the past. It continues to detail precisely a) the export control licensing procedures, and b) the export criteria but not the norms on transparency which remain vague. In fact, Decree 160/2011 explains in detail the three phases of the authorisation procedures and the terms and conditions for granting the three kinds of licences - individual transfer licences, global transfer licences and general licences (Art.11, 12 and Annexes 3-11 to the Decree), enshrines certification procedures (Art. 23), data reporting and deadlines to be reported by companies to government including value, quantity and final destination for all the three kinds of licences (reporting requirement Art 21), thus offering all the information to carry out controls and extend transparency to the two new kinds of licences as well.

Despite some aspects such as end-user control and re-export controls being left in detail to secondary law (Art.13 of the Decree and General Transfer Licences of 2 July 2012),[394] Hungary distinguishes itself among the three case studies for the high degree

394 Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, Decision HU3FAE1200694 of 2 July 2012, issuing General Transfer Licence HU3FAE1200694 – End-user armed forces, law enforcement entities and intelligence agencies - Budapest 2nd July 2012, English version; http://mkeh.gov.hu/haditechnika/hadikulker_2012/l#top, last accessed 21 October 2018).

of detail in its primary regulation and for the ability to extend this intrusive control to global and general licences as well. [395] Overall, the Hungarian transposition law represents a good practice in the capacity to combine new forms of intra-Community exchange of defence material with the reformulation of efficient controls. Secondly, (b) the criteria and bans on exports are equally enshrined in a clear and easily applicable way (Art. 8). However, as in the past, the new transposition law continues not to detail the level of transparency in terms of quality and quantity of data to be reported to the Parliament. The reference to the general public disappears, whereas the general obligation for the Ministry for Foreign Trade and Economic Development to report to the three parliamentarian committees once a year remains (Art. 23). [396] Thus, the overall mark of the Hungarian regulation transposing the Directive remains at 4.[397]

### *4.4 Legislative branch versus executive branch*

*Hungarian regulation according to Government Decree 16/2004 (II.6.) before the approval and transposition of Directive 2009/43/EC*

The Hungarian regulation before the approval of Directive 16/2004 detailed by primary law all the licensing procedures, including end-user certificates to be attached and subsequent controls, and all the bans and criteria to be followed for arms export licences, but remained generic in the third pillar, that is transparency (see dimension n.2). The power of the Parliament in assessing arms export licence was *ex post* and it was limited furthermore by the fact that it was not presented to the whole Assembly, but just to the three ministerial subcommittees. The data contained in the national report include value, category, final destination and cover both licences and deliveries, thus offering the basic instrument to carry control but it did not extend to sensitive

395 Details also for global and general licences in a more integrated context. The NEW Decree, in fact specifies definitions, certification procedures, data reporting and deadlines to be reported by companies to the government, all the information required for individual and global licences, by primary law.
396 Article 23. The Minister responsible for Foreign Trade and the Economic Development of the Economic Zone of the Carpathian Basin shall report once a year on the military foreign trade licensing activity to the parliamentary committees dealing with defence, security, foreign affairs and national security affairs, respectively.
397 As a side note it is important to underline that the new Decree improves the detail of primary law in some important aspects which are not directly required by the Directive: firstly it introduces new definitions including the definition of the international import certificate, and the norms on re-exports which have crucial importance. Secondly it is very detailed in the format, information and attachments required for individual and global licences. Thirdly it introduces a new section on controls and penalties (Art. 24).

information (see dimension n. 4). Thus, the rank assigned to the Hungarian regulation before the approval and transposition of the Directive was 3.

*The principles introduced by Directive 2009/43/EC and Hungarian regulation after the transposition of the Directive with Decree 160/2011*

In Hungary the transposition of the Directive in 2011 did not significantly change the balance of power between the legislative and the executive, as in Italy. On the contrary the balance, remained more or less the same, with the exception that necessarily for general licences the executive has more power in establishing some specific conditions and particularly end-user requirements. Secondly, arms export data which are not reported in the authorisation phase are reported *ex post* in the delivery phase. Thus, the rank remains the same: 3**.**

### *4.5 Transparency versus opacity*

*Hungarian regulation according to Government Decree 16/2004 (II.6.) before the approval and transposition of Directive 2009/43/EC*

In Hungary, transparency has been a relatively new development. In fact for a long time there was no annual report to the Parliament. However, under the pressure of the European Union and in conformity with the needs often expressed at the United Nations for greater transparency in international arms trade, seen as a means of increasing mutual trust internationally and of preventing the development of conflict, Hungary undertook important steps forward so that *Government Decree 16/2004* established two kinds of reports. The first is the report required by the European Code of Conduct on European Arms export, concerning arms exports broken down by military category and it is addressed to the international community and public (Art. 4.8); the second concerns arms exports activities and regulation and it is presented every year by the Ministry of the Economy but its diffusion is limited to the Defence Committee, the Foreign Affairs Committee, and the National Security Affairs Committee of the Hungarian Parliament (Art. 4.7).

The Hungarian annual reports did not contain sensitive data concerning banking transactions or companies but it did include all the basic information on the military category of arms, the value and the final destination. The data are aggregated by final

destination and military category. They include both licences and deliveries. The information concerned all kinds of arms exported (including small arms), and all licences (and deliveries), including co-productions and global licences. Thus, the rank of the Hungarian regulation before the transposition of the Directive was 3.

*The principles introduced by Directive 2009/43/EC and Hungarian regulation after the transposition of the Directive with Decree 160/2011*

Directive 2009/43/EC does not explicitly treat transparency and reporting to the Parliament. This lack of explicit reference to transparency offers MS the opportunity not to extend the norms of transparency to the new general licences. This aspect has created concern among European non-governmental organisations about the impact on transparency. This is not an easy task because it requires rethinking new forms of transparency for the new kinds of licences which are introduced by the Directive. In fact, some information such as value, quantity, kind of defence material exported and final destination are no longer collected in the licensing phase and consequently transparency is necessarily reduced during this phase. However it is possible to collect this information *ex post* and to communicate it to the Parliament. Some MS have used the directive, under the pressure of defence companies, to reduce transparency or at least introduce ambiguity about transparency on general and global licences, others have instead tried to extend the same norms on transparency for individual licences also to the new kinds of licences, global and general.

After the approval of the Directive, there were some steps forward and some steps back, but in substance the rank is the same. In fact, on the one hand the first report was presented to the Parliament, and since then the lengthiness of the report has increased progressively. On the other hand, the information concerning general licences are necessarily less detailed than those concerning individual and global licences because the information on value and quantity are not collected in this phase. However, data on new licences are recovered in the delivery phase, and reported among the delivery data. In a nutshell the annual report does not contain sensitive data on banking transactions or companies but it does include all the basic information concerning the military category of arms, the value and the final destination. The data are aggregated by final destination and military category. They include both licences and deliveries, individual, global and general licences. Therefore, the rank remains 3**.**

### *4.6 Responsibility versus delegation*

*Hungarian regulation according to Government Decree 16/2004 (II.6.) before the approval and transposition of Directive 2009/43*

After the collapse of the Berlin wall, with the drastic decrease of military expenditures in the former Eastern bloc Countries and the opening to the market economy, some Eastern European Countries started to consider defence material goods similar to other civilian goods. Consequently, there were cases of exports to countries in conflict (such as the former Yugoslavia), or violating human rights. Some Human Rights Organisations and the same NATO representatives exercised pressure so that Eastern European Countries would tighten controls of their regulations which were considered permissive and lax in some regards. As a consequence, several CEES increased their systems of control on the final destination. Hungary was one of the countries that worked in making its control stricter and Decree 16/2004 represents an important step in this direction.

According to Art10.5 of Decree 16/2004, it was always obligatory that all applications for export of any kinds of defence material were accompanied by three documents concerning end-user: the International Import Certificate (IIC), the End-User Certificate (EUC), and a Declaration of the buyer. These obligations are valid for exports of any kind of defence material (part, component or finished material). The number of certifications is reduced to 1 - but not eliminated - in cases of export to EU and NATO countries.

Under Article 13, the IIC must contain a Declaration that the imported military equipment and service will be utilized solely with the terms and conditions stipulated in the Declaration. However, the primary law does not specify exactly what these conditions are. This put a veil of ambiguity on norms concerning re-exports. Thus, this lack of specification puts Hungary's rank prior to approval of the Directive at just 3.

*The principles introduced by Directive 2009/43/EC and Hungarian regulation after the transposition of the Directive with Decree* No. 160/2011

The EU Directive invites MS to dramatically reduce the use of End-user certificates in intra-Community transfers under general licence, also in line with the new interpretation of the European Court of Justice, considering defence goods like other

traded goods, with some relevant exceptions. However, each MS is free to choose the degree of controls that it wants to maintain also in intra-Community transfers. Thus, Hungary is exposed to two pressures for Europeanisation going in different directions: reducing end-user certificates in transfers of defence material among partner countries, and on the contrary, strengthening end-user controls and preventing the risk of diversion. The result is an original attempt to conjugate flexibility and the use of general licences in intra-Community transfers with controls on final destination. The facility to rethink controls in a more integrated context is facilitated by the marginal role of the defence industry.

Decree 160/2011 transposing Directive 43, in fact, extends the end-user controls that it applied to individual licences, to global licences *(sic et simpliciter*) and even to general licences. It is important to underline that Hungary is one of the few EU countries that envisages strict end-user controls also in case of general licences. In fact the texts of all three general licences that have been granted by the Hungarian government since 2011, include for the companies using this kind of licence the obligation to attach an End-user certificate and prohibits re-export without a written approval by the Hungarian Government. Furthermore, in line with the overall trend of strengthening end-user controls, it requires a declaration by the importer not to use these arms for any purpose linked with chemical, biological or nuclear weapons, or missiles capable of delivering such weapons. Thirdly, defence material cannot be re-exported or otherwise re-sold or re-transferred to any destination subject to UN, EU or OSCE arms embargo where the act would be in breach of the terms of that embargo.[398] Lastly, considering the long lapse of time covered by general licences which often refer to coproduction which might last several years and more than a decade, the Hungarian government requires the importers to renew the end-user commitments, considering that the conditions, as well as governments or company managers, may change over a long period of time. Overall this effort to rethink end-user controls in a changed

398 Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, Decision HU3FAE1200694 of 2 July 2012, issuing General Transfer Licence HU3FAE1200694 – End-user armed forces, law enforcement entities and intelligence agencies - Budapest 2nd July 2012, English version,; http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top, last accessed 21 October 2016 .
Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, Decision HU3FAE1200703, of 2 July 2012, issuing General Transfer Licence –Temporary transfers for the purpose of repair, exhibition, presentation, Budapest 2nd July 2012, English version, http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top, last accessed 21 October 2016. Hungarian Trade Licensing Office - Authority on Military Industry and Export Control, Decision HU3FAE1200699 of 2 July 2012, issuing General Transfer Licence HU3FAE1200699 – End-user certified companies of another EU MS, Budapest 2nd July 2012, English version, http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top, last accessed 21 October 2016.

environment of globalised and Europeanised context of production offers some interesting suggestions and translates the Hungarian formulation into good practice which is able to combine efficient controls with the introduction of general licences.

However, it is important to underline that end-user requirements for general licences are stated by secondary law. Furthermore, after an interview with officers of the Hungarian authority it emerged that in practice the decision on whether to request an import licence, an IIC, or an EUC is made on a case-by-case basis and, more importantly, in cases of co-production, "the export licence is issued for the country where the manufacturing site of the industry is located: this data is included in the reports. At the time of the issuance of an export licence you may have absolutely no information about where in the future the finished product will end up". [399] Therefore, a crucial margin of flexibility in final destination is maintained in practice. As a consequence the rank remains 3.

### *4.7 Common standards versus fragmentation*

*Hungarian regulation according to Government Decree 16/2004 (II.6.) before the approval and transposition of Directive 2009/43/EC*

The Decree of 16/2004 in Hungary envisaged only one kind of licence: individual licence. Bans and criteria, norms on transparency are applied in a uniform and unique way to all individual licences. Export criteria are formulated in a clear and unique way. There is one interpretation and application which is established at the primary law level and extended to all the licences. A simplified procedure for arms export to NATO and UE countries concerns only the possibility of not asking for a negotiation licence and of having only an end-user certificate instead of three, therefore not affecting the

399 According to a civil servant of the Hungarian Trade Licensing office, "The authority would prefer to have all 3 documents submitted together with an export licence application and we require companies to try and obtain all of them. It prefers that state authority of the importing country verify documents, therefore they would accept an IIC. However in case of governmental procurements there is only an EUC available. The decision on whether an import licence, an IIC or an EUC is asked for and accepted in relation to a global or individual licence application is decided on a case-by-case basis and depends mostly on what types of documents are available in the importer country. The export licence is issued for the country where the manufacturing site of the industry is located: this data is included in the reports. At the time of the issuance of an export licence you could have absolutely no information about where in the future the finished product will end up." Interview to a civil servant of the Hungarian Trade Licensing Office of 24 June 2016.

fundamental aspects of the regulation. Thus, the rank of the Hungarian arms export control regulation is 5.

*The principles introduced by Directive 2009/43/EC and Hungarian regulation after the transposition of the Directive with Decree 160/2011*

After the transposition of the Directive, the Hungarian legislator introduces two differing procedures between intra-Community transfer and export to third countries and three kinds of licences for intra-Community transfers, that are general, global and individual licences (plus a fourth one concerning firearms and ammunitions according to regulation EU n 258/2012). As a consequence, the degree of fragmentation increases. Furthermore, the new decree also includes among export criteria one concerning the national economy of Hungary, without establishing a clear order of priority between political and economic criteria, thus increasing ambiguity slightly, at least formally. However the same controls, bans and norms on transparency are also extended to global and general licences in a unique and homogeneous way. Control on final destinations are equally strong (albeit established by secondary law) and the regulation remains clear and unambiguous in its fundamental parts. Thus the rank of the Hungarian regulation dropped to 4.

### *4.8 Checks and balances versus centralisation*

*Hungarian regulation according to Government Decree 16/2004 (II.6.) before the approval and transposition of Directive 2009/43/EC*

The Hungarian political system, particularly during the communist period, had a tradition of high centralisation of all the tasks concerning arms export control and transparency which overcame the same national boundaries to be managed at the Warsaw Pact level. However during the 1990s and the early 2000s, some important steps in the direction of checks and balances were undertaken.

As a consequence the 16/2004 Decree embodies these steps towards decentralisation. First of all, the administrative tasks have been separated by political tasks, with the creation of two Commissions, the Committee on Foreign Trade in Military Equipment and the Committee on Licensing of Foreign Trade in Military

Equipment. Secondly, both these Commissions with delicate political and technical tasks have been set up with a collegial composition.

The Inter-ministerial Committee on Foreign Trade in Military Equipment, which had the central task of elaborating criteria and setting policies related to licensing of international trade of military equipment was made up by State Secretaries of the Ministry of Defence, Ministry of Justice and Security, Ministry of Foreign affairs, Ministry of Economy and Transport and a person appointed by the Minister without portfolio directing civilian national security. The chairman of the Committee was appointed by the Prime Minister, whereas the Secretary was appointed by the Minister of Economy and Transport. (Art. 3). The Committee on Licensing of Foreign Trade in Military Equipment, with the tasks of formulating expert opinions related to trade/activity was inter-ministerial in its composition and independent in its power of proposal. (Art. 4).

Administrative tasks remained centralised in the hands of the "Office" which depends on the Ministry of Economy and Transport. The office regrouped several tasks from licence granting, to deliveries and controls of registers filled in monthly by companies (Art. 6.4), to End-user certificate collection (Art. 13.2) to controls on end-user and on company registers and reporting. In some of these tasks it was flanked by other different subjects, such as the Custom and Financial Guards, in the delivery phase. It is important to underline that at the primary law level the role of the judiciary, sanctions and penalties are not treated in the decree, but they are readdressed to the national codes. Thus, the rank assigned to the Hungarian regulation is 3.

*The principles introduced by Directive 2009/43/EC and Hungarian regulation after the transposition of the Directive with Decree 160/2011*

*After the transposition of the Directive th*e two Commissions disappeared in the text of the new Decree 160/2011. Most of the administrative tasks are the responsibility of the Authority of Defence Industry and export control which operates under the political control of the Ministry for National Development and Economy, in collaboration with the Ministry of Foreign Affairs. The responsibilities of the Authority of Defence Industry and Export Control of the Hungarian Trade Licensing Office are extensive and structured and range from (a) issuing licences, *(b)* performing controls and monetary sanctions, (c) having jurisdiction to control and impose fines, (d) registering and managing data and reports on licences. The system appears highly centralised but at

the same time there is also a form of collegiality for the specific crucial tasks of licence granting. In fact, according to Article 7 of the 2011 Decree “The Authority shall issue the licences requesting the expert opinion of the Minister responsible for Foreign Affairs, the Minister responsible for Foreign Trade and the Economic Development of the Economic Zone of the Carpathian Basin, the Minister responsible for Security, the Minister responsible for National Defence, and the respective leaders of the Constitution Protection Office, the Information Office, the Special Service for National Security, the Military National Security Service, the National Police Headquarters, and the National Tax and Customs Administration of Hungary.”[400] Furthermore the judicial tasks are clearly enshrined in a specific part of the new decree. Thus, after the transposition of the directive the Hungarian rank is 2.

### *4.9 States versus companies*

*Hungarian regulation according to Government Decree 16/2004 (II.6.) before the approval and transposition of Directive 2009/43/EC*

The Hungarian regulation before the approval of the Directive was prescriptive and entailed a strong control on the activities of the companies, including financial aspects. In fact, according to Article 6.2 “The companies shall be obliged to provide monthly information to the Office about the licence portfolio and the trade transacted, until the 15th day of the month after the month concerned, on the form implemented by the Office.” At the same time, however there was a first form of responsibility because companies were requested to verify and be responsible for the reliability of the buyer, end-user and the mediators or brokers (Art. 10.7). Thus the rank was 4.

*The principles introduced by Directive 2009/43/EC and Hungarian regulation after the transposition of the Directive with Decree 160/2011*

One of the explicit aims of Directive 2009/43/EC is that of increasing the responsibility of economic actors in arms export control procedures. Thus, according to the letter of

400 Article 7 of the 2011 Hungarian Government Decree No. 160/2011 (VIII. 18.), of 18 August 2011, on the authorisation of the export, import, transfer and transit of military equipment and services and the certification of enterprises, Hungarian version, http://mkeh.gov.hu/haditechnika/hadikulker_2012/I#top, last accessed 21 October 2018.

the Directive, companies are responsible for undertaking *ex post* controls, finding a reliable partner, and communicating to the partner the bans and criteria imposed by their government in case of re-exports. They are also responsible for managing operations under global and general licences.

The Directive *per se* increases the power and responsibility of the companies whereas it reduces the burden of the state in undertaking strict *ex ante* controls. As a consequence, the transposition of the Directive has entailed necessarily an increase of tasks of companies in this field. However, these new responsibilities are not enshrined by primary law but by secondary law.

The text of the three general licences granted in Hungary, in fact, states that the users of the general transfer licence have to make sure to communicate to the foreign buyer the special terms and conditions prescribed by the Hungarian Authority, including limitations regarding end-use, re-export and re-transfer. For confirmation end-user certificates must be obtained at the latest when the contract is signed. In case of re-transfer intention, the Hungarian authority must be informed by the company about the limitation of the original owner. [401] Thus, despite the control of the state remaining strong both via end-user certificates that are also required in cases of general licences for confirmation and for the very detailed reporting, the responsibility of the Hungarian Government with respect to that of the companies, slightly decreases to the rank of 3.

## 5. Conclusion

In this case study chapter devoted to Hungary I undertook the following steps. Firstly, I explained the context of the Hungarian regulation especially the relationship between the three branches of power and the relationships between the state and the market, the policy philosophy and policy goals in the arms trade sector. Secondly, I analysed Hungarian regulation before the approval of Directive 2009/43/EC and thirdly I investigated the law transposition of the Directive in its main features. Then, I compared the Hungarian regulation before the approval of Directive 2009/43/EC

401 After the transposition of the EU Directive, Hungarian companies are no longer required to give detailed information in the authorisation phases for general licences, but, according to Article 21 must give all the information *ex post*. This information which includes quantity, quality, value and final destination of the defence goods transferred under general licence, must be communicated to the Hungarian Government quarterly.

(Hungarian Government *Decree 16/2004)* with the Hungarian Decree transposition of the Directive (Hungarian Government decree 160/2011), in order to explore the direction and intensity of domestic change along eight fundamental dimensions.

In order to measure the *direction of change* more precisely and also the intensity of change at the domestic level, I used a scale of intensity for each of the eight dimensions. Overall lower values are associated with a pro-industry model of European arms exports whereas higher values are connected to a restrictive model, where ethical and political values prevail.

### *5.1 Peculiarities of the Hungarian case study*

The Hungarian case study has been extremely challenging and interesting. In fact, most of the literature and primary sources were written in Hungarian, so it really was a slow unearthing of information. As the translation proceeded some unexpected side empirical findings were found.

Firstly, I found that Hungary was characterised by an important peculiarity, the marginal role of the defence industry. If Eastern European Countries have a smaller defence industry compared to prime contractors and main EU exporters, then the Hungarian industry is even tinier, nearly irrelevant. The limited role of the defence industry lobby, which is a very important variable in arms export policies and regulation, makes this case study extremely interesting from a scientific point of view because it is like insulating arms market and production by this elephant in the room that is defence industry pressure. At the same time, the other significant societal actor in this field, namely the NGOs working for arms control, transparency, peace and disarmament, also have a marginal role in Hungary. This has important consequences in the decision-making process of arms transfer control regulation, which has been smoother, and in the legal formulation which is clear and unambiguous, unlike most other EU partners.

Secondly, I chose Hungary, together with Italy and the UK because I thought they represented a group of countries which, after the collapse of bipolarism, was characterised by extremely lax and permissive regulation. On the contrary, I found that from the early Nineties until mid-2000, Hungarian regulation, particularly during the 2000s, was quite well articulated and contained some good practices.

### *5.2 The Hungarian regulation before the approval of Directive 2009/43/EC*

The starting point of the comparison is the Hungarian regulation of 2004. In that period Hungary occupied an intermediate level between the two, having elements of both models as well as some particularities such as a strong presence of transnational companies.[402] Similarly, Hungary's initial marks for the eight dimensions before the approval of the Directive were roughly medium. These middle scores are the result of a process to approach European standards, which had begun once Hungary applied to join the European Union and the North Atlantic Treaty Organisation. Hungary's strong desire to learn from other partners is witnessed by the numerous meetings, forums, conferences, and multilateral agreements, the Hungarian Government had participated in since the fall of the Berlin Wall. Thus, important first steps forward had already been made before the approval of Directive 2009/43/EC, with regard to transparency, national responsibility and control of the final destination of defence goods, decentralisation and the checks and balance system. But what happened with the transposition of EU Directive 2009/43/EC? What was the direction, intensity, degree and scope of domestic change?

### *5.3 Empirical findings*

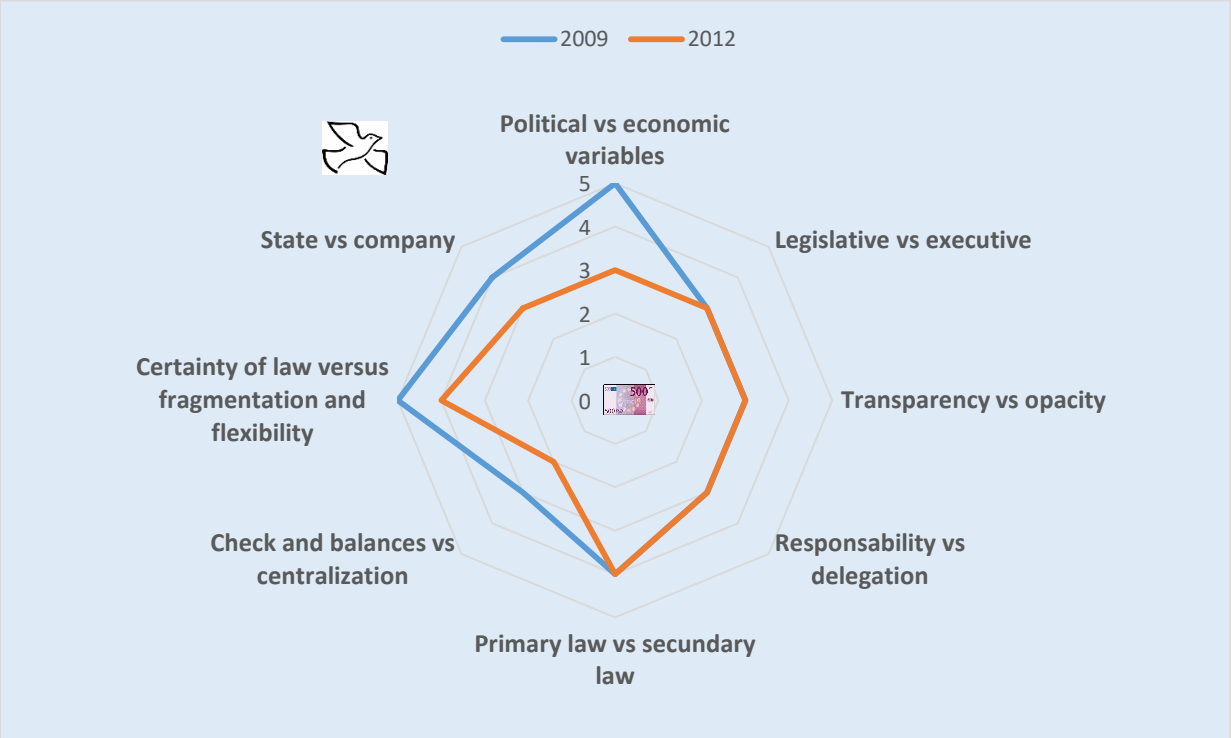
Empirical findings in the Hungarian case study show a slight move towards a pro-industry model as a consequence of the transposition of EU Directive 2009/43/EC. However, these changes are less marked than in the Italian case and are absent in four of the eight dimensions.

In the graph below the blue line indicates Hungarian Regulation before the approval of the Directive, the orange line after the transposition law. The orange shape becomes smaller and nears the centre which symbolises an ideal pro-industry model. However,

402 Hall and Soskice (2001). Nölke, A., & Vliegenthart, A. (2009).

some important dimensions remain stable: Legislative vs executive, transparency vs opacity, responsibility vs delegation, primary law vs secondary law.

Figure 5.2 Direction and intensity of domestic change along eight dimensions with the transposition of Directive 2009/43/EC: the Hungarian case (changes from 2008 to 2012)




 restrictive arms exports control model

 pro -industry arms exports control model

### *5.4 The eight dimensions*

In fact in Hungary (a) the balance between political strategic variables versus economic and industrial variables changed in favour of economic and industrial variables, with the introduction of new economic criteria guiding export licence assessment and granting; (b) the certainty of the law diminished in favour of fragmentation of primary law with the introduction of two new kinds of licences; (c) the role of the state decreased slightly compared to companies which became responsible for informing the partner/importing company of all the export conditions established by the Hungarian government and (d) decentralisation and collegiality diminished in favour of returning

several administrative tasks (from licence granting to delivery checking) to the Hungarian Authority (HTLO).

On the other hand, however, domestic change did not affect the fundamental and substantial aspects of Hungarian national regulation. In fact the a) balance between legislative and executive branches remained untouched; b) the subjects treated by primary law and delegated to secondary law remained the same. From a certain perspective there were changes; (c) the degree of transparency in arms exports policies and data did not decrease, and (d) the degree of responsibility on the final destination of defence material exported by the Hungarian territory including cases of coproduction under the new kinds of licences was untouched. In fact, the end-user certificate was extended to general and global licences. And it was forbidden to re-export without the written approval of the Hungarian Government even for material under global and general licences. This is unique among the three case studies.

Table 5.5 Intensity of domestic change along eight dimensions with the transposition of Directive 2009/43/EC: the Hungarian case (changes from 2008 to 2012)

| HUNGARY | 2008 | 2012 |
|---|---|---|
| Political vs economic variables | 5 | 3 |
| Legislative vs executive branch | 3 | 3 |
| Transparency vs opacity | 3 | 3 |
| Responsibility vs delegation | 3 | 3 |
| Primary law vs secondary law | 4 | 4 |
| Checks and balances vs centralisation | 3 | 2 |
| Certainty of law versus fragmentation and flexibility | 5 | 4 |
| State vs companies | 4 | 3 |

### *5.5 The scope of domestic change*

Unlike Italy (and the UK), the Hungarian transposition of Directive 2009/43/EC did not impact some fundamental aspects of the domestic regulation concerning transparency,

the balance between executive and legislative, control on final destination of defence material, and the degree of detail of primary law. The Hungarian Government was able to introduce the changes required by the Directive aimed at facilitating exchange of defence material between EU MS without impacting the fundamental pillars of the domestic regulation.

Thus, in Hungary, the scope of domestic change is limited to "policy instruments" and it does not touch the "fundamental paradigms" nor does it change policy goals. Peter Hall in a famous article disaggregates the process whereby policy changes into three subtypes, according to the magnitude of the changes involved. First order change concerns change of policy instrument settings, second order refers to policy instruments and third order extend to policy aims and overarching paradigms. Using Peter Hall's categories, in Hungary the transposition of the Directive has modified the techniques and policy instruments, without radically altering the hierarchy of goals, but not the overarching goals that guide policy (second order change). On the contrary, in Italy, the transposition of the Directive affected the same perspective and aims of the law, thus inscribing a wider and more radical change (third order change).[403]

### *5.6 Side findings*

*a) The role of societal actors*

The absence of a strong defence industry lobby is the first macroscopic difference with the Italian case. In Italy, these actors especially have pressed the government to use the Directive to renew domestic regulation and completely change the approach, the same "philosophy" of arms trade control, thus pressing to increase the scope of domestic change. In Hungary, where the defence industrial lobby is nearly absent, domestic change has been limited to some adjustments to policy instruments. Thus, among various factors, a possible interpretation is that the presence/absence of actors has influenced the scope of domestic change.

Secondly, the ease with which the Hungarian Government has been able to transpose the EU Directive (which however created some problems of compatibility with the domestic regulation and tradition) and to conjugate the introduction of general and

403 P.A. Hall (1993) "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain" *Comparative Politics*, Vol. 25(3): 275-296.

global licences while maintaining the traditional paradigms of national regulation, is probably also due to the absence of pressure from societal actors such as defence companies and NGOs. Overall, the absence of a strong industrial lobby and NGO lobby has made the transposition much easier and more linear than for other countries. Ambiguity and non-knowledge are reduced to a minimum level in this case study.

*b) The role of bureaucrats*

Hungarian bureaucrats/civil servants show a moderate attitude towards the opportunity to change offered by the European Directive on intra-Community transfers. They do not use the Directive to sharply change domestic regulation in a pro-industry direction. On the contrary they are quite conservative, in maintaining domestic regulation and limiting the changes to what is strictly required by domestic tradition and Hungarian paradigms.

Thus once again, comparing the Italian to the Hungarian case can offer some interesting empirical food for thought. In Italy, where there is a strong industrial lobby there has been a third order change. In Hungary this change has been more limited. In Italy even some representatives of the administration seemed more in favour of a radical domestic change, in Hungary the approach of civil servants was more prudent and limited to a second/first order change. One explanation could be that state actors are influenced by the industrial lobby and so civil servants in these cases are not the real actor/agents of change but are influenced by societal actors such as defence companies.

Thus these empirical findings partly contradict the state theorists who claim that the key agents pushing for change are the experts working for the state (or close to the state) and that the state acts autonomously from societal actors. On the contrary they support Peter Hall's articulation of the analysis that sustains the state acts rather autonomously on first and second order changes but act under societal actor pressure for third order change.

*c) Two Europeanisation processes?*

Lastly the Hungarian case clearly shows that the direction of the Europeanisation process is not unique but depends not only on domestic variables, but also on the nature of the decision-making process. The Hungarian case shed light on and allowed observation of two distinct Europeanisation processes with two different directions and aims. The first which mostly took place in the early Nineties until the mid-2000s,

through intergovernmental channels and focused on arms export to third countries (non-European) in the framework of a Common Foreign and Security Policy. Thanks to this process Hungarian regulation increased in transparency and end-user control especially from the early Nineties to the early 2000s, thereby raising the value of some dimensions towards an ethical export model. The second, originating in the economic context of progressive integration, was based on the extension of the TFEU articles on the freedom of movements of goods also to defence goods and led, thanks to the proactive role of the Commission and the ECJ to the Directive on Intra-Community transfer, thus decreasing other dimensions towards a pro-industry model. The Hungarian case has demonstrated further that these two apparently opposite directions are not irreconcilable, but rather might work together by covering both the internal and external markets, increasing efficiency together with transparency in a context characterised by no pressures or exploitation by societal actors. [404]

In conclusion, overall the impact of the EU Directive on intra-community defence transfers transposition indicates a slight move of the Hungarian regulatory system towards *a pro-industry* model. However, these changes are less marked than in the Italian case and are absent in four of the eight dimensions. Hungary is able to introduce the new general and global licences, certification systems and new export controls by maintaining the same degree of responsibility, control and transparency that was applied for individual licences. The changes introduced are mainly linked to what is strictly required by the Directive without going further and without changing any fundamental pillars of the Hungarian domestic regulation. This is probably due to the marginal role and pressure of the domestic defence industry.

404 This means that in certain conditions it is technically and politically possible to simplify exchange of defence material, without diminishing political control, power of the Parliament and control on the final destination in case the good to conjugate efficiency with democratic controls. One side methodological finding is that the eight dimensions are not interdependent, at least for certain conditions in the Hungarian case. Four dimensions vary and the other four do not (or move slightly in the opposite direction).

# Chapter 6. The impact of Directive 2009/43/EC on UK regulation on arms export control and transparency

## 1. Introduction

This case study has been chosen as representative of those European countries characterised by a flexible and liberal arms export control regulation. The UK arms export model is very similar in spirit, goals and regulatory approach, to Directive 2009/43/EC. Thus, the degree of "misfit" between the European rules and domestic regulation is very low. Furthermore, the UK is characterised by a strong defence industry ranking first among the EU and by an active, multifaceted constellation of NGOs dealing with disarmament and arms control.

The present chapter is organised along similar lines as the other case studies. The first introductory section offers information on the main features of the UK defence industry and the role of the societal actors. The second section thoroughly analyses UK regulation on arms export control and transparency (Export Control Act 2002 and Export Control Order 2008) *before* the approval of the Directive. The third investigates how UK law transposes the Directive. The fifth compares the previous UK regulation with the successor transposing regulation, in order to investigate the degree and direction of domestic change along eight fundamental dimensions. A final section draws the threads together.

### *1.1 The main features of the UK defence industry*

The UK defence industry is extremely strong, one of the largest in the world. "[..] Arms production forms a *meso* system of the national economy which […] remains a core part of national technological and industrial policies".[405] According to SIPRI (Stockholm International Peace Research Institute), in 2014 UK companies made up 10.4% of the

405 J. Mawdsley (2015), "France, the UK and EDA" in Karampekios N. and I. Oikonomou (Eds.) *The European Defence Agency: Arming Europe,* London and New York, Routledge, pp.139-154*:* p. 140*.*

top 100 arms producers in the world, classified by the prestigious Swedish research institute. In 2016, there were eight UK companies among the 100 largest arms producers in the world, which included in order of size, BAE Systems (3), Rolls-Royce (14), Babcock International Group (26) and Serco (39) (Bromley 2016). Overall in 2014, the arms sales of these four UK companies reached USD 42.7 billion (35.1 billion euro).[406]

The first one, BAE Systems, was in 2015 the third most important defence industry in the world (after the two big American ones: Lockheed Martin and Boeing), with about 94% of military production and arms sales for 25,510 million dollars in 2015. This company employed a total of 82,500 people in 2015, slightly less than the 83,400 in 2014. "According to the Aerospace, Defence and Security Association, the UK defence industry association, the industry had £24 billion in 2015 (32.6 billion euro) – making it the second largest in the world after the United States – and employed 142,000 people. Furthermore, ADS claims that there are over 5,000 SMEs that are directly involved in supplying the MOD". [407]These data explain the weight of the UK defence industry at the national level and at the same time its influence at the European and international levels.

Concerning arms exports, it is difficult to find homogeneous data in the UK, despite the relevance of this sector. These discrepancies are due to the fact that each source uses very diverse methods, collects different data and aggregates them differently. Beyond these methodological differences, there is one other fundamental (political) reason for this ambiguity in data concerning UK arms exports. The official UK data, which are transmitted yearly to the Parliament and the European Union for the Consolidated Report, lack one key detail: the value of exports under general licences and open individual licences, which are widely used in the UK and cover a significant part of UK arms exports.

According to UK Government data released by the Defence and Security Organisation, the UK won orders worth £8.5 billion (€10.9 billion) for new defence products and

406 Stockholm International Peace Research Institute, (2015) *The SIPRI Top 100 Arms-Producing and Military Services Companies, 2014*; SIPRI Fact Sheet, Stockholm: SIPRI.

407 M. Bromley (2016). *Arms export control policy and legislation in the United Kingdom,* unpublished report written for the Flemish Peace Institute which has been used as basis for the following publication: D. Cops, N. Duquet and G. Gourdin (editors) (2017), *Towards Europeanised arms export controls? Comparing control systems in EU Member States*, Flemish Peace Institute, Bruxelles, June 2017, p. 11 available at the following address: https://www.vlaamsvredesinstituut.eu/sites/...eu/files/.../rapport_wapenexp_eur_def.pdf, (last accessed May 2017). SIPRI Yearbook 2016, Aude Fleurant et al. (2015), "The SIPRI Top 100 Arms-Producing and Military Services Companies, 2014"; SIPRI Fact Sheet, December 20.

services in 2014.[408] This made the UK the second largest exporter after the United States with roughly 16 per cent of the global market.[409] In this case, the source is the UK Government, and specifically the defence export figures of the Defence and Security organisation statistics.[410] The official UK data on arms exports are based on 'an annual survey of defence export orders won by known UK companies operating in the defence sector.'[411] "The same department specifies that of course not all the orders became licences and deliveries, thus the data could be overestimated".[412]

The second governmental source is the UK report to the Parliament and the data transmitted by the UK Government to the European Union for the annual EU consolidated report on UK arms exports.[413] According to this source, the UK approved over 5 billion Euros in arms export licences in 2013, 2.6 billion Euros in 2014, and 8 billion in 2015. However, the same UK Government warns that UK export licence data do not represent an accurate picture of UK arms exports because some of these licences will not be used to make all of the exports authorised and others will not be used at all. In addition, a significant proportion of UK arms exports take place under open licences which do not have a value attached to them.[414] The UK Government also specifies that it does not collect data on deliveries.

The third source is an independent one: the SIPRI database on arms transfers.[415] SIPRI values are lower than those presented by the two UK Governmental sources because SIPRI researchers measure only major weapons systems (deliveries) plus some components and munitions and do not include exports of related products and services. According to this prestigious research institute, the UK ranked sixth after the USA, Russia, China, France and Germany from 2011-2016.

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408 UK Defence & Security Organisation, UK Trade & Investment, *Defence Export Figures for 2014*, July 14, 2015, available https://www.gov.uk/government/statistics/uk-defence-and-security-export-figures-2014 (last accessed 15 May 2019).
409 *Ibidem*.
410 *Ibidem*.
411 *Ibidem.*
412 *Ibidem: p. 6.*
413 British Government (2015), *United Kingdom Strategic Export Control Annual Report 2014*, The Stationary Office: London July 2015.
414 Bromley (2016).
415 SIPRI Arms Transfers Database, available at: www.sipri.org/databases/armstransfers (last accessed 20 May 2019).

Table 6.1 Major world exporters: value of annual arms exports per country

| Supplier | | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2011-2016 |
|---|---|---|---|---|---|---|---|---|
| 1 | United States | 8090 | 9100 | 9132 | 7647 | 10312 | 10184 | 54465 |
| 2 | Russia | 6172 | 8658 | 8317 | 7779 | 5103 | 5554 | 41583 |
| 3 | China | 1477 | 1274 | 1599 | 2113 | 1168 | 1764 | 9395 |
| 4 | Germany (FRG) | 2735 | 1345 | 820 | 727 | 1762 | 1792 | 9181 |
| 5 | France | 899 | 1766 | 1033 | 1517 | 1705 | 2080 | 9000 |
| 6 | United Kingdom | 1151 | 1025 | 899 | 1580 | 1575 | 1139 | 7369 |
| 7 | Spain | 263 | 1429 | 546 | 728 | 1050 | 1151 | 5167 |
| 8 | Italy | 529 | 939 | 753 | 877 | 700 | 692 | 4490 |
| 9 | Ukraine | 479 | 568 | 1492 | 671 | 640 | 347 | 4197 |
| 10 | Netherlands | 381 | 540 | 805 | 348 | 654 | 474 | 3202 |
| 11 | Israel | 655 | 572 | 449 | 432 | 399 | 694 | 3201 |

Source: SIPRI Arms Transfer database, available at https://www.sipri.org/databases/armstransfers/background.

In terms of geographic destination of UK defence exports, the UK has always privileged the transatlantic market, in particular the USA, and has never shown a specific European preference. Middle East countries represent another important market, particularly Saudi Arabia. SIPRI data relating to the first two most important importers of UK arms shows that, from 2003 to 2009 (which was immediately after the approval of the Export Control Act and the inauguration of the new ethical foreign policy), the USA received 22% of UK arms exports whereas Saudi Arabia just 7%. From 2009 to 2016, Saudi Arabia jumped to 47%, nearly half of the global UK arms exports, whereas the USA decreased to one tenth of British arms exports 9.5%).

In conclusion, despite some discrepancies, the above mentioned data about defence production and exports in the UK explains firstly the weight of the UK defence industry at a national level, and at the same time its influence at European and international levels.

### *1.2 Societal actors*

*Defence companies*

Given the strength of the UK Defence industry, industrial actors have played an important role both at the national and European levels. Defence companies are regularly consulted by the UK Government in order to decide the defence industrial

strategies. In particular, thanks to this consultative "form of governance" they developed a particular ability to move also in the European environment. BAE Systems, as strong prime contractor, has played a leading role (together with a few other companies, such as Thales and Finmeccanica and more recently Airbus group/ EADS in the past), at the European level and has regularly been consulted by the European Commission in all discussions preceding the approval of the ITC Directive since the 1990s. According to Mawdsley, "The ease of access that EADS, Thales and BAe Systems especially, but also other defense firms, have to the decision-making levels of the EU should also not be underestimated."[416] She explains that "The stress laid by the states on the creation of large prime contractors has meant that the results enjoy better access to national and European decision-making structures than their peers, thus forming an important lobby group that is largely unopposed, and this imbalance has impacted on policy."[417]

*NGOs*

If the UK is characterized by a strong defence industry with a traditional capacity of lobbying and collaborating with different ministerial departments, it also distinguishes itself by its highly organised NGOs. Their aim is to control arms trade, and to favour a strict and rigorous export control regulation aimed to prevent arms that fuel conflicts, human rights abuses, hindrances to development, and violations of international law (restrictive model). This opposition to exports without adequate controls tends to be located in a number of well-organized NGOs, such as Saferworld, the Campaign Against Arms Trade (CAAT), Amnesty International UK, the World Development Movement and Oxfam UK."[418] Oxfam International based in the UK is equally extremely active. What emerges from this analysis is the strong influence that the UK system including political actors and companies have played at European and international levels, because the detail of several EU instruments and even international instruments are largely inspired by the UK regulation and system. Saferworld, Oxfam and Amnesty International UK have played a leading role in the process of approval of the European Code of Conduct since the late 1990s until now. They've demonstrated an extraordinary ability to manage networks with other NGOs and representatives of

416 J. Mawdsley (2003). "The European Union and Defense Industrial Policy". *BICC Papers* (31), p.13.
417 *Ibidem,* p. 14.
418 Stavrianakis (2010), p. 20.

governments and regional and supranational institutions, and to move effectively in the EU environment.

At the European and international levels, different UK actors (government and Parliament, but also non-governmental actors such as companies and relevant NGOs), have sharply influenced the Europeanisation and internationalisation process, playing a leading role in this field. The British narratives on armaments cooperation seem not to be particularly transformed by the Europeanisation process but, on the contrary, have sharply influenced this process, shaping both the norms concerning European arms exports and those concerning the internal arms market.[419]

Overall, the UK profile with regards to the arms export policy is characterised by a neo-liberal paradigm, particularly expressed in the light and flexible arms export regulation and in the early withdrawal of the UK state from the ownership of the defence industry. The UK Government policy largely favours the free market and competition.

Overall, there are three main characteristics that explain the spirit of the evolving UK regulation on arms exports control and transparency.

Firstly, the UK's approach to the arms market is traditionally considered to be "economic liberal", according to which "the government should regulate the market with a light hand, allowing firms to shape the market".[420] The rhetoric around the arms market is focused on "economic efficiency".[421] The ideology of liberalism and regulatory simplification inform arms export regulation and state ownership of defence companies, but they are not reflected in the huge support for British arms exports. In fact, there is strong political, financial and economic support for arms export.

Secondly, the UK has privileged commercial relationships with the USA and has never shown a clear European preference. In other words, orientation toward a liberal arms market and flexible regulation is not limited to European borders but, on the contrary, has a global dimension.

Lastly, but not least, the third characteristic is Britain's pragmatic attitude toward national and European regulation of arms transfer: "The British discourse on European armaments cooperation has always been one of pragmatic engagement, rather than a

419 Mawdsley (2015), pp. 139-154.
420 *Ibidem*.
421 In practice the deep interpenetration between states and industry has also been marked by strong political support and financial assistance to this strategic sector, see: Stavrianakis, A. (2008), "The facade of arms control: how the UK export licensing facilitates arms trade", Goodwin paper #6. London: Campaign against the Arms Trade. February 2008 Retrieved from: https://www.caat.org.uk/resources/publications/government/facade-2008-02.pdf.

commitment to European autonomy from the USA, which it regards as undesirable, viewing cooperation as a way to save money that could be used to strengthen European military capabilities more broadly."[422]

The result is the so-called British model of regulation of arms transfer which has maintained some fundamental characteristics: maximum flexibility, pragmatism, a deep interpenetration between the political and economic dimensions, a high discretion of the executive in the field, with an active role of the Parliament and national NGOs.[423]

## 2. The UK legislation on arms export control and transparency preceding the approval of Directive 2009/43/EC: Export Control Act 2002 and Export Control Order 2008

The central piece of legislation for the UK's system of strategic trade controls *before* the approval of EU Directive 2009/43/EC is the *Export Control Act* (2002 Act).[424] It entered into force in May 2004. The specific controls introduced under the Act are detailed in the main secondary legislation which consists mainly of Export Control Orders. The most important and organic one is the *Export Control Order* 2008 (SI 2008/3231), which came into force in April 2009.[425]

This second section is devoted to the UK regulation of arms transfers control and transparency *before* the approval of Directive 2009/43/EC. I will briefly illustrate the origin of the Export Control Act and then I will details the provisions in its fundamental pillars (principles and bans to exports, licensing procedures and transparency) and the main features of the UK regulation.

### *2.1 The origin of Export Control Act 2002*

The Export Control Act 2002 was put in place in response to the flaws identified in the UK's strategic trade controls by Lord Scott's Report of the Inquiry into Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions of 1996.

422 Mawdsley (2015): 146.
423 Davis (2002); Stavrianakis (2008).
424*Export Control Act* (2002 Act), 28 July 2002, brought into force on 1 May 2004, available online at https://www.legislation.gov.uk/ukpga/2002/28/contents.
425 *Export Control Order 2008, (*SI 2008/3231), brought into force ON 6 April 2009, available online at http://www.legislation.gov.uk/uksi/2008/3231/contents.

"After the Gulf War of 1991, the issue of arms exports to Iraq in the run-up to the conflict and the adequacy of UK arms export controls generated a significant amount of political controversy."[426]

The UK Government started to prosecute a defence firm; Matrix Churchill, for illegal arms export to Iraq but then it came out that sections of the UK Government were aware of the intended end-use of the components and that Matrix Churchill were supplying the UK Government with intelligence about Iraq.[427]

In 1992, Lord Justice Scott was asked to conduct a large-scale investigation into arms exports to Iraq. After spending over two years receiving written and oral evidence from more than 200 witnesses, including the former Prime Minister, Scott published a 1806-page report in February 1996.[428] The report and arms exports scandal opened a wide debate about the UK arms export control regulation.

After the Scott Report was released, arms export controls became a key issue in the 1997 national elections. The Labour Party won the election, promising to introduce a more ethical approach to national arms exports and to promote protection of human rights in foreign policy. In February 1997 the British Labour Party pledged itself to: (a) refuse sales to regimes that might use them for internal repression or international aggression or in circumstances where the sale of weapons might intensify or prolong existing armed conflict or might be used to abuse human rights; (*b*) press for an EU code of conduct on arms transfers and strengthen the UN Register of Conventional Arms; (*c*) immediately ban the manufacture of, and trade in, landmines and torture equipment (such as electric-shock batons); and (*d*) publish an annual report on British strategic exports. [429] Once elected, the new government published a memorandum containing a list of new arms export criteria. In July 1997, Foreign Secretary Robin Cook of the new Labour government, launched a new regulation for the export of British arms within the framework of a "new ethical foreign policy". In 1998, Prime Minister Tony Blair asked the government to publish an annual report on arms exports from the UK aimed at increasing the level of transparency and parliamentary scrutiny in export policy. In July 1998, the Labour government presented the White Paper on Strategic Export Controls, which contained a new legislative framework for arms export controls.

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426 M. Pythian (2000).*The Politics of British Arms Sales since 1964* Manchester: Manchester University Press, pp. 47–48.

427 *Ibidem.*

428 UK House of Commons (1995). *The Right Honourable Sir Richard Scott, Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, HC 1995/96 115 Her Majesty's Stationery Office: London.

429 Davis (2002), p.150.

In 1999 an annual reporting system was introduced and then strengthened by stronger parliamentary oversight. In October 2000 the government presented the UK export control criteria to the Parliament. This process eventually culminated in the Export Control Act of 2002 which is the core of the UK's present regulation.

It is important to note that the change of attitude (as indicated in its official statements) of the British Government at the national level was accompanied by an equal change of attitude at the European Union level, in favour of the approval of a European Code of Conduct in arms exports. In fact, in the EU setting, the UK Government abandoned traditional scepticism towards and rejection of European regulation (having blocked any steps forward in the past) and led the coalition of actors in favour of the European Code of Conduct.

In conclusion, what emerges from an overview of dynamics triggered after the Scott Report and the New Ethical Foreign policy is that:

1) Both the national and European processes- which led respectively to the approval of new export criteria and to the 2002 Export Control Act at the national level and to the 1998 European Code of Conduct on Arms Exports at the European level- have the same roots: the 1997 new ethical foreign policy of the Labour Party and the change in attitude of the UK Government.

2) The wording of the national UK criteria on arms exports published by the Labour Party in 1997, then formalised in 2000 and included as guidance in the new 2002 Export Control Act, is very similar, nearly identical – with only slight differences- to the criteria of the 1998 European Code of Conduct.

3) UK politics and regulation have preceded and influenced European regulation. This influence from the national to the European level has witnessed the participation of non-governmental actors; in this case, the most evident was the proactive role of UK NGOs in promoting the UK model at the European level. All the UK actors showed particular ability in developing networks at different levels, lobbying and exerting influence. Overall the UK system of governmental and nongovernmental actors played a leading role also at the European level favouring the approval of the European Code of Conduct.

4) Formulating criteria at the national and European levels represents an important step forward, an ethical foreign policy and a rupture with the past. However, the wording inherits and indirectly recalls the flexibility which characterised the old British regulatory model, because the criteria are broadly and generically worded (please see the paragraph 3.3).

### *2.2 The institutional framework*

The Export Control Act gives powers to the Secretary of State for Business, Innovation and Skills powers to:

• impose controls on exports from the UK;
• impose controls on the transfer of technology from the UK and by UK persons anywhere by any means (other than by the export of goods);
• impose controls on the provision of technical assistance overseas;
• impose controls on the acquisition, disposal or movement of goods or on activities, which facilitate such acquisition, disposal or movement (this is often referred to as trafficking and brokering or simply as "trade");
• apply measures in order to give effect to EU legislation on controls on dual-use items (i.e. items with a civil and potential military application).

It is important to note that, despite the wide range of power delegated to the Secretary of State, according to the Act each Export Control Order must be approved by affirmative resolution in both Houses of the Parliament (see transparency paragraph).[430] Overall, primary law remains general and most of the aspects are clarified and regulated at a secondary or lower law level. This is in harmony with the UK's approach to and tradition of regulation which is oriented to the maximum flexibility in order to make it adherent to single concrete cases.

The Act also formalised for the first time the requirement on the government to report annually to Parliament on the controls imposed on both strategic and cultural exports (Section 10, Clauses 1 and 2). This is achieved through the Strategic Export Controls: Annual Report, which is published by the government, usually every July. Since the beginning of 2004 the government has also published annual and quarterly reports detailing export licences approved and refused during that period (see paragraph devoted to transparency).[431]

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430 Twelve other Orders issued since 2008 contain changes to the legal framework of the 2008 Order and its schedules, while another fourteen amendments only pertain to controls on exports to specific countries. Bromley (2016).

431 J. Lunn (2017). "The legal and regulatory framework for UK arms exports. House of Commons" *Library Briefing Paper,* Number 2729, 4 September 2017. Retrieved from: https://researchbriefings.files.parliament.uk/documents/SN02729/SN02729.pdf (last accessed 15 October 2018).

The ministry responsible for taking formal decisions on issuing export licences until its abolition in 2016 was the Department for Business, Innovation and Skills (BIS).[432] During the period we are analysing (from 2002 to 2009), in practice the Export Control Organisation (ECO) within BIS was responsible for implementing the UK's strategic trade controls and for issuing and refusing export licences for arms and dual-use items. The ECO sets out the regulatory framework under which licence applications are considered. The government minister who headed BIS – the Secretary of State for Business, Innovation and Skills – took the formal decision on whether to issue, refuse, suspend or revoke export licence applications in accordance with the applicable legislation and announced policy. [433] The Secretary of State for the Department for Business, Innovation and Skills (now Department of International Trade) wields some crucial powers, such as imposing controls on export, including terms and conditions for issuing licences, end-user certificates, and deciding what to report to Parliament and the export criteria.

However the dimension of collegiality and participation of different ministries is also present. The UK system for strategic trade controls – including both arms dual-use export controls – is operated by a single Export Licensing and Enforcement Community. This Community comprised nine Government Departments or Agencies, of which seven play a role in implementing arms export control. These were: Department for Business, Innovation and Skills (BIS); Foreign and Commonwealth Office (FCO); Ministry of Defence (MOD); Her Majesty's Revenue and Customs (HMRC); Border Force (BF); and Crown Prosecution Service (CPS). [434]

The Foreign Office, the Ministry of Defence, and the Department for International Development provided ECO with advice on how to assess export licence applications. Particularly delicate or sensitive applications are referred to government ministers in the FCO for a final recommendation. Her Majesty's Revenue and Customs (HMRC) is responsible for enforcing the UK's strategic trade controls. In particular, HMRC works with Border Force to prevent, detect and investigate breaches of the UK's strategic

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432 In July 2016 – in the aftermath of the vote to leave the EU and the arrival in office of a new Prime Minister, Theresa May – BIS was abolished, with its roles and responsibilities parcelled out to two new government departments. One of them was the Department for International Trade (DIT). It took over responsibility for strategic export controls. Lunn (2017), p. 11.

433 Bromley (2016), p. 1.

434 *Ibidem.*

trade controls. Any criminal prosecutions that result from such investigations are undertaken by the Central Fraud Group within the Crown Prosecution Service.[435]

### *2.3 Principles, criteria and bans to exports*

As illustrated above, after the arms exports scandals and the recommendations of the Scott Report, the Labour Party vowed to refuse sales to regimes that might use them for internal repression or international aggression, in circumstances where the sale of weapons might intensify or prolong an existing armed conflict or might be used to abuse human rights. They also pressed for an EU Code of Conduct. Once elected, the Labour government announced a new ethical foreign policy and new criteria for guiding arms exports policy.

The Consolidated EU and National Arms Export Licensing Criteria were included in the 2002 Export Control Act taking the form of guidance and (as detailed in Export Control Order 2008 - (Schedule 4 Part 3), Schedule 4 - Countries and Destinations subject to stricter export and trade controls). The formulation of these criteria is very similar to the European Code of Conduct criteria and includes them.

#### *2.3.1 Preamble*

The ministerial statement preceding the UK consolidated criteria to arms exports opens as follows: “The UK’s defence industry can make an important contribution to international security, as well as provide economic benefit to the UK. […]The Government remains committed to supporting the UK’s defence industry and legitimate trade in items controlled for strategic reasons. But we recognise that in the wrong hands, arms can fuel conflict and instability and facilitate terrorism and organised crime. For this reason it is vital that we have robust and transparent controls which are efficient and impose the minimum administrative burdens in order to enable the defence industry to operate responsibly and confidently.”[436] Thus, the criteria are

435 *Ibidem.*

436 The UK consolidated criteria to arms exports are reported in *United Kingdom Strategic Export Controls Annual Report 2014***,** Presented to Parliament pursuant to Section 10 of the Export Control Act 2002, Ordered by the House of Commons to be printed 16 July 2015 Annex A, p. 38, available at the following address: https://www.gov.uk/government/publications/uk-strategic-export-controls-annual-report-2014 (last accessed September 2018).

presented as an exception to the support of the UK Government to arms trade and to the defence instrument for security and economic reasons.

*2.3.2 Case by case*

According to the preamble of the UK consolidated criteria, the eight ethical criteria to arms exports will not be applied mechanistically but on a case-by-case basis taking into account all relevant information available at the time the licence application is assessed and consulting with relevant departments. This means that "While the government recognises that there are situations where transfers must not take place, as set out in the following criteria, at the same time it claims that it will not refuse a licence on the grounds of a purely theoretical risk of a breach of one or more of those criteria." [437]

The introduction of the case-by-case analysis means that the criteria are not immediately and automatically applicable but that their application can change from one country to another. While this approach favours the maximum elasticity and discretion, it may undermine the certainty of the law, and in cases where these procedures and assessments are not communicated to the Parliament, can also weaken the principles of transparency and Parliamentary control.

*2.3.3 Legal status of the criteria*

According to Article 9.3 of the 2002 Export Control Act, the Secretary of State must give guidance about the general principles to be followed. The Consolidated Criteria were issued to fulfil this obligation. Also the Criteria of the EU Common Position on arms exports have been introduced in the UK regulation with the status of guidance. A guidance must be laid before Parliament without requiring its approval.

Thus, although the Secretary of State has the duty to give guidance, there are no obligations about the content of this guidance in the Export Control Act of 2002. The main duty of the Secretary of State is of a procedural nature. This means that he can formally change the content of the criteria at his discretion. From a strictly legal perspective, the criteria and bans to export are not established by the Parliament and do not act as a limit to the executive power, but are placed once again in the area of discretion of the executive.

437 *Ibidem.*

The legal status has been discussed (and confirmed) on two different occasions. The first was the reformulation of export criteria issued in March 2014. These modifications contained only minor changes which revolved around a new preamble and a few small additions to the wording of the criteria.[438]

According to the Parliament, this new version (and in particular the elimination in the preamble of the following sentence "An export licence will not be issued if the arguments for doing so are outweighed by concern that the goods might be used for internal repression") could sharply weaken the commitment of the UK Government not to export to countries violating human rights.[439] According to the government these were only minor changes because they were limited to the preamble. By contrast the extension of the criteria, also to serious international humanitarian law violations was an important addition. Overall the key point is not the limited changes introduced by the Secretary of State but the legal power of the government, and in particular the Secretary of State, to make minor or major changes to national and European export criteria on arms exports, without any prior vote in Parliament. Thus, efforts should be addressed first of all towards a new legal status of the criteria and a new stricter formulation of them.[440]

### *2.3.4 Content of the export criteria: strengths and weaknesses between renewal and continuity with the past*

The Consolidated EU and National Arms Export Licensing Criteria set out the eight criteria against which all exports transit and brokering licence applications are assessed. Export criteria revolve around some very important ethical principles which according to the UK Government should regulate arms exports. Here I describe each of the eight criteria highlighting the main features and limits of their legal formulation.

The *first criterion* concerns respecting the UK's international commitments, in particular the sanctions decreed by the UN Security Council and those decreed by the EU, UN and EU arms embargoes, agreements on non-proliferation and other subjects, (the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention), as well as other international obligations (Arms

438 In their July 2014 report on arms exports and arms controls, the Committees on Arms Export Controls argued that the new version of the Consolidated Criteria was still not fully consistent with the 2008 EU Common Rules Governing the Control of Exports of Military. See Lunn (2017).
439 *Ibidem.*
440 *Ibidem*.

Trade Treaty). The government will not grant a licence if it is inconsistent with the above-mentioned treaties and obligations. When assessing an Export Licence Application (ELA) under Criterion One, the International Organisations Department at the FCO is consulted to confirm whether the country of final destination is currently subject to any embargoes or other relevant commitments.

The *second criterion* concerns the respect for human rights in the country of final destination. The UK shall not issue an export licence if there is a *clear risk* that the proposed export might be used for internal repression or in the commission of a serious violation of international humanitarian law.

*Criterion three* concerns the internal situation in the country of final destination, the existence of tensions or armed conflicts. MS will not allow exports which *would provoke or prolong* armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

*Criterion four* envisages the preservation of regional peace, security and stability. The UK will not issue an export licence if there is a *clear risk* that the intended recipient would use the proposed export *aggressively against another country* or to assert by force a territorial claim.

*Criterion five* concerns the national security of the UK and territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries. The government "*will take into account"* the potential effect of the proposed transfer on the UK's defence and security interests, while recognising that this factor cannot affect consideration of the criteria on respecting human rights and on regional peace, security and stability; the risk of the items being used against UK forces or against those of other territories and countries as described above; and the need to protect UK military classified information and capabilities.

*Criterion six* concerns the behaviour of the buyer country with regard to the international community, especially as regards its attitude to terrorism, the nature of its alliances and respect for international law. The government "*will take into account"*, *inter alia*, the record of the buyer country with regard to its support for or encouragement of terrorism and international organised crime; its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts, its commitment to non-proliferation and other areas of arms control and disarmament, particularly the signature, ratification and implementation of relevant arms control and disarmament instruments referred to in criterion one.

*Criterion seven* concerns diversion, or the *existence of a risk* that the equipment will be diverted within the buyer country or re-exported under undesirable conditions. In assessing the impact of the proposed transfer on the recipient country and the risk that the items might be diverted to an undesirable end-user or for an undesirable end-use, the government *will consider*: (a) the legitimate defence and domestic security interests of the recipient country, including any involvement in the United Nations or other peace-keeping activities; (b) the technical capability of the recipient country to use the items; (c) the capability of the recipient country to exert effective export controls; (d) the risk of re-export to undesirable destinations and, as appropriate, the record of the recipient country in respecting re-export provisions or consent prior to re-export; (e) the risk of diversion to terrorist organisations or to individual terrorists; and (f) the risk of reverse engineering or unintended technology transfer.

*Criterion eight* addresses the compatibility of the arms exports with the technical and economic capacity of the recipient country, *taking into account* the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources. The government will take into account, in light of information from relevant sources such as the United Nations Development Programme, World Bank, IMF and Organisation for Economic Co-operation and Development reports, whether the proposed transfer would seriously undermine the economy or seriously hamper the sustainable development of the recipient country.

### *2.3.5 Limits of the UK principles and criteria*

The criteria are formulated in a way that leaves a wide marge of discretion to the executive. The first criteria is pleonastic, because it requires the executive to respect obligations that already exist for the UK (UK and EU embargoes, duties deriving from being part of international treaties and so on). The second, third and fourth are core criteria and they are formulated as real obligations, but the use of the words “risk” (criterion 2 and 4), or subjective evaluations such as those concerning whether some arms exports “may prolong a conflict or not”, without any reference (in the primary or secondary regulation) to evidence, or to impartial supranational or scientific sources. The last four criteria, 5, 6, 7 and 8 do not contain any obligations, but just the suggestion to take these into account, leaving the final decision to the executive.

Given the sensitivities of this field, the UK regulation did not envisage an impartial assessment and a certain and unique application of the law -- which could have limited flexibility in a field where several factors are at play -- but on the contrary, opted for a subjective interpretation based on the balance of multifaceted factors and sources. Once again the final say is left to the government – which should of course consult several sources of information including intelligence, British embassies and the importing government - but which has discretion in weighing and balancing all this information, and different sources, according to a case-by-case analysis. Thus, as confirmed by the High Court's ruling on the difficult case of arms exports to Saudi Arabia, the British Government's duty and responsibility is just procedural and does not involve the merit and content of the criteria. The sentence of the Court is reported in the last governmental report to Parliament as follows: on 10 July 2017, the Court handed down its judgment, dismissing CAAT's claim. The judgment recognises the rigorous processes in place across government to ensure that UK defence exports are licenced consistent with the government's Consolidated EU & National Arms Export Licensing Criteria. It describes the government's decision-making about export licensing as "highly sophisticated, structured and multi-faceted" and points to "the essential rationality and rigour of the process".[441]

These limits were understood by experts since the early approval of the criteria both at the national and European levels.[442] First, in comparing the new criteria with their predecessors, the Trade Industry Committee has already concluded that "the July 1997 criteria represent a rather less radical break with past policy than is sometimes represented to be the case and the same patterns of behaviour and justification are being repeated. As before ministerial interpretation of the criteria in the difficult cases is the touchstone of their real significance".[443]Along the same line, according to Davis "(A)lthough the new export criteria introduced by Labour held out the promise of greater restraint, the scope for flexible interpretation still remains [..]".[444]

Similar evaluations were expressed about the European Code of Conduct which is quite similar to the UK in its formulation of the criteria. According to some scholars, the Code's criteria represented a still rather weak instrument that does not prevent MS

441 UK Government (2017). *United Kingdom Strategic Export Control Annual Report 2016,* Stationary Office: London: p.3.
442 Davis (2002).
443 Cited in Davis (2002), p. 151, note 175.
444 Davis, (2002), pp. 153-154.

from preserving different foreign and exports policies. The European Parliament defined the Code's criteria as "a general abstract guide" that grants wide discretion to MS.[445] According to Burkhard Schmitt, former researcher at the Institute for Security Studies of the Western European Union now working at the EU Commission, "the Code only provides a common set of ethical standards beyond which national control regimes continue to differ widely."[446] The criteria are worded in a way that leaves wide discretion to MS. Schmitt concluded that "the principles outline broad moral and political considerations that licensing authorities have to take into consideration. But there has been little progress in establishing prescriptive criteria that could help define these principles."[447]

Overall, the legal status represents the first legal weakness of the UK consolidated Criteria, the content of which is at the discretion of the Secretary of State. However, the second and more important weakness is represented by their vague formulation which, once again, allows the executive to make assessments based on subjective rather than objective analysis of the evidence. In other words, there are no clearly defined indicators on how to apply the criteria, based on scientific or supranational sources; rather most is left to the discretion of the executive who is obliged to follow rigorous procedures and hear from different sources, but who can decide the balance between these references, and definitely has the final say. This flexibility is emphasised by the case-by-case approach. The modality and ways to assess criteria are opaque to the public and Parliament. Lastly, the political, ethical and economic industrial variables (which are not always in harmony) reiterated in the preamble and conclusions without a clear order of priority could cause contradictions.

445 European Parliament - Directorate General for Research (1999) Working Paper - *The Policy of the members states of the European Union in the Field of Arms Exports* - Political Series (POLI 112 EN), 8-1999.
446 B. Schmitt (2001). "A Common European Export Policy for Defence and Dual Use Items?", *Occasional Paper n. 25*, Institute for Security Studies of the Western European Union available at the following address http://www.iss-eu.org/occasion/occ25.pdf.
447 *Ibidem*.

### *2.4 Transparency and parliamentary control*

As explained in 3.1 above, the Blair Government's decision to issue an annual report on arm exports was embodied in the Export Control Act of 2002 thus representing an important innovation with respect to the previous legal regulation.

The primary law dictates that the government shall present the annual report on arms export to Parliament, but it does not specify the quality and quantity of data that should be presented, nor the time limit in which to present it. The "level" of transparency depends on the discretion of the government. The report is presented to Parliament but it does not require approval from the legislative power.

Since 1997 the government has published Annual Reports, and since 2004 Quarterly Reports, which provide details of individual export and trade licensing decisions. The information covers individual licences issued, refused and revoked by destination and gives the rating, a generic description (the "annual report summary" or ARS) and total value of items licenced to that destination. The Quarterly Reports are published 3 months after the end of the quarter to which they refer. [448]

Overall, despite the abundance of sources and different reports both from the government and parliament, the current information on the value of exports reported from the British Government concerns only exports licences relating to single licences. They present two main deficiencies: the value of the material exported each year under open and general licences which cover a very relevant part of British arms exports, and the data on deliveries which are the real exports, and which governments usually collect and compare with licences. The UK is one of the few EU countries not to report data on effective exports. The comparison is important because each delivery must be previously authorised and because not all authorisations become effective deliveries (and it might happen that some deliveries have not been previously authorised). Furthermore data are presented in an aggregated way which may change from year to year, making it difficult for parliament and civil society to exercise efficient cross controls.[449]

448 Recognising that the published reports do not always meet the needs of readers, the Government launched the Strategic Export Controls: Reports and Statistics website in April 2009 (http://www.exportcontroldb.bis.gov.uk). This provides a user-friendly searchable database of data published from 1 January 2008 onwards.

449 Bromley (2016).

Another important instrument to control and guide the UK's conduct in this delicate field are the Parliamentary Committees on arms export control, with a direct interest in the UK's regulatory framework for arms exports: the Foreign Affairs, Defence, International Trade and International Development Committees. Originally known as the Quadripartite Committee, in March 2008 it was renamed the Committees on Arms Export Controls (CAEC). The House of Common Committees on Arms Export Controls publishes annual (and quarterly) reports. The CAEC annual report has details of the hearings, the evidence submitted and recommendations for how UK arms export controls can be improved. The UK Government is not required to act on the recommendations made but it must produce a written response to each recommendation.

*Documentation produced*

UK regulation provides a very rich (but limited) yearly documentation on UK arms exports data and on the main regulatory developments. The first group of sources are governmental sources to the Parliament and among these there are two main reports.[450] The second group of sources are parliamentary sources: the CAEC publishes its annual report with details of the hearings, evidence submitted and recommendations for how UK arms export controls can be improved. It is very rich and articulated, reaching 800 pages each year. Both the annual reports and the quarterly reports represent another source which adds details to the classical governmental report, both from a legal and an economic-statistical perspective.[451]

In conclusion, there are abundant sources, governmental reports, detailing the average time used by the government to issue a licence, discursive parliamentary reports analysing governmental data on UK arms exports, but there are at the same time two fundamental limitations. First, references to transparency by primary law are extremely vague. There is no reference to the quality and quantity of data that should be presented nor a reference to the time limit. Second, some crucial key details are

450 For example for 2014: Defence & Security Organisation, UK Trade & Investment, "Defence Export Figures for 2014," July 14, 2015, https://www.gov.uk/government/statistics/uk-defence-and-security-export-figures-2014. Defence & Security Organisation, UK Trade & Investment, "UK Defence & Security Export Statistics for 2014," July 14, 2015, 4, https://www.gov.uk/government/statistics/uk-defence-and-security-export-figures-2014.

451 UK House of Commons Committees on Arms Exports Controls (various years), "Scrutiny of Arms Exports and Arms Controls (various years): Scrutiny of the Government's Strategic Export Controls Annual Report 2013, the Government's Quarterly Reports from October 2013 to June 2014, and the Government's Policies on Arms Exports and International Arms Control Issues," London: The Stationary Office.

missing: the value of general and open licences, and the value of the deliveries. This makes the picture concerning the UK arms exports only partial.

### *2.5 Export licences*

In the UK according to the 2008 Export Control Order, arms export licences are granted by the Secretary of State and may be either general or granted to a particular person via Art. 26.6a. Thus, the UK regulation, unlike that found in the majority of other European Countries, already envisaged general licences by primary law.

According to letter b) and c) of the same Article, export licences granted by the Secretary of State may be limited so as to expire on a specified date unless renewed, subject to or without, conditions (and any such condition may require any act or omission before or after the act authorised by the licence). Article 9.2 of the 2002 Export Control Act states that "(T)he Secretary of State may give guidance about any matter relating to the exercise of any licensing power of other functions to which this section applies". A guidance is an act of the Secretary of State which must be laid before the parliament but which is not approved by the legislative branch. Thus, the UK Export Control Act of 2002 and the Export Control Order of 2008 provides the executive and especially the Secretary of State with a wide margin of discretion in establishing when to use general or individual licences, their conditions, what must be declared by the exporters, and documents to be attached, including end-user certificates. This is in harmony with the spirit of maximum flexibility and case-by-case analysis which guides the whole UK regulation.

Under this broad legislative framework, in practice since the early Nineties, the UK licensing system has been divided into three main types of licences:

1. The individual licences which are called Standard Individual Export Licences (SIELs): these licences are issued to a single exporter for a single transfer (allowing shipments of specified items) of defence material to a specific consignee. This kind of licence is one of the most widely used in Europe. When filling out the application the exporter has to specify all information concerning quantity, value, description of the good and final destination and attach an end-user undertaking. Single Individual Export Licences can be permanent or temporary and are valid for two years or one year respectively.

2. Open Individual Licences (OIELs) are the second type, and are specific to an individual exporter, but cover multiple shipments of specified items to specified destinations. OIELs are generally valid for a period of five years, with the exception of OIELs for the transfer of military items to destinations in other EU MS, which are valid for three years but may be renewed at the exporter's request. [452]

Table 6.2 Open Individual Licences and Standard Individual Export Licences

| Year | SIELs | OIELs |
|---|---|---|
| 2016 | 13734 | 334 |
| 2015 | | |
| 2014 | 13126 | 279 |
| 2013 | 13578 | 406 |
| 2012 | 12896 | 277 |
| 2011 | 11936 | 231 |
| 2010 | 12933 | 279 |
| 2009 | 10850 | 133 |

Source: UK annual report various years.

3. The third kind of licences are Open General Export Licences (OGELs). OGELs are pre-published licences that permit the export of specified controlled goods by any qualifying company or person, removing the need for exporters to apply for an individual licence, provided the shipment and destinations are eligible under the OGEL and that the terms and conditions set out in the licence are met. If exporters are eligible to trade under an OGEL then they just have to register. Once registered, there is no need for an exporter to submit further applications to trade under the licence they have registered to use.

These are normally issued by ministerial decree *ex officio* and for this reason the exporter is not required when registering to specify quantity, value or description of the good intended for export. Furthermore, the undertaking is not required to send to the UK Government End-user certificates. The exporter is required to register with the ECO before the licence is used (Art. 28 and Art. 30).

However, the loosening of *ex ante* controls is replaced by *ex post* controls: the exporter under general licence is required to keep relevant records (Art. 29.1), and allow ECO

452 There are several subtypes of OIELs including Global Project Licences, as well as Dealer-to-dealer, Cryptographic, Media and Continental Shelf OIELs Dealer-to-dealer OIELs (or simply Dealer OIELs) authorise UK registered firearms dealers to export certain categories of firearms and ammunition solely to other registered firearms dealers on the European Union only, provided that copies of valid documentation are forwarded to the Home Office at least 2 working days before each shipment.

to carry out compliance visits to ensure all conditions are being met (Art. 31). Other terms and conditions are specified in the single general licences.

As explained above, general licences have been widely used in the UK, since the early Nineties. In 2009 the UK National Report to the Parliament states that there were 37 open general licences active that year (see Table 4).[453] In 2016 there were 40 open general licences, including those related to military material and dual-use items.

Table 6.3 Open general licences issued in 2009

| | | |
|---|---|---|
| 1. Military Goods: Government or Nato End-Use 11.0 | 14. Access overseas to Software Technology for Mili | 26. Cryptographic Development |
| 2. Military Components 11.06.08 | Goods: Individual Use Only | 27. Dual-Use Items: Hong Kong Special Administrative |
| 3. Technology for Military Goods 11.06.08 | 15. Military and dual-use Goods: UK Forces Deployed | Region (HKSAR) |
| 4. Export After Repair/replacement under warranty: | non-embargoed destinations | 28. Oil and Gas Exploration: Dual-Use Items |
| Military Goods | 16. Military and dual-use Goods: UK Forces Deployed | 29. OGTL (Dual-Use Goods: HKSAR) |
| 5. Export After Exhibition or Demonstration: | embargoed destinations | 30. Open General Transhipment Licence |
| Military Goods | 17. Turkey | 31. Open General Transhipment Licence (Sporting Guns) |
| 6. Export for Exhibition: Military Goods 11.06.08 | 18. Computers | 32. Open General Transhipment Licence (Postal Packets) |
| 7. Military Surplus Vehicles 29.09.06 | 19. Technology for Dual-Use Items | 33. Open General Trade Control Licence (Category C Goo |
| 8. Export For Repair/Replacement Under Warranty: | 20. Export After Repair/replacement | 34. Software and Source Code for (Category C Goods) |
| 9. Historic Military Goods: 11.06.08 | Under warranty: Dual-Use Items | 35. Exports of non-lethal military and Dual-use goods: |
| 10. Vintage Aircraft 01.05.04 | 21. Export After Exhibition: Dual-Use Items | To UK Diplomatic Missions or Consular Posts |
| 11. Accompanied Personal Effects: Sporting Firearm | 22. Low Value Shipments | 36. Open General Trade Control Licence (Small Arms) |
| 12. Military Goods: For Demonstration 24.05.07 | 23. Specified dual-use items 1 | 37. Vintage Military Vehicles |
| 13. Exports or transfers in support of UK Governmen | 24. Chemicals | |
| Defence contracts | 25. Export For Repair/Replacement under Warranty: | |

Source: UK Strategic Arms Export Report 2009

General licences are used in the UK in an extensive range of cases (exhibitions repairs, but also co-productions and national armed forces, and so on), and they cover different kinds of defence material, including dual use, small arms, and technology. Furthermore, they do not have geographical boundaries, but are released for exchange with European countries, western countries, Middle East and Northern African countries, and so on. This is possible thanks to the very flexible general legal formulation. Terms and conditions may change from one general licence to another. In the UK they are estimated to cover between 30% and 50% of UK arms exports.[454]

This simplified and quicker export system, in terms of the required *ex ante* documentation, is based on a high level of trust between government and companies which use general licences. Since the early 1990s, Members of Parliament and the

453 UK Government (2010). *United Kingdom Strategic Export Control Annual Report 2009*, The Stationary Office: London July 2010.
454 Bromley (2016).

CAEC (Committees of Arms Export Controls) recommended prudence in using and issuing general licences, given that the drastic reduction of *ex ante* control requires such a high level of trust between government and companies (and also between companies and importing governments). These recommendations were addressed to the government in the late Nineties, before the approval of the 2002 Export Control Act (see previous paragraph) and were renewed recently in the 2000s as a reaction to the attempt by the government to increase the proportion of exports that are carried out under 'open' rather than 'individual' licences. Thus, more recently the UK Government has sought to encourage exporters to utilise open general licences and more specifically, open individual licences where possible. However, the CAEC has recently raised concerns about this policy, explaining that there is a risk of an increase in breaches of the Government's arms export control policies.[455] The CAEC has argued that its "concerns about this policy [were] reinforced by the fact that since the start of the so-called Arab Spring in December 2010 the Government has had to revoke or suspend a total of 52 Open Licences". [456] The high number of revocations or suspensions of licences issued for export with the countries involved in the repression of Arab Spring has made it clear that the government enjoys excessive ease in issuing licences, including those licences granting a very light form of controls. Greater prudence is needed because these licences require a very high level of trust with the importer.[457]

### *2.6 Reporting requirements*

After the authorisation phase, there are two main systems of control in the UK: reporting requirements and inspections. The first form of controls consists in reporting requirements to exporters using open and general licences. These controls are very important considering it is not possible to collect specific information in the

455 UK House of Commons Committees on Arms Exports Controls (2015), "Scrutiny of Arms Exports and Arms Controls (2015): Scrutiny of the Government's Strategic Export Controls Annual Report 2013, the Government's Quarterly Reports from October 2013 to June 2014, and the Government's Policies on Arms Exports and International Arms Control Issues," London: The Stationary Office.
456 *Ibidem.*
457 In the October 2014 Westminster Hall debate, Sir John Stanley pointed to the rise in the number of existing licences (individual and general) revoked by the Coalition Government in recent years as evidence that it had adopted an insufficiently cautious approach to arms exports, Lunn (2017), pp.28-29.

authorisation procedures for open and general licences. Thus, information is not collected *ex ante*, but rather *ex post* requiring licence holders to keep detailed records on what is exported and to whom.

However, there are significant weaknesses in the reporting requirements. Firstly, the end-user, which is very sensitive information, must be declared in the reporting requirements only if it is known by the person responsible for exports. Secondly other essential sensitive information: the value of the material exported is missing from the list of reporting requirements. This may compromise transparency but also governmental controls over a significant part of UK arms exports. Thirdly, there is no obligation to communicate all the data regularly to the government. In practice they are checked via inspections (discussed next).

### *2.7 Inspections*

Inspections are the second kind of controls. In the UK, the absence of regular and systematic communication from the companies to the governments of all the data concerning deliveries is replaced by a system of inspections, undertaken *ex post* on a percentage of companies that export each year. The inspectors control the regularity and lawfulness of all the data collected in the register. According to Article 31 of the Export Control Order, the person responsible for keeping registers shall permit those compulsory records to be inspected and copied by a person authorised by the Secretary of State or the Commissioners. A person authorised by the Secretary of State or the Commissioners shall have the right to enter the company at any reasonable hour, in the case of compulsory records required to be kept under Article 29 or 30 of this Order. [458] The approach is usually based on mutual trust and collaboration between the government and industries. Thus, companies which are found not fully compliant are not immediately sanctioned but are firstly notified and encouraged to collect the missing information. According to the most recent governmental report to the parliament on UK strategic arms exports, the Compliance Team carried out a total of 572 inspections in 2016. Where at the first visit about 50%

458 Section five of annual governmental report on UK arms exports offers very detailed information about inspections undertaken by the UK Government. ECO (Export Control Organisation) has at its disposal a compliance team to inspect companies holding open individual and open general licences. UK Government (2017).

were fully compliant and about 25% noncompliant, upon revisiting the companies, 70% were compliant whereas only 3% were noncompliant.[459]

### *2.8 End-user controls*

Details concerning end-user controls and certificates are not enshrined by primary law, but, in conjunction with the spirit of the UK regulation, geared toward maximum flexibility. The Secretary of State is delegated the authority whether to introduce end-user controls, require end-user undertakings or documentations, and impose conditions according to the kind of licences or kind of arms exported. According to the current guidance on End-user Undertakings, the end-user controls are different according to the kind of licences: Standard Individual Licences, Open Individual Licences, and Open General Licences.[460]

Particularly in recent years, the information on end-user required to exporters covered the consignee, the end-user and even the ultimate end-users, are explained extremely clearly in a table elaborated by ECO. The table covers all the possibilities of co-productions, re-exports with two or more countries involved, in the global chain of production and all cases of re-export. Nevertheless, Mark Bromley explains, it is still possible not to report the end-user, if it is not known to the exporters.[461] According to Bromley: “Both the EEU form and SSU form require information to be provided to identify the *known end-use of the arms*. However, there does not appear to be a mechanism to explicitly declare cases of ‘unknown end-use’”. [462]

Also with *Open Individual Export Licences,* applications require a consignee undertaking in accordance with licence conditions. This document must be obtained in advance from the end-user. The undertaking should confirm the nature of the goods ordered by the consignee and what they will be used for. The OIEL consignee undertaking should be completed by the organisation or company to whom the goods are being sent, confirming that the end use of the items match the OIEL conditions. [463]

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459 *Ibidem*, pp.21-22.
460 Guidance - End-User and Stockist Undertakings for SIELs and Consignee Undertakings for OIELs. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/402903/15-118-OIELs-process-guidance.pdf (last accessed September 2018).
461 Bromley (2016).
462 *Ibidem.*
463 *Ibidem.*

*Open General Export Licences* are normally issued by a ministerial decree *ex officio*. For this reason, in 2009 the year of ITC approval, the exporting company was not asked for the End-user undertaking or End-user Stockist Undertaking (SU) upon registration. Given the nature of this kind of licence, the information about the end-user was usually verified only *ex post*. OGEL holders are required to adhere to all the specified terms and conditions. This includes keeping certain records as required by the licence for the controlled goods and technology being exported and to open the company's doors for inspections.

### *2.9 Re-export controls*

The UK requires exporters to specify when an export relates to items that will be incorporated and re-exported from the destination country. The issue of if and how to assess licences for the exports of components that are due to be incorporated into a military system and re-exported to a third state has been a subject of discussion in the UK since the early 2000s. Much of this debate has evolved around the export of components to the USA that are due to be incorporated into US-made weapon systems and re-exported to Israel.[464]

As a consequence, in July 2002 the Secretary of State presented new guidelines for assessing licence applications for goods destined to be incorporated in defence equipment in a second country and re-exported to a third country. According to these guidelines the UK Government must take into consideration the following criteria:

"(a) the export control policies and effectiveness of the export control system of the incorporating country;

(b) the importance of the UK's defence and security relationship with the incorporating country;

(c) the materiality and significance of the UK-origin goods in relation to the goods into which they are to be incorporated, and in relation to any end-use of the finished products which might give rise to concern;

(d) the ease with which the UK-origin goods, or their significant parts, could be removed from the goods into which they are to be incorporated; and

464 *Ibidem:* p. 148.

(e) the standing of the entity to which the goods are to be exported." [465]

According to a new formulation of the guidelines, in assessing the risk of re-exports the UK Government must refer to the EU Code of Conduct criteria, but may also consider a range of other factors, including 'the importance of their defence and security relationship with that country'.[466]These different factors (political, ethical and economic) may conflict with each other and, in the absence of a clear order of priority, may offer a wide margin of discretion to the government in assessing re-export control guidelines, according to the concrete case. As a consequence, despite these guidelines for re-export representing an important step forward, they still need to be more clearly defined in order to be more effective.

In conclusion, the UK model already has a regulation in which a) commercial variables played an important role and were given full weight in arms export policies b) the executive branch enjoyed a wide marge of discretion, in regulating the three pillars of any export regulation (transparency, export criteria and procedures); c) primary law dictated only a general framework and delegated most of the activities of the field to the executive: export control orders, guidance, other acts of bureaucratic authorities in order to maintain a high degree of flexibility to regulate this delicate field and to adhere to the single cases. d) the government decided the level of transparency and the quality and quantity of data to be reported to the Parliament: there is an abundance of information and transparency but some crucial data such as value and deliveries are not included; e) end-user and re-export control can change according to the kind of licences, and the principle of delegation to the partner country, the awareness of the exporting company and of the government about the final end use; f) most of the power is centralised in the hands of the Department for Trade and Industry and its head, the Secretary of State; g) companies enjoy a high level of trust by the government; h) the UK regulation is characterised by great differentiation from case to case and by a great differentiation in different kinds of licences and related controls.

Overall the UK arms transfer regulation before the approval of the Directive is characterised by great flexibility, a strong power of the executive in applying the export criteria and in establishing the main characteristics of arms transfers licences, and

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465 House of Commons (2002). *Foreign and Commonwealth Affairs, Written Answers to Questions, Export licences, Column 653W and* Column 654W, 8 July.2002. available at http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020708/text/20708w01.htm#column_652.

466 *Ibidem.*

thorough, detailed information produced by the Parliamentary committee on arms trade, despite some crucial aspects not being reported.

## 3. The transposition of Directive 2009/43/EC in the UK context: focus on the main features of the transposition law Export Control (Amendment) (No. 2) Order 2012

The Directive was transposed into UK law via the Statutory Instrument that is the Export Control (Amendment) (No. 2) Order 2012 (SI 2012/1910).[467] The amending Order came into force on 10 August 2012. This Order implements 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, as amended by Directive 2012/10/EU as regards the list of defence-related products. Furthermore, the Order introduces changes to the control lists agreed upon in the Wassenaar Arrangement (this Arrangement is an international control regime) and some amendments as a consequence of changes to Council Regulation 428/2009 for the control of exports, transfer, brokering and transit of dual-use items and to Council Regulation 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. It decontrols the movement of historic military vehicles.[468]I focus only on the amendments related to the transposition of Directive 2009/43/EC and not those related to the Council Regulation concerning torture nor those related to the Council regulation on dual-use items.

Overall, the legal modifications are very limited because the last formulation of Directive 2009/43/EC and the UK regulation present very strong similarities in the spirit and in two of the three pillars of the exporting system: the new types of global and general licences and a system of ex-post controls based on inspections. This low degree of misfit between the EU and domestic level, is due also to the fact that the UK tried successfully to upload its regulation at EU level before the Directive was approved

467 Export Control (Amendment) (No. 2) Order 2012 (SI 2012/1910), brought into force on 10th August 2012, available at https://www.legislation.gov.uk/uksi/2012/1910/pdfs/uksiem_20121910_en.pdf (last accessed 7 January 2020).

468 Explanatory memorandum on the Export Control (Amendment) (No. 2) Order 2012 (SI 2012/1910)., available at https://www.legislation.gov.uk/uksi/2012/1910/memorandum/contents (last accessed 7 January 2020).

and downloaded at the domestic level (see next sub-section). As a consequence, the amendments contained in the transposition only concern the introduction of a certification system for companies and some changes in the definition of military items. Moreover, according to the UK regulation, the Secretary of State already enjoys great discretion in using general or individual licences, in establishing terms and conditions to issuing a licence or not. Thus, part of the few changes generated by the Directive are not regulated with amendments to primary law but delegated to the Secretary of State who introduces them by guidance or directly modifying the text of general licences.

Considering the low degree of misfit between the UK and EU regulation, the following sub-section will focus not only on the few amendments of Export Control Amendment Order 2012, but also on the extraordinary similarities between the UK domestic regulation and the disposal of the Directive, as well as few but meaningful differences between the domestic and EU levels, which were not included in the Export control amendment, but rather were ignored.

### *3.1 The debate preceding the approval of Directive 2009/43/EC*

The initial position of the UK Government toward a defence industry strategy by the European Commission, was sceptical. In 2004, together with France, they stated that there was no need for a Directive and opted for intergovernmental cooperation, instead of envisaging a role for the Commission.[469] This scepticism was due mainly to two reasons.

Firstly, the UK did not want to penalise commercial relationships with its traditional favourite commercial ally (the USA) and other western allies.[470] Overall, traditionally the UK orientation towards the market is “global”, overcoming European and even Western boundaries. General licences were already issued not only for defence exports with European Countries, but also with the USA and several Middle Eastern countries. The UK is mainly characterised by pragmatism with one fundamental principle: a free global market.

469 Strikwerda (2017): 19-36.
470 Fiott (2017): 1045-1061.

The second reason was a reluctant approach towards a supranational regulation of the arms market, particularly towards the EU Commission's power to oversee UK export regulation and policies: "While industry generally saw the proposed directive as a positive piece of legislation for the European defence market (UK Government, 2014, p. 2), both industry and government were aligned in seeking assurances that adoption of the directive would not lead to greater supranational oversight for defence exports or a 'weakening of the UK's export control system' (House of Commons, 2008c; UK Government, 2014, p. 2)." [471] They feared that a new directive regulating the arms market could have added to the burden on arms exporters with limited benefits.[472]

However, between 2005 and 2006 the UK's position changed and became favourable to the internal market directive. According to a 2015 interview of a British official by Strikwerda this happened once the UK Government understood that the arms market was considered a single market issue, and as a consequence the Commission could have legitimately legislated on it, on the basis of internal market rules: "The big legal issue was whether they had competence. And the legal advice was that they had competence because it is a single market issue".[473] Secondly, the UK Government declared to be in favour of the creation of a European Defence Market, favouring competition in this field. "The UK, as a leading European defence exporter, was a strong advocate for an open defence equipment market".[474] "An open market was expected to bring increased competition for the national defence industry".[475] The possibility to save money made possible by the Directive was viewed as a benefit.[476] Thus, the UK Government started to glimpse the possibility of a convergence with the Commission principles of free market, giving priority to liberalisation over harmonisation.

Moreover, once the UK Government understood that the Commission had legal competence to initiate a legislative process in this field, the attitude of the UK Government was that of leading and influencing this process as much as they could: "And so what we will do, we will go along with this, we will join their discussion groups, and we will participate in the drafting of the Directive, and have our lawyers be very careful that nothing is done which contradicts the ultimate big bazooka of our national

471 *Ibidem,* p. 1051.
472 *Ibidem.*
473 Interview British official, as quoted in Strikwerda (2017): 31.
474 *Ibidem.*
475 *Ibidem.*
476 *Ibidem*.

security interest. And then when the Directive finally comes into force we will ignore it."[477]

Therefore the UK government tried to shape the content of the Directive. As the then UK Secretary of State for Defence, Desmond Browne, reported: 'we did not agree with the early proposals. We argued for a set of proposals which were much more akin to the scheme that we have in this country'.[478] However the footprint of the UK is much more evident than the German influence, and the Directive much more similar to the UK regulation than to the German one. Indeed, the Commission realised during the negotiations that the Germany–UK 'three-tier' system offered an efficient blue-print for the proposed EU regime.[479]

According to a Commission's senior official, interviewed by Fiott, "Without the Commission's willingness to adopt and promote the British–German export model, there would likely have been little reason for Germany or the UK to continue with negotiations."[480]

Thus the UK pressed for regulation similar to that in the UK and succeeded impressively. In fact, as admitted by the ECO, and as I will explain in the next paragraph, the ITC Directive has been heavily influenced by the UK regulation.

The UK's traditional pragmatism and its impressive capacity for influencing Commission decisions, led to the adoption of a new draft proposal heavily shaped and influenced by the UK and German three-tier system.[481]The UK was able to approve a proposal that was nearly identical to its own national regulation.

### *3.2 Definitions*

The first amendment introduced by the Export Control (Amendment) (No. 2) Order 2012 concerns definitions. It introduces the term "European military items" which is used to limit the amendments to the 2008 Order to the items within the scope of the Directive. However the transposition law does not adopt all the new definitions envisaged by the Directive which distinguishes between intra - EU transfers (defence

477 Interview British official as quoted in Strikwerda (2017): 20.
478 Cited in Fiott (2017).
479 F. Liberti, *et alii* (2010). *Pratiques communautaires internes de contrôle des exportations et des transferts intracommunautaires de produits de defense*. Paris: Institut de relations internationales et stratégiques, p. 6
480 Interview British official as quoted in Fiott (2017): 1054.
481 Fiott (2017).

material exports within the EU boundaries) and exports (defence material exports outside the EU), maintaining its traditional national different meaning for these two terms.[482] This is because, as previously explained, the UK does not want to penalise its exchange and relationship with its main transatlantic partner with respect to the European partners.

### *3.3 Three-tier system: general licences and global licences.*

As already explained in previous chapters, the main revolution of the Directive is represented by the introduction for intra-European exchanges of armaments material for three kinds of licences: the general licences, the global licences, as well as the traditional individual licences, in order to improve the competitiveness of the European defence industry, reduce national obstacles by simplifying the system of licences, aim to harmonise national export procedures, lighten the burden of companies in the exchange of defence material within the EU borders and to favour collaboration and coproduction. To achieve these ambitions, the Directive introduces a three-tier licensing system for those military goods listed on the EU Common Military List.

Overall, the legal modifications are very limited because the UK regulation is extremely similar to the text of the Directive. It is the same ECO (Export Control Unit) as a note to the exporters explains: “Broadly speaking, there are *few practical implications* for UK companies arising from the implementation of the Directive in the UK. The ICT model used by the Commission is *heavily UK inspired* and will allow the UK to operate a system of licensing very close to our current arrangements.”

Firstly, as clearly summarised by the same ECO the UK regulation […] “already operates a similar three-tier structure for the export licensing of military and dual-use goods, software and technology”.[483] This structure comprises Open General Export Licences (OGELs), Open Individual Export Licences (OIELs) and Standard Individual Export Licences (SIELs).

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482 According to the UK regulation and definitions, exports refer to any material moved from the UK to any other countries and transfer to the export of technology.

483 UK Export Control Organisation (2012b). “Implementation of the European Union Directive 2009/43 (Intra-Community Transfer of Defence Goods or ‘ICT Directive’)”. N*otice to Exporters 2012/37*, available online at https://webarchive.nationalarchives.gov.uk/20121015093035/http://www.bis.gov.uk/policies/export-control-organisation/eco-notices-exporters (last accessed 16 January 2020).

Thus there was no need to change the architecture of the UK licensing regulation, in contrast to several other European countries.

### *3.3.1 General licences*

According to Article 5.1 of the Directive, MS shall publish general transfer licences directly granting authorisation to suppliers established on their territory. These suppliers must fulfil the terms and conditions attached to the general transfer licence, to perform transfers of defence-related products, as specified in the general transfer licence, to a category or categories of recipients located in another Member State. According to Article 4.6., MS shall determine the terms and conditions of transfer licences for defence-related products.

According to 26,(6) of the UK 2008 Export Control Order, a licence granted by the Secretary of State may be (a) either general or granted to a particular person; (b) limited so as to expire on a specified date unless renewed; (c) subject to, or without, conditions and any such condition may require any act or omission before or after the doing of the act authorised by the licence. Thus, Article 26 of the Export Control Order potentially include all the terms and conditions contained in the Directive, the cases in which a general licence should be used, and even including re-export controls and controls on parts and components.

Terms and conditions established in the Directive, re-export requirements, norms concerning export of parts and components fall to the discretion of the Secretary of State and the executive, and are treated as guidance, for an act of the executive that however must be laid before Parliament. Consequently, there is no need for any amendments to the Export Control Act. The UK legislator decided not to define all these aspects by primary law, but on the contrary, in harmony with the nation's traditional spirit of flexibility to delegate authority to the executive using the instrument of guidance.[484]

According to point 2 of Article 5 of the Directive there are four main cases when general licences can be released: allowed to release general licence typologies of general licences,

484 Explanatory memorandum on the Export Control (Amendment) (No. 2) Order 2012 (SI 2012/1910).

- the recipient is part of the armed forces of a Member State or a contracting authority in the field of defence, purchasing for the exclusive use by the armed forces of a Member State.
- the recipient is an undertaking certified in accordance with Article 9.
- the transfer is made for the purposes of demonstration, evaluation or exhibition.
- the transfer is made for the purposes of maintenance and repair, if the recipient is the originating supplier of the defence-related products.

Furthermore, MS may issue general licences in cases of coproduction.

The UK Export Control Order gives the Secretary of State a wide range of possibilities to allow general licences, nearly a *carte blanche* – with only a few exceptions - in deciding if and when to use general licence, and whether and which conditions to apply or not. Thus, once again the four main cases listed in Article 5.2 are potentially included at the discretion of the Secretary of State in issuing general licences.

In practice, the Secretary of State has issued 37 general licences, covering a broader range of cases than those foreseen by Article 5.3 of the Directive.

As explained in a notice to exporters and in the previous paragraph, there were several cases in which the UK was allowed to release general licences, covering an even wider range of typologies than the Directive had indicated. However, in practice only one type of general licence envisaged by letter b of Article 5 of the Directive - general licences to be used with EU companies certified under Article 9 of the Directive – was not present among the nearly 40 general licences issued by the UK Government. Thus, it was necessary to create a new general licence to be used with other EU certified companies (which is available for any UK company to use providing that they can meet all the terms and conditions of the licences) also to adjust five other ones concerning the other letter of Article 5 in order to include all the EU countries.[485]

As summarised by ECO in a notice to exporters, the only changes made to OGELs, as a result of the Directive's implementation, were the addition of Cyprus and Bulgaria to five named OGELs which correspond to the categories listed in the Directive, and to create a new general licence to be used with other EU certified companies. These changes were not introduced at primary law level with amendments to the Export

485 UK Export Control Organisation (2012a). "Amendment to the military goods Open General Licences adding Cyprus and Bulgaria as permitted destination". *Notice to Exporters 2012/29,* available online at:https://webarchive.nationalarchives.gov.uk/20121015093035/http://www.bis.gov.uk/policies/export-control-organisation/eco-notices-exporters (last accessed 16 January 2020).

Control Order. Acting correctly within the disposition of the UK regulation, they were introduced directly by the Secretary of State by creating and modifying existing general licences, and did not require any amendment to Export Control Act 2002 or to Export Control Order 2008.

*3.3.2 Global licences*

Global licences play an intermediate role between general and individual licences. They authorise one supplier to send one or more shipment to one or more specified recipients.

According to Article 6 of the ICT Directive,[486] MS shall decide to grant global transfer licences to an individual supplier, at its request, authorising transfers of defence-related products to recipients in one or more other MS. MS shall determine in each global transfer licence the defence-related products or categories of products covered by the global transfer licence and the authorised recipients or category of recipients. A global transfer licence shall be granted for a period of three years, which may be renewed by the Member State.

In the UK, according to what was clearly explained by the Export Control Organization in a notice to exporters, the global licences already exist and correspond to the UK Open Individual Export Licences. OIELs are specific to an individual exporter, but cover multiple shipments of specified items to a specified destination or a category of destination. OIELs are generally valid for a period of five years, with the exceptions of OIELs for the transfer of military items to destinations in other MS of the EU, which are valid for three years but may be renewed at the exporter's request. Thus, no amendment to the Export Control Order was necessary to implement the Directive.

### *3.4 Certification*

All the norms concerning the certification process required an amendment to the Export Control Order of 2008, because they were not included in it originally.

An important element of the Directive is the introduction of the certification process for the companies in order to identify reliable companies among different EU MS. The

486 Article 6 of the Directive 2009/43/EC. of the European Parliament and the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community [2009] O.J. L146/1.

overall aim is to offer a common European system to certify the reliability of the companies addressed in particular to foreign companies and foreign governments. According to Article 9 of the Directive, in fact "[..]The certification shall establish the reliability of the recipient undertaking, in particular as regards its capacity to observe export limitations of defence-related products received under a transfer licence from another Member State. Reliability shall be assessed according to the following criteria:
(a) proven experience in defence activities, taking into account in particular the undertaking's record of compliance with export restrictions, any court decisions on this matter, any authorisation to produce or commercialise defence-related products and the employment of experienced management staff;
(b) relevant industrial activity in defence-related products within the Community, in particular capacity for system/sub-system integration;
(c) the appointment of a senior executive as the dedicated officer personally responsible for transfers and exports;
(d) a written commitment of the undertaking, signed by the senior executive referred to in point (c) that the undertaking will take all necessary steps to observe and enforce all specific conditions related to the end-use and export of any specific component or product received;
e) a written commitment of the undertaking, [..] to provide to the competent authorities, with due diligence, detailed information in response to requests and inquiries concerning the end-users or end-use of all products exported, transferred or received under a transfer licence from another Member State; and
(f) a description […] of the internal compliance programme or transfer and export management system implemented in the undertaking. This description shall provide details of the organisational, human and technical resources allocated to the management of transfers and exports, the chain of responsibility within the undertaking, internal audit procedures, awareness-raising and staff training, physical and technical security arrangements, record-keeping and traceability of transfers and exports."[487]

The UK Export Control Amendment transposes, with minor changes, the whole Article 9 of the Directive. Amended Article 2(1) of the 2008 Order defines "certification" by reference to the Directive. New Article 28A(2) of the 2008 Order sets out the criteria for the granting of certification. These provisions are copied out from the Directive (Art.

487 *Ibidem.*

9.2). New Article 28A(3) of the 2008 Order provides that conditions may be attached to certifications relating to provision of information and suspension/revocation (Art. 9.4). New Article 28A(1) of the 2008 Order provides the Secretary of State with the power to grant certifications. Amended Article 2(1) of the 2008 Order defines "certification" by reference to the Directive.

Despite the certification system representing one of the few consistent amendments to the previous UK regulation, there are two points worth underlining.

1) Once again the certification system is largely inspired by the UK regulation which has preceded it. The ECO specifies to the exporters that "the [certification] criteria used by the Commission has been taken from the UK's existing Code of Practice on Compliance. This Code represents UK best practices for those UK companies who already currently make use of open licences.[488]

2) The UK Code of Practice is voluntary. In line with its approach to arms export control, the ECO explains to the exporters that the certification process under the Directive is voluntary and that it is worth "tackling" this – long and difficult- process only if UK companies want to benefit from general licences released by other European countries. Thus, in line with its traditional pragmatism, the UK Government does not encourage UK companies to certify unless strictly necessary in order to use general licences issued by other EU Member State companies.

Overall the UK, in line with its traditional liberal approach to the arms market, has privileged an interpretation of the Directive as a tool of liberalisation of the market, rather than as a means of building mutual confidence and creating common procedures and regulations for the arms market. It is possible to find a very similar approach in two other major EU exporters, Italy and France, where the Directive has been interpreted as a tool of liberalisation and less as a means of integration and supra-nationalisation, despite their traditional approach to arms market regulation being historically much more intrusive and regulated, compared to that of the UK.

488 http://www.businesslink.gov.uk/exportcontrol/compliance.

### *3.5 Record keeping requirements*

According to the Directive 2009/43/EC, all the holders of general, global and individual community transfers licences are obliged to keep a register updated and filled with crucial information concerning all the transfers/movement of parts and components undertaken under the umbrella of the Directive. This information is vital especially for general and global licences, given that they are not disclosed by the companies during authorisation procedures. In absence of *ex ante* control, this is an essential form of *ex post* control.

Comparing the previous 2008 UK regulation and specifically Article 29 of the Export Control Order of 2008 and Article 8 of the 2009 Directive reveals that they are very similar, and that once again the UK regulation seems to have greatly inspired the Directive. The ambiguous formula about the awareness of the end-user listed in Article 8 of the Directive, seems to have been inherited from Article 29 of the 2008 Export Control Order. In fact, according to Article 29, the exporting company must keep records on the name and address of the end-user, in so far as it is known. Equally, according to Article 8 of the Directive, a company must give information on the end-use and end-user of the defence-related product “where known”. Thus, both these legal instruments allow exporting without knowing the final destination of the defence material; it seems that the UK regulation and its extreme flexibility and liberal perspective have influenced the Directive in this crucial aspect as well.

Nonetheless, the UK national regulation presents some important differences from the norms and disposition of the European Directive. The first one was translated in an amendment to the Export Control Order and concerned the extension of the reporting requirements also to the holders of individual licences. The existing Article 29 of the 2008 Order (record-keeping requirements) is amended so that it also applies to individual licences to export/transfer items within the scope of the Directive (it previously only applied to general licences).

Secondly, there is another important difference between the two regulations which is worthy of attention: the Directive obliges exporters to keep data concerning the *value* of the material exported in the register, whereas this crucial detail is not mentioned in Article 29 of the Export Control Order. Given that this information (supported by documentation) is obligatory under the Directive, it is curious that it is not mentioned in the transposition law, nor has there been any discussion in the Parliament on this. The

obligation to report one detail crucial for increasing transparency was missed by the UK actors in this delicate game.

The Directive also offered the opportunity to make the controls on reporting requirements more regular and more systematic by the UK Government, but this opportunity to fill in the missing data on deliveries under general licences was neglected.[489]

### *3.6 The transparency initiative*

It is worth mentioning another softer political initiative which is oriented to increase transparency and regularity in reporting requirements with attention to general and global licences, which is called the "transparency initiative". This process, which could have been indirectly and implicitly triggered by EU Directive 2009/43/EC, is emblematic on the one hand of the capacity and will of the Secretary of State and the Export Control to conjugate liberalisation with controls, efficiency with transparency, and on the other, of the dynamics between governmental and non-governmental actors. It is articulated in four main steps.

1. As a first step, on 7 February 2012, the Secretary of State Vince Cable made a written ministerial statement to Parliament, where he presented his proposals to improve transparency.[490] The main proposal was to include in all open export licences a provision requiring the exporter to report periodically on transactions undertaken under open individual and general licences. The government would have then published this information. There were also two other proposals: The second one concerned information contained in standard export licence applications but not reported in the government's annual and quarterly reports. The Export Control Organisation believed certain additional information contained in licence applications could be made public without causing concern to exporters. The third proposal was to

489 In fact Article 8 of EU Directive 2009/43/EC clearly specifies that MSs shall ensure and *regularly check* that suppliers keep detailed and complete records of their transfers, in accordance with the legislation. This aspect of regularity on controls is absent in the UK 2008 Export Control Order. Regularity of controls could have strengthened a new reporting system based not on inspection of only a percentage of companies, but rather based on regular collection of data on exports and referred to OIEL and OGEL. But this reference to regularity has not been formally transposed as an amendment to the Export Control Order.

490 The full statement is available online at: http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120207/wmstext/120207m0001.htm#12020767000002, (last accessed 15 September 2018).

appoint an independent person to scrutinise the Export Control Organisation's licensing process. The role of this independent person would be to confirm that the process is indeed being followed correctly and report on their work [...].[491]

The reasons for this initiative were identified in the necessity to overcome the weaknesses of the UK reporting system, which are clearly explained by the Export Control Order "Since 1997 the government has published Annual Reports, and since 2004 Quarterly Reports, which provide details of individual export and trade licensing decisions. The information covers individual licences issued, refused and revoked by destination and gives the rating, a generic description (the "annual report summary" or ARS) and total value of items licenced to that destination."[492] But this system has some relevant limits.

(i) the information only covers individual licences – no information is provided on open general licences other than the number of registrations;

(ii) there is no information on the quantity and value of items licenced under Open Individual Export Licences since these licences are not limited by value or quantity and applicants do not have to provide this information in their licence applications;

(iii) the reports only provide information on the items licenced for export, not on quantities/values actually exported;

(iv) the reports give no information on end-use or end-users for the items licenced for export or trade.

2. The second step of the transparency initiative was represented by a questionnaire given to the companies as well as other non-governmental actors. The questionnaire revolved around some crucial preliminary questions concerning the kind of information that companies would be willing to disclose to the public (with reference to the value, quantity, description of the goods), the way of giving this information (in real time using information technology) and a quantification of the burden of regularly communicating.

491 *Ibidem.* See also Lunn (2017): p. 23.

492 Recognising that the published reports do not always meet the needs of readers the Government launched the Strategic Export Controls: Reports and Statistics website in April 2009 http://www.exportcontroldb.bis.gov.uk. This provides a user-friendly searchable database of data published from 1 January 2008 onwards. Users can create bespoke reports covering one or more destinations, specific ratings or ARS, and user-defined time periods (with a minimum 30-day period). The reports are available in a variety of formats and can be downloaded and saved to the user's own computer.

Additional information on exports would have implied high costs in terms of time and money for the companies.[493]

To this end, it is important to quote a part of the ECO survey and especially consider the question of additional administrative burdens on exporters to communicate value, quantity, end-users and other sensitive data to the government. The survey results revealed that the administrative burden was estimated to be extremely low by the exporting companies. In particular, according to the survey results, "a small company estimated £100 per annum; medium sized companies' estimates included figures of £200 per month, £3000 per reporting period and £40,000 per annum (which includes IT support); while large companies provided estimates ranging from £170 for 10 to 15 hours work inputting data, £1000 per reporting period up to an exceptional figure of £245,000 per annum for supplying information in a disaggregated format on SPIRE. The cost is dependent on the level of detail required and is clearly greater for larger companies operating across multiple sites."[494]

3. As a third step, in July 2012 the Secretary of State, based on the questionnaire outcome, was able to better define the proposals around the transparency initiative: companies would report data on open and general licences, including a description of the items exported or transferred, the destination, value and/or quantity, and some information about the end-user.[495] This data would be published in an aggregated form, by destination, in the government's quarterly and annual reports on strategic export controls, and would be searchable through strategic export control: reports and statistics website. All this information should be reported quarterly via the "SPIRE" website.

This transparency initiative was relevant for several reasons: firstly, because the UK Government was willing to fill an important gap on transparency covering open individual and general licences. Secondly, based on long held practices in the past for general and open licences, the UK Secretary of State with the help of ECO was able to find an efficient way to combine simplification through controls, efficiency with transparency whilst rethinking controls and transparency in a more interdependent

493 UK Department for Business Innovation and skills (2012). "Export Control Organisation, Transparency in Export Licensing". *Discussion Paper, March 2012.*

494 *Ibidem*, p.3.

495 When submitting a licence application, applicants would have been required to indicate whether any information in their applications was sensitive and should not be made public, and give reasons why. In considering whether to release this information the Government will take the applicant's wishes into account but will not be bound by them, see UK Department for Business Innovation and skills (2012) "Export Control Organisation, Transparency in Export Licensing". *Discussion Paper, March 2012*).

system of coproduction and export. Thirdly because it also envisaged the possibility to transmit these data quarterly or even in real time thanks to an efficient informatics system of reporting data, with a very light administrative burden. This is a modern solution that could also inspire other EU countries and the whole EU in the hypothesis of creating a common database on intra-Community transfers. Lastly, the way of taking the final decision on such a sensitive issue was really inclusive of the opinion of different companies and actors involved in the process. All the companies declared that they were in favour of a lighter informatics system of reporting and declared that uploading data on value or quantity would mean irrelevant or low costs. [496]

4. The fourth step of the transparency initiative was a step backward. In fact, one year later, on the 18th July 2013, the Secretary of State announced to Parliament important changes to the strategic export control transparency initiative.[497] The Secretary of State explained that reporting requirements on the use of Open licences under the transparency initiative "*would be scaled back significantly*".[498]

The reasons why are clearly identified by the Secretary of State in a notice to Exporters as follows: **"**Many companies have expressed concerns that this would place an unacceptable administrative burden on exporters."[499] As a result the Secretary of State has decided that "exporters will only have to provide information on the country of destination; type of end-user; number of times the licence has been used for that country/end-user type."[500] The notice also declared that the report will not be made on a quarterly but rather annual basis.

Consequently, it was no longer necessary to report the quantity, value, and description of the items exported and their classification. Thus, all efforts for transparency were reduced to merely secondary information, continuing to make it difficult to draw a clear picture (and keep effective control) of the one of the most important and sensitive sectors in the UK.

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496 This initiative could have been an important quality step for the UK in transparency and reporting for a significant part of UK arms export, aligning the first EU exporters to the other leading exporters of the UE.

497 UK Export Control Organisation (2013). "Important Changes to the Strategic Export Control Transparency Initiative". *Notice to Exporters 2013/18, available at https://webarchive.nationalarchives.gov.uk/20160701133534/http://blogs.bis.gov.uk/exportcontrol/uncategorized/notice-to-exporters-201318-important-changes-to-the-strategic-export-control-transparency-initiative/ (*last accessed 16 January 2020).

498 *Ibidem..*

499 *Ibidem..*

500 *Ibidem.*

This step backward indirectly shows the power of economic actors in the UK, and in this case the superiority of worries about commercial confidentiality over the instances of transparency and control on such a delicate and important sector for the UK economy and policy. It also shows the gap between rhetoric and official reasons (administrative burden) and real reasons (commercial confidentiality).

### *3.7 Re-export requirements*

There are also two processes that were probably triggered by the discussion linked to the approval and transposition of the Directive which are worth mentioning (despite not entailing any amendment to the UK Export Control Order or Export Control Act). Article 8.1 of the ICT Directive sets out an obligation on exporters to inform recipients of any terms and conditions of a licence relating to end use or re-export. Licences will contain a condition requiring exporting companies to inform recipients of any terms or conditions relating to end-use or re-export and to keep records showing compliance with this obligation. The UK regulation does not detail by primary law this delicate and crucial aspect for coproduction. Thus, this Article does not entail any amendments to the UK regulation, because it can be regulated (or not) by the Secretary of State, by guidance or directly in the text of the licences. However, the added value of Article 8.1 is that it poses the problem of reflecting on specific re-export controls and conditions and on increasing responsibility on the final destination of UK defence material.

In fact, in recent years some steps have been made in the direction of strengthening exports control. In 2010 the UK Government began requiring companies and states importing UK military goods to commit to not re-exporting them to countries subject to a UN, EU or OSCE embargo.[501] Furthermore, in the EUU (End-user Undertaking) form, the end-user is required to state that he will not: supply the goods to an entity known or suspected to likely use the defence material for any purpose connected with chemical, biological or nuclear weapons, or missiles capable of delivering such weapons. In addition, the UK Government has become more willing to carry out other aspects of post-export monitoring, particularly tasking embassies with collecting information on how weapons are used after delivery.

501 UK House of Commons Business, Innovation and Skills, Defence, Foreign Affairs, and International Development Committees (2010). Scrutiny of arms export controls (2010): London: the Stationery Office: pp. 27-30.

Despite these steps forward, the Commission on Arms Export Controls continued to press the UK Government to release more information about cases where re-export controls have been breached. In the 2015 CAEC Report, the Committee "recommend that the Government states in its Response whether, apart from the sniper rifles to France case in 2012, it remains unaware of controlled goods with export licence approval from the UK Government having subsequently been re-exported for undesirable uses or to undesirable destinations contrary to the Government's re-export controls and undertakings which became compulsory from July 2010."[502] In response, the UK Government stated that it was not aware of any other such cases.[503] This answer confirms that it is hard to strengthen the principle of responsibility in the UK regulation.

### *3.8 End-user controls and export requirements for OGEL*

The second step forward concerns strengthening controls on Open General Licences. Despite these aspects being introduced in the text of single general licences and not a superior legal source, they testify to the will to ameliorate controls in order to find the right balance between reducing administrative burden on the one hand and maintaining controls and transparency on the other. For example, the *text of the* Open General Export Licence*," Exports in Support of Turkish Aerospace Industries (TAI) TF-X Programme"* of July 2017, includes three aspects worthy of attention.

1) Exporters must provide in advance (with the registration) an original undertaking from the person or entity of the goods which confirms the export is for (in this case) the design, manufacture or development of TF-x, including the contact number and the *name of the items* which can be checked against the control list. It is recommended that companies renew this document every year. In other words any End-user certificate is also requested *ex ante* for general licences with the recommendation for annual renewal, considering the length, flexibility and broad range of material covered by general licences. This documentation is a very important step towards better controlling all the material which is exported under the general umbrella

502 UK House of Commons Committees on Arms Exports Controls (2015), p.19.
503 UK House of Commons Committees on Arms Exports Controls (2015). p.28.

of the general licence. It is the first time that a version of an end-user certificate is required immediately after the registration and before the effective delivery.

2) Exporters must explicitly and regularly communicate the data on their exports under general and global licences to the government via the SPIRE system. This regularity in communicating *ex post* is a consequence of the transparency initiative and a first step towards having a complete picture of all the material transferred under general licences.[504] However, as explained before, the most important data such as end use and value, is lacking from the report.

3) Thirdly, the requirement not to re-export to countries under UN OSCE or EU embargo, or not to export when that material is likely to be used for purposes linked to weapons of mass destruction (biological, chemical or nuclear), is also extended to the users of these general licences.[505]

### *3.9 Penalties*

Additionally there are a number of other aspects arising from the UK's implementation of the ITC. A range of new penalties have been introduced by the new legislation. This includes making it a criminal offence to supply misleading information in support of applications for certification. These new penalties have been included in the Export Control Order as an amendment. However, as explained above, their practical application is minimal given that there are no certified companies in the UK, according to the EU Commission CERTIDER website.

## 4. Comparing the UK regulatory regime before and after Directive 2009/43/EC: domestic change along the eight dimensions

### *4.1 Introduction*

Having given an overview of UK regulation before the approval of Directive 2009/43/EC and after the transposition of the Directive, the chapter now seeks to measure the *direction of change* more precisely and also the intensity of change at the domestic

504 Open General Export Licence, *"Exports in Support of Turkish Aerospace Industries (TAI) TF-X Programme"* of July 2017.
505 *Ibidem.*

level. To do this I used a scale of intensity for each of the eight dimensions. Overall lower values are associated with a pro-market model of European arms exports and higher values with a restrictive model, where ethical and political values prevail.

### *4.2 Political and strategic variables versus economic and industrial variables*

*UK regulation according to 2002 Export Control Act and 2008 Export Control Order before the transposition of the Directive 2009/43/EC*

The first dimension concerns the balance between economic, industrial variables and political variables (defence, security, foreign policy and ethical variables). The UK regulation has been characterised by a strong interpenetration of these two groups of variables: political strategic variables and economic variables. The old British model was characterised by the *open promotion of arms sales*, and the UK defence companies received strong support from the government. DESO (Defence export service organization within the Ministry of Defence) was the concretisation of this support. The organisational situation changed and DESO was closed in 2007, but there was still a strong interpenetration and huge staff in the government devoted to following commercial variables of arms trade. [506]

The UK regulation, unlike some other EU regulations, makes explicit reference to commercial and industrial variables. This in particular happens in the preamble and conclusion of the UK consolidated criteria on arms exports, which have the status of guidance. The preamble is emblematic because it helps to understand the spirit of the whole UK regulation. It starts by quoting exactly the UK defence industry and establishing *a crossover and mutual support* between the interest of the UK defence industry and the interest of the UK Government in terms of peace and security. The rules of a free market are a principle governing the defence trade field and producing security, whereas export criteria and bans are considered an exception to this principle and geared toward making sure arms do not finish in the “wrong hands”.

In the UK transposition of the EU consolidated criteria, which state they “may where appropriate also take into account” the effect of proposed exports on their economic social and commercial interest, the commercial dimension is also strengthened. In fact,

506 Stavrianakis (2008).

the UK consolidated guidelines specify that when considering licence applications the UK Government will "give full weight to the UK's national interest". They then explicate all the dimensions of the UK national interest paying particular attention to the commercial aspects: the potential effect on the UK's economic, financial and commercial interests, the potential effect on any collaborative defence production or procurement project with allies or EU partners; and the protection of the UK's essential strategic industrial base. "In a legal context, 'full weight' is a term given to evidence weighting, and attributes primary significance and importance to this type of evidence."[507] Thirdly, case-by-case analysis in practice allows giving priority both to commercial and ethical variables according to the single case study. Fourthly, the ministry responsible for taking formal decisions issuing export licences was the Department for Business Innovation and Skills (BIS) and recently the Department for International Trade. In conclusion, with reference to the scale concerning this first dimension, the position of the UK regulation *before* the transposition of Directive 2009/43/EC was 2.

*The principles introduced by Directive 2009/43/EC and the UK regulation after the transposition of Directive 2009/43/EC*

This UK approach is considered "economic liberal" according to which the government should regulate the market with light hands, allowing firms to "shape the market" and the rhetoric of economic efficiency, based on the presumed coincidence between commercial and political (security/defence) interests, is very similar to that of the EU Directive, according to which the freedom to move goods (extended to defence goods with some caveats) is the principle, whereas political principles of national regulation (foreign policy, security policy and international law principles concerning the respect for human rights, the prevention of conflicts) in this sensitive field of arms exports, are exceptions which must be used only in extraordinary cases, if the essential security interest is at stake, under certain conditions (necessity and proportionality).

507 UK Working Group on Arms,(2014). *The updated (2014) UK Consolidated EU and National Arms Export Licensing Criteria: comparison with the original Consolidated Criteria and with the EU Common Position*, p. 4. Online report available at: https://www.saferworld.org.uk/resources/publications/822-the-updated-2014-uk-consolidated-eu-and-national-arms-export-licensing-criteria (last accessed 16 October 2019).

Finally, in overall spirit the UK regulation seems to have inspired the Directive with the difference that liberal auspices do not limit within European boundaries but extend to the European level. Thus, the Export Control Amendment Order does not imply any modification to the UK regulation and does not entail any change to the balance between economic and industrial variables with the political and ethical ones. As a consequence, the UK situation stayed the same after the approval of the Directive and the entry into force of the transposition law. Thus, in 2012 UK regulation assessment was 2 again.

### *4.3 Primary law versus secondary law*

*UK regulation according to 2002 Export Control Act and 2008 Export Control Order before the transposition of the Directive 2009/43/EC*

The UK regulation in 2009 (ECA 2002 and ECO 2008) offers general guidelines and leaves it to secondary law to define the details concerning the three fundamental aspects of any regulation a) the criteria and bans on exports have the status of guidance and can be modified by the executive; b) it is the secondary law which regulates terms and conditions of the three fundamental kinds of licences, including all the articulation concerning end-user controls and re-export requirements and c) lastly, the quality and quantity of information to be reported to the Parliament are decided at the secondary law level. Consequently, UK regulation was evaluated as 2 in 2009.

*The principles introduced by Directive 2009/43/EC and by the UK regulation transposing the Directive (2012 Export Control Amendment Order)*

The balance between primary and secondary law remains unchanged after the approval of the Directive and the entry into force of the transposition law. In fact, all the details concerning the application of the Directive and of general and global licences (with the exception of few aspects concerning certification process and penalties) are regulated at the secondary law level or via “Notes to the exporters”. Thus UK regulation after the transposition of the EU Directive still ranked 2 in 2012.

### *4.4 Legislative branch versus executive branch*

*UK regulation according to 2002 Export Control Act and 2008 Export Control Order before the transposition of the Directive 2009/43/EC*

A characteristic of the UK regulatory model was the flexible discretion the government enjoyed, both in authorisation procedures and in establishing criteria and bans. This discretion was particularly broad in the Eighties but, after the scandals of arms export to Iraq, the Scott Report explained that this discretion gave the government "an unfettered power to impose whatever export controls it wishes and to use those controls for any purpose it thinks fit" and recommended increasing transparency and accountability. [508] As a consequence, with the 2002 regulation, the legislative branch put a framework and limits in arms export policy. Firstly, it established the obligation to present a report to the Parliament on the arms trade of the previous year. Secondly, it introduced the obligation for the statutory instruments, implementing the 2002 Export Control Act, to be approved by both houses of parliament. However, within this framework the executive still enjoyed a marge of discretion. This power included all three fundamental pillars of any arms export control regulation: bans and criteria, licensing procedures and control and transparency. In fact, according to Article 9 of the Export Control Act, a) it is the executive which must give guidance concerning bans and criteria and can decide the content of the criteria; b) it is the executive and in particular the Secretary of State who may decide when using general licences and individual licences (with few exceptions established) whether to put conditions on licences including end-user assurances or not; and c) lastly, the legislative imposes the duty to present to the Parliament an annual report on UK strategic arms exports, but it is up to the executive to establish the quality and quantity of information to be reported. The power of the UK Parliament is successive to the licence granting from the government and the degree of transparency is medium, considering that some

[508] British House of Commons (1996). *The Right Honourable Sir Richard Scott, Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions: Return to an Address of the Honourable the House of Commons dated 15th February*, HC 1995/96 115 (Her Majesty's Stationery Office: London, 1996).

crucial details are lacking. Thus, the evaluation of the UK regulation before the approval of the EU Directive was 2.

*The principles introduced by Directive 2009/43/EC and by the UK regulation transposing the Directive (2012 Export Control Amendment Order)*

In line with this UK tradition, the 2012 Arms Export Control Amendment Order (which is redacted by the executive but which must be approved by both houses of Parliament), introduced only a few amendments concerning the certification process (which remains voluntary) and penalties and a few small adjustments to the existing regulation. In contrast, whereas all the details about when to use general and global licences, terms and conditions for issuing general licences, very delicate cases regarding end-user control, re-exports, and differences between parts, components and finished products are not mentioned in the Export Control Amendment, but rather delegated to the Secretary of State who regulates them by guidance or even in the text of the single licence. This is in line with the spirit of the UK regulation oriented towards maximum flexibility in applying the general UK primary law guidelines, in order to adhere to the single case.

Thus, the balance between executive and legislative power stays exactly the same as before the approval and transposition of EU Directive 2009/43/EC. As a consequence, the scaling stayed the same after the approval of the Directive and entry into force of the transposition law. In 2012 UK regulation was assessed as 2 again.

### *4.5. Transparency versus opacity*

*UK regulation according to 2002 Export Control Act and 2008 Export Control Order before the transposition of the Directive 2009/43/EC*

From a strictly legal point of view, the 2002 Export Control Act formalises the obligation for the government to present to the Parliament an annual report on the strategic exports undertaken in the previous year. However the quality and quantity of the data are not established by primary law, but fall under the discretion of the government.

In practice, since 1997 the government has published annual reports on individual licences, issued, refused and revoked by destination. These reports give the rating, a generic description of the good and total value of items licenced to that destination.

There are also three different documents that are available to the Parliament and the public. Thus, in the UK there is a wealth of information on strategic arms exports. However, in practice the UK transparency model is not complete because of the lack of information on a very sensitive, crucial aspect: the value of general licences which cover a relevant part of UK arms exports. These data would have been essential for both transparency and controls and to have a reliable picture of UK arms exports. Furthermore, unlike most European countries, there is no information on deliveries, which are important for transparency and control reasons. The lack of this information is perfectly legal because primary law does not specify the level of transparency. Thus the overall mark assigned to the UK regulation before the approval of the Directive was 2.

*The principles introduced by Directive 2009/43/EC and by the UK regulation transposing the Directive (2012 Export Control Amendment Order)*

Despite the Directive having been criticised by the NGOs for the lack of explicit reference to transparency, it introduces in Article 8 the obligation for those companies using general, global or individual intra-Community transfer licences to keep updated registers and to report regularly to the government data on the quantity, value, description of the goods, end-users and other details. A faithful transposition of the EU Directive would have increased UK transparency on arms export by introducing the obligation to report the value of exports under global and general licences, albeit *ex post*, and introducing regular communication of these data to the government as well as offering the government regular information on effective deliveries.

However, the UK Government did not opt for a formal amendment to the ECO, but for a softer and more inclusive political initiative, the “transparency initiative”, aimed to fill the lack of information on general and open licences, with explicit reference to value and quantity. This softer initiative was further reduced in its impact, because the companies asked to delete the reference to the *value and description* of the goods. Thus, at the end of this long process the increase in transparency for open licences was limited to reporting data on the country of destination (OIEL) and the number of registrations per year, with a long list of exceptions. Overall, compared to previous UK regulation, the “transparency initiative”, has entailed a slight marginal increase in *ex post* transparency concerning open licences. However, the value of open general and

individual licences is still excluded from the annual report. Thus, UK regulation after the transposition of the Directive increased by half a point, to 2.5 in 2012.

### *4.6 Responsibility versus delegation*

*UK regulation according to 2002 Export Control Act and 2008 Export Control Order before the transposition of the Directive 2009/43/EC*

The UK regulation concerning end-user controls and re-export is fragmented and differentiated. In fact, this delicate and crucial aspect is not regulated by primary law but instead is delegated to guidance by the Secretary of State. Thus, firstly end-user controls change according to the kind of licences. Exporters using Individual and Open Individual Licences are required to attach an end-user undertaking whereas companies exporting under general licence are not. Furthermore, there is an escape route of not reporting the end-user if it is not known to the exporters. As far as re-export requirements are concerned, the UK Government in 2002 adopted general guidelines which allow the possibility for placing conditions based on the strategic function of the material exported, the reliability of the importer country, and other variables. Thus, the overall assessment of the UK regulation is 3.

*The principles introduced by Directive 2009/43/EC and by the UK regulation transposing the Directive (2012 Export Control Amendment Order)*

The Directive makes a clear distinction between transfers within EU boundaries and exports to third countries. In the first case, it encourages MS to minimise the use of end-user certificates to a few cases involving security concerns whereas they allow each MS to set conditions for a partner country on re-exports. This is in line with the European Court of Justice's establishment of the mutual recognition principle rule stipulating that products "lawfully produced and marketed in one of the MS must be allowed by the national market". The principle is a real driving force for European integration and expansion of European law, which might favour a process pushing MS with stricter or more regulated laws and politics to harmonise with those having more flexible or lax regulation, in order to maintain their competitiveness. However, for exports to third countries the Directive allows MS the possibility to put export conditions

and controls in harmony, considering that these aspects fall under the realm of a Common Foreign and Security Policy.

The 2012 Export Control Amendment Order does not make any distinction between intra-Community transfers and exports, in line with its openness to a global market.
Overall, the global UK regulation concerning end-user control and re-export remains unchanged after the approval of the Directive and the entry into force of the transposition law in 2012. However, the debate on final destination triggered by the approval of the Directive has slightly improved end-user controls with respect to two political dimensions. The first concerns re-export requirements. In recent years some steps have been taken towards strengthening exports control. In 2010 the UK Government began requiring companies and states importing UK military *goods to commit to not re-export them to countries subject to a UN, EU or OSCE embargo, or for any purpose* connected with chemical, biological or nuclear weapons, or missiles capable of delivering such weapons. This step has proven not to be very strict but merely a sign of good intention about the future. The second (small) step forward concerns end-user controls for OGELs: in the text of some new general licences the exporter is required for the first time to provide in advance an original undertaking form to the importer which confirms the export is for that specific use including the name of the item exported. It is recommended that this End-user certificate form for general licences be renewed every year. In the following years, the situation was slightly ameliorated from two main perspectives. Firstly, in 2010 the UK Government began requiring importing companies and states to commit to not re-exporting them to countries subject to UN, EU or OSCE embargoes, or for purposes connected to weapons of mass destruction. But these commitments are generic. Secondly, for some general licences the UK Government started to require a sort of end-user assurances *ex ante***.** It is recommended that this End-user certificate form for general licences be renewed every year.

Thus, the assessment of the UK regulation after the approval of the EU Directive rose slightly to 3.5.

### *4.7 Common standards versus fragmentation*

*UK regulation according to the 2002 Export Control Act and 2008 Export Control Order before the approval and transposition of the Directive*

UK regulation has always been characterised by maximum flexibility. Firstly, there are several kinds of licences: general, open individual and individual licences which are subdivided into several other subcategories. Each kind of licence has a different type of control and the Secretary of State may change terms and conditions for single licences. Equally, the export criteria are vaguely formulated, without a unique interpretation, but on the contrary, favour a *case-by-case* approach, based on a form of shopping between different sources, criteria and interpretations and leaving the final say to the Secretary of State. Overall, the system is set up to leave maximum flexibility of the regulation and adherence to the single case study and the wider marge of manoeuvre to the executive in arms export control policies. Consequently, the position of the UK regulation before the transposition of the EU Directive was 3.

*The principles introduced by Directive 2009/43/EC and by the UK regulation transposing the Directive (2012 Export Control Order Amendment)*

The Directive is heavily inspired by UK regulation. Given the similarities between the two systems (both based on a three kinds of licence) the degree of fragmentation remains substantially the same before and after the approval of the Directive. The UK regulation just adds another general licence to the 37 already existing in 2009. Most of the modifications concerning general and global licences (such as terms and conditions for issuing general licences, very delicate cases concerning end-user control, re-exports, difference between parts, components and finished products) were introduced using guidance, or intervening directly in the text of the licences, or via communications of the Secretary of State, keeping in line with past high levels of flexibility. Thus, the assessment of the UK regulation after the approval of the EU Directive remains 3.

### *4.8 Checks and balances versus centralisation*

*UK regulation according to 2002 Export Control Act and 2008 Export Control Order before the transposition of the Directive 2009/43/EC*

The UK regulation is characterised by a strong centralisation of several powers into the hands of the Ministry for Business Innovation and Skills and in particular those of its head: the Secretary of State.

The Minister who heads BIS - the Secretary of State for Business, Innovation and Skills - undertakes a wide range of tasks: he formally decides on whether to issue, refuse, suspend or revoke export licence applications in accordance with the applicable legislation and announced policy, establishes terms and conditions for licences, including end-user certificates and norms for re-export, authorises inspections, defines the political guidelines and content of the export control criteria. However, several governmental departments and ministries (nine) participate in assessing export licence applications. In one case it is reported that the executive branch influenced the judiciary thus compromising the division between the three fundamental powers. It is reported that the UK Serious Fraud Office was stopped from proceeding with investigations into allegations of bribery and false accounting by BAE Systems in relation to arms sales to Saudi Arabia. This was because the UK Government argued that continuing the investigation "might have led to a withdrawal of Saudi diplomatic cooperation on security and intelligence issues and thus represented too great a risk to national security. Thus this investigation was dropped." [509] This example underlines the scope the executive power had to centralise decisions, interpreting national interest. The position of the UK regulation before the transposition of the EU Directive was at 2.

*The principles introduced by Directive 2009/43/EC and by the UK regulation transposing the Directive (2012 Export Control Amendment Order)*

In line with this tradition of centralisation, the 2012 Export Control Order Amendment gives the Secretary of State the responsibility for the certification procedures and releasing certificates. Furthermore in line with the UK tradition the Secretary of State

509 Stavrianakis (2010): p. 1.

will define terms and conditions for issuing general and global licences. Thus, the 2009 Directive and the transposition law of 2012 do not change the degree of centralisation. Accordingly, the rank of the UK after the transposition of the EU Directive remains the same 2.

### *4.9 States versus companies*

*UK regulation according to 2002 Export Control Act and 2008 Export Control Order before the transposition of the Directive 2009/43/EC*

The UK regulation has traditionally been based on *mutual trust between the state and companies.* The wide use of general and global licences since the late nineties has been based on trust with companies, giving these commercial actors the responsibility for keeping registers and for the final destination of defence products. This is in line with the UK approach to the arms market and is considered to be economically liberal according to which the government should regulate the market with a light hand, allowing firms to shape the market. Accordingly, the overall mark assigned to the UK regulation before the transposition of the Directive is 2.

*The principles introduced by Directive 2009/43/EC and by the UK regulation transposing the Directive (2012 Export Control Amendment Order)*

The new regulation does not change the relationships between states and companies. They must keep their registers in order and communicate *ex post* all the data concerning transfers and exports under general and global intra-Community licences. They are responsible for communicating all export conditions and restrictions dictated by their governments to partner companies from other EU MS. Undertakings should declare to their competent authorities when requesting an export licence to third countries whether they have abided by any export limitations attached to the transfer of defence-related products by the MS which issued the transfer licence. Thus, the distribution of duties and responsibilities between the UK state and companies does not change after the approval of the Directive and entry into force of the transposition law. The score is still 2.

To summarise this assessment, the UK is a very particular case because its model heavily inspired the Directive. Thus, the degree of misfit is really low and the changes between the previous regulation and the transposition measures are marginal,

particularly from a strictly legal perspective, whereas the influence of the UK model appears much stronger in shaping the spirit and the letter of the EU Directive. Overall six of the eight dimensions stay the same and there is no change as an effect of the Europeanisation process and transposition of the Directive. However there are two dimensions, transparency and national responsibility, which demonstrate a very slight political change in terms of increasing transparency and end-user controls. These two marginal changes go in the opposite direction from the Italian case.

## 5. Conclusion

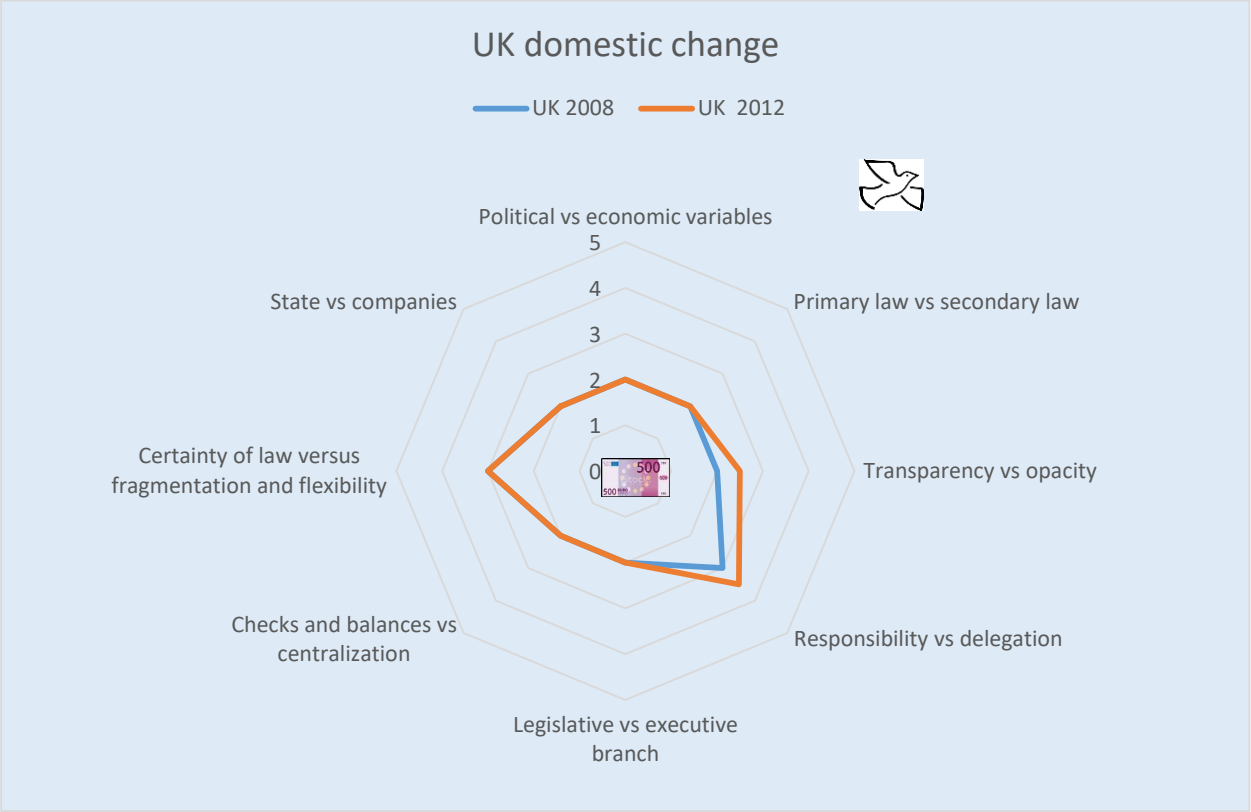
### *5.1 The UK regulation before the approval of the ICT Directive*

The UK was considered an example of Liberal Market Economy characterised by very light intervention of the state in the market. The arms export control regulation that characterised the UK immediately before the approval of the Directive reflected the overall liberal model and was found to be the closest to the ideal arms export control from the perspective of a “pro-export” model. In fact, UK arms export control regulation before the transposition of the Directive was characterised by very low values for all the eight dimensions, ranging from 2 to 3. The degree of misfit of the UK domestic regulation compared to the EU Directive guidelines was equally low. What happened after the creation of a European Defence Market with the implementation of Directive 2009/43/EC? Did the values of the eight dimensions change? In which direction? Where and how great has domestic change been in the UK?

### 5*.2 Empirical findings*

The overall result is that the UK is only marginally influenced by the Europeanisation process in this field and in particular by the ICT Directive. In fact, the political and institutional changes following the domestic transposition of the Directive are really marginal. Only two of the eight dimensions change (transparency and responsibility). These two dimensions change only slightly albeit they move in the opposite direction of the Italian case.

Figure 6.1 Direction and intensity of domestic change along eight dimensions with the transposition of Directive 2009/43/EC: the UK case (changes from 2008 to 2012)




 restrictive model

 pro-industry model

### *5.3 The eight dimensions*

In particular, after having analysed each of the eight dimensions, I found that the UK a) already had a regulation in which commercial variables played an important role and were given full weight in arms export policies; b) the executive branch already enjoyed a wide margin of discretion, in regulating the three pillars of any export regulation (transparency, export criteria and procedures); c) primary law dictated only a general framework and delegated most of the activities of the field to the executive: export control orders, guidance, other acts of bureaucratic authorities *in order to maintain a high degree of flexibility to regulate this delicate field and to conform to the individual*

*single case context; d)* the government decided the level of transparency and the quality and quantity of data to be reported to the Parliament: there is an abundance of information and transparency but some crucial data such as value and deliveries are not included; e) end-user and re-export control can change according to the kind of licences, and the principle of delegation to the partner country, the awareness of the exporting company and the government about the final end use; f) most of the power is centralised in the hands of the Department for Trade and Industry and its head, the Secretary of State; g) companies enjoy a high level of trust by the government; g) the UK regulation is characterised by great differentiation from case to case and by many different kinds of licences and related controls.

Thus, the policy-related institutional effects of the Directive are marginal (half a point) and involve only two of the eight dimensions: transparency and responsibility. I registered a very slight increase of transparency (because the approval of the Directive triggered a process aimed at reporting the number of general licences registrations and end-users of open individual licences) and a very slight increase in responsibility (because after the approval of the transposition law, some general norms for re-exports and a form of end-user assurance for some general licences were also introduced).

Table 6.4 Intensity of domestic change along eight dimensions with the transposition of Directive 2009/43/EC: the UK case (changes from 2008 to 2012)

| | **UK 2008** | **UK 2012** |
|---|---|---|
| Political vs economic variables | 2 | 2 |
| Primary law vs secondary law | 2 | 2 |
| Transparency vs opacity | 2 | 2.5 |
| Responsibility vs delegation | 3 | 3.5 |
| Legislative vs executive branch | 2 | 2 |
| Checks and balances vs centralisation | 2 | 2 |
| Certainty of law versus fragmentation and flexibility | 3 | 3 |
| State vs companies | 2 | 2 |

### *5.4 Side findings*

*Uploading a UK model and the power of attraction of the UK model*

The UK has been only marginally influenced by the Europeanisation process, but UK regulation has heavily influenced the Europeanisation process. This dynamic exists in other areas of the common market. Despite its initial scepticism towards supranational regulation of the EU internal market, the UK Government has shown an extraordinary power of influence over the ICT Directive. The attitude of the UK Government toward the Directive can be explained with the words of one UK functionary: once they decided "not to leave", because they pragmatically understood that the cost in terms of burden did not outweigh the drawbacks in terms of liberalisation of the arms market, they decided "to lead" and to influence the process, and tried to be influenced as minimally as possible. Before the House of Commons the UK Secretary of State explained that they argued for a set of proposals which were much more akin to the scheme that we have in this country. Finally the Export Control Organisation explains to the exporters that there are very minimal changes compared to the previous regulation, because the UK "heavily influenced" the ICT Directive.[510]

*Contradictions of the UK model*

When observing the uploading and convergence towards the UK model, it is important to remember its contradictions. The UK model in the armaments field is not a real pure pro-industry model. In fact, on the one hand there is "less state" in arms export control regulation and as state ownership. On the other hand, there is the heavy presence of the state in supporting arms exports, in terms of subsidies, research funds and political and financial support (in terms of government and embassy personnel employed to promote UK arms exports, also after the closure of DESO) as an expression of that military Keynesism which characterises Anglo-Saxon models and which grows in LMEs. This model (or military Keynesianism model) has been uploaded at the European level and it is now characterising the EU Commission strategy in this field.

*Leading role of UK actors*

Second, this impressive power of influence has been exerted by the whole country system involving both a) government and b) societal actors (defence companies and

510 Strikwerda (2017).

NGOs) which demonstrate extraordinary ability and familiarity to move within the machinery and governance of European institutions, and to lead networks of other similar actors at the European level. This is also due to several similarities between the EU and UK models (soft governance leaving a wide space to societal actors, strong executive with initiative power, centrality of the market, competitiveness and freedom of movement of goods, flexibility) and to the low degree of misfit with the European regulation. The UK influence and leading role can be found also in other important EU acts and institutions in the armaments field, such as the 1998 European Code of Conduct on arms exports and the creation of the European Defence Agency. In the case of the European Code of Conduct, for example, the wording of the national UK criteria published by the Labour party in 1997 preceded and is nearly identical to that of the criteria of the 1998 European Code of Conduct. In the case of EDA, the Europeanisation of British defence policy demonstrates that it is the UK pushing its preferences onto the EU and not the reverse.[511]

In conclusion, the UK has sharply influenced and shaped the wording of the ICT Directive and has been only marginally influenced by the Europeanisation process. Similar conclusions were reached by Dover analysing the process that led to the creation of the European Defence Agency. He found that the UK was able to advance its preferences at the European level and saw its influence multiply as a result. [512] According to Mawdsley, ”(T)he British narrative on armaments cooperation seems not to be particularly transformed by the Europeanisation process, but on the contrary has sharply influenced this process.” [513]

511 Dover (2007).
512 *Ibidem.*
513 Mawdsley (2015): p.153.

# Chapter 7. Conclusion

## 1. Introduction

The overall aim of the dissertation was to investigate the direction of travel of the Europeanisation process in the arms export control field. It started from three fundamental questions:

1) As a consequence of the transposition of the EC Directive 2009/43/EC what and how much has changed domestically in Italy, the UK and Hungary?

2) Are MS converging, and if so, what do they converge around?

3) Is the Europeanisation process making the arms export control field more or less restrictive?

In order to answer these three questions, I narrowed the field of analysis to one directive, Directive 43/2009, and three case studies, Italy, the UK and Hungary. To assess the direction and intensity of domestic change I used two models – a restrictive arms export control model and a pro-industry model - and eight dimensions. In order to measure the *direction of change* more precisely, and also the intensity of change at the domestic level, I used a scale of intensity; a synoptic scheme which indicates the direction and degree of change for each of the eight dimensions. Then, I compared the national regulations of the three MS as they were *before* the approval of the Directive with the domestic laws (or regulations), transposing the Directive. Each dimension was articulated along a scale ranging from 0 to 5 described in a synoptic table, which helped to identify the direction and assess the entity of domestic change. Lower values for each dimension corresponded to a commercial arms export regulation model, whereas higher value indicated an ethical arms export legislation model.

This final chapter is divided into three main sections. The first is devoted to my empirical findings. It compares domestic change in the three case studies and then, using the same taxonomy, assesses if MS are converging and, if so, around which arms export control model are they converging. The second section focuses on the theoretical implications of these findings and the third section discusses future

trajectories of research.

## 2. Empirical findings

### *2.1 The domestic arms exports control regulation before the approval of the Directive in the three case studies*

The analysis concerned three case studies which were extremely different with respect to their arms exports control regulation immediately before the approval and transposition of the Directive on Intra-Community transfers in 2007: one country had especially intrusive and strict regulation (Italy), one country had more flexible regulation (the UK), and one country had newer regulation (Hungary).

Italy was characterised by a restrictive arms exports control law which obtained high values for most of the eight dimensions, all ranging from 4 to 5, very near to the ideal restrictive arms exports control model. Actually, Italian law 185/90 was considered to be a result of the pressure from public opinion and NGOs for arms control and disarmament to control arms exports and place constitutional and ethical principles over commercial interests. Thus, the Italian regulation was characterised by a high level of transparency, strong control of the Parliament over the discretion of the executive power, and intrusive end user control in arms exports.

The UK, on the other hand, had a very flexible and light touch arms exports control model, with low values for most of the dimensions, ranging from 2 to 3. This model was based on collaboration between state and companies, which enjoyed a high degree of confidence. The written regulation was lighter touch than in Italy. The executive enjoyed a wide margin of discretion and flexibility in arms exports licence granting and arms exports control, including end user controls. The overall regulation was less prescriptive and characterised by a great differentiation from case to case and by different kinds of licences.

Hungarian arms exports control regulation fell in the middle between Italian and British regulations, with most of the dimensions ranging around 3 or 4. Some of these values had increased thanks to the pressure the EU had exercised before the approval of Directive 43/2009 on the new EU members from Easter Europe in order to strengthen their arms exports control regulations, which had been too lax for European standards.

The three case studies also differed in the defence industry dimension, with Italy and the UK placing among the six strongest EU exporters and Hungary with a small but dynamic panorama of defence companies. Furthermore, each of these three case studies was characterised by different legal and economic contexts and different relationships between the state and the market, different policy paradigms in the defence sector, different roles and weight of the actors in the field, different legal traditions, and by distinct varieties of capitalism.

Starting from these very different case studies, I investigated what happened after the transposition of Directive 2009/43/EC. Where did domestic change occur in these three countries and how significant was the change? Have regulations become more or less liberal? The initial hypothesis was that, despite some great differences, these three case studies tend to converge around a similar arms exports control model as a consequence of the domestic change generated by the Europeanisation process in this field.

### *2.2 Intensity and direction of change: different patterns for the three case studies*

The empirical findings firstly show that the dynamics and intensity of change are different in the three countries. The convergence is not uniform.

The Italian case which started furthest from the center and which was very strict, was characterized by the highest intensity of change. Empirical findings show a clear and consistent domestic change towards a pro-industry model. In fact, six of the eight dimensions consistently lose points after the transposition of the Directive, whereas only two of the eight dimensions remain stable.

The research found:

(a) the balance between legislative and executive power changed in favour of the executive branch (decreasing from 4,5 to 3);

(b) the area covered by primary law in favour of secondary law or discretion of the executive and administrative authorities, particularly concerning general and global licences, decreased from 5 to 3;

(c) the national responsibility for the final destination of co-produced goods was reduced from 5 to 3 in favour of the mutual recognition principle;

(d) collegiality in the decision-making process was reduced from 5 to 3,5 in favour of new centralisation around UAMA, an administrative body of the Italian Foreign Ministry;

(e) the certainty and clearness of primary law norms in regulating arms exports

decreased from 4 to 3, meaning some crucial detailed are now decided at secondary law level or at an administrative level;
and (f) the power of the state decreased in favour of the power of the companies and their capacity for autoregulation, from 5 to 3.
Some of these changes concerned not only intra-Community transfers, but also indirectly effected the regulation of exports outside EU boundaries.
Only two dimensions remained, at least formally, static: these are (g) the level of transparency and information contained in the annual report to the Parliament and (h) the weight of political and constitutional variables compared to economic ones in the spirit and principles of the law. In both cases, the NGOs who had campaigned for Law 185/90, have played a decisive role, by pressuring Members of Parliament and the Italian government to maintain at least the same spirit, principles and level of transparency for the new kinds of general and global licences as well.
In Italy, domestic change also concerns some fundamental aspects which were not directly and explicitly required by the Directive, but which constitute the pillars of any arms export control regulation, such as the balance between legislative and executive, between primary and secondary law, and affected the same principle of responsibility upon which the whole Italian regulation is built. Furthermore, using Peter Hall's terminology and parameters, this change did not just involve basic instrument settings (first order change), and the techniques or policy to attain the goals of a law/policy (second order change), but the overarching goals that guide policy. Thus, in Italy there was a "third order" change modifying the goals that guide policy and its "philosophy", its fundamental paradigm, after the transposition of EU Directive 2009/43/EC[514].
This consistent domestic change in the direction of a pro-market, pro-export model finds some analogies in the literature concerning case studies similar to Italy with regards to the defence industry and regulation which is restrictive or prescriptive.
These changes were not limited to Italy, and research on other cases supports my findings. According to Lucie Béraud-Sudreau's study, the French arms exports control model has been progressively liberalised and the ICT Directive has represented an opportunity for a radical change of philosophy and structure of the entire domestic arms export control regulation in a pro-export direction[515]. Similarly, Malena Britz who analysed the evolution of the Swedish arms exports control model, claims that

514 Hall (1993).
515 Béraud-Sudreau (2014).

Europeanisation has gone hand in hand with marketization[516]. She concluded that "market oriented UK model of defense industry policy was transferred to Sweden and the changes in Swedish defense industry policy were then part of the emerging European defense industrial policy". [517]

Hungary followed the same direction of change as Italy, towards a pro-market, pro-industry model, but the magnitude of change is much more limited than in Italy, both for the number of dimensions involved and the intensity of change for each dimension. In fact, domestic change concerned only four of the eight dimensions:
(a) checks and balances diminished in favour of a more centralized system from 3 to 2 (thus reversing the trend toward a pluralistic model of arms exports which had been initiated with the collapse of the communist regime);
(b) the detail and clarity of the law decreased in favor of a greater flexibility from 5 to 4;
(c) the control of the state over the companies diminished by one point from 4 to 3 in favor of greater confidence and trust given to defence industries in managing their arms exports;
(d) and the weight of political and strategic variables decreased from 5 to 3 by 2 points in favor of economic variables which were listed for the first time among the principles inspiring arms export control policies.
Unlike Italy, the Hungarian transposition of Directive 43/2009 did not impact fundamental aspects of the domestic regulation concerning transparency, the balance between executive and legislative, control on final destination of defence materials, and the degree of detail of primary law. The Hungarian government was able to introduce the changes required by the Directive without impacting its fundamental pillars of domestic regulation. Thus, in Hungary, the scope of domestic change is limited to policy instruments and does not touch the fundamental paradigms nor does it change policy goals. However formally it appears perfectly compliant with the EU Directive.

Lastly, the United Kingdom presents different patterns from the first two countries. Firstly, it goes in the opposite direction with respect to the other two case studies. In

516 Britz (2010).
517 *Ibidem,* p.4

fact, the EU pressure boosts towards an *increase* of the value of some dimensions and thus towards a restrictive arms exports model. However, this pressure is extremely weak and concerns only two dimensions, because of the strong resemblance between the UK domestic arms exports control model and that introduced by the ICT Directive. The two dimensions that show a slight increase in their value are transparency (from 2 to 2.5) and responsibility for the final destination of exports (from 3 to 3.5), thus approaching the values of the other two countries for these dimensions.

However overall the UK does not show any consistent domestic change. Instead, it remains stuck in its original position for the other six of the eight dimensions. Unlike Italy, the UK appears only marginally influenced by the Europeanisation process. On the contrary, the UK seems to have exercised an extraordinary power of attraction with respect to the other two countries, and an ability to influence the Europeanisation process, starting from uploading important characteristics of their regulation at EU level. This dynamic exists in other aspects of arms field-such as its influence on the European Code of Conduct on Arms Exports and in shaping the European Defence Agency, as widely explained by Davis, Dover and Cooper respectively[518]. This policy area tracks UK influence in other areas of Single Market policy. For example Egan, has described the phenomenon of "first mover advantage", where British firms have sought to get the national standards that they operate under accepted by the European standards agencies in order to minimise costs to British firms and force the greater regulatory adjustment on competitors.[519] Padgett cites Bomberg and Peterson in noting how countries seek to gain competitive advantages for their firms and industry in the Europeanisation process by seeking to 'upload' national policies to the EU level where they will then be adopted by the other MS.[520]

In conclusion, on the basis of this empirical work, it emerged that Italy has been characterised by an intense change in most of the dimensions, covering both explicit request of the directive, but going beyond what required by the directive in the direction of the liberalisation of arms export control market, increasing the role of the executive in respect to the parliament, of secondary law in respect to primary law. The overall

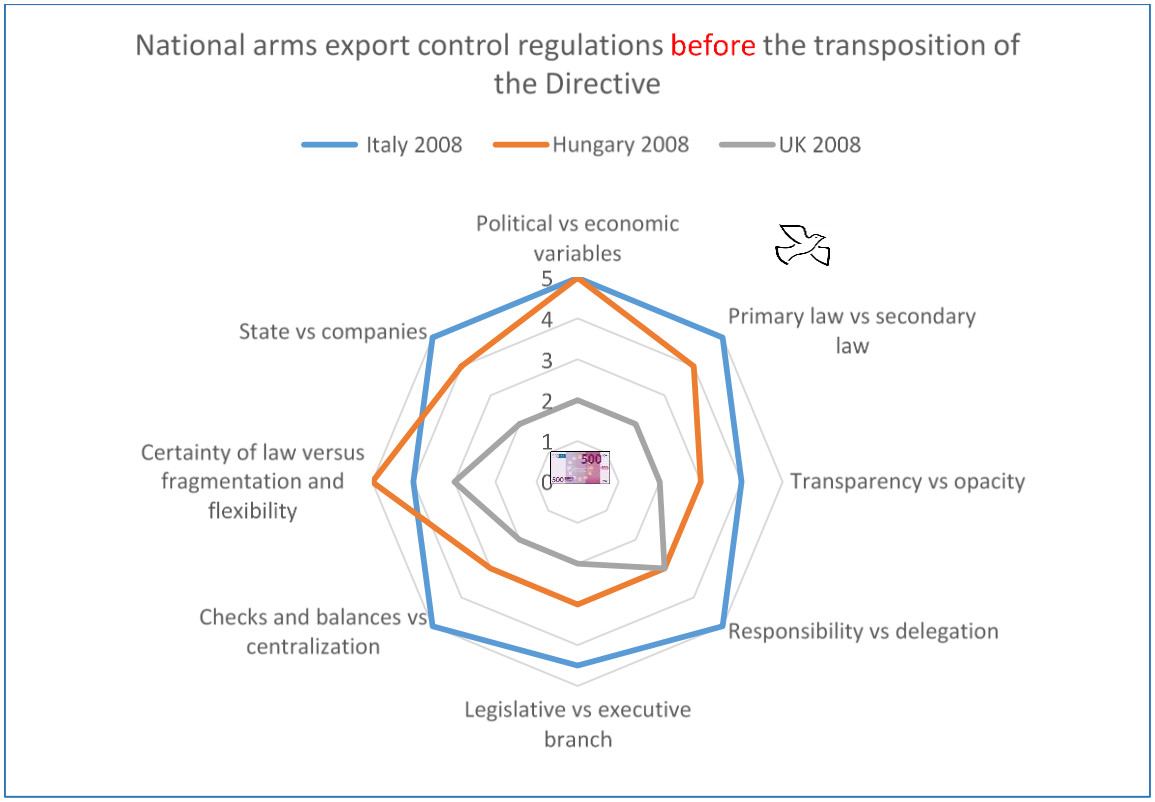
518 N. Cooper, (2000). "Arms exports, New Labour and the pariah agenda." *Contemporary Security Policy* 21(3): 54–77; Davis (2002); Dover (2007).
519 M. Egan (1988). "Regulatory strategies, delegation and European market integration." *Journal of European Public Policy* 5(3): 485-506.
520 S. Padgett, (2003). "Between synthesis and emulation: EU policy transfer in the power sector." *Journal of European Public Policy* 10(2): 227-245.

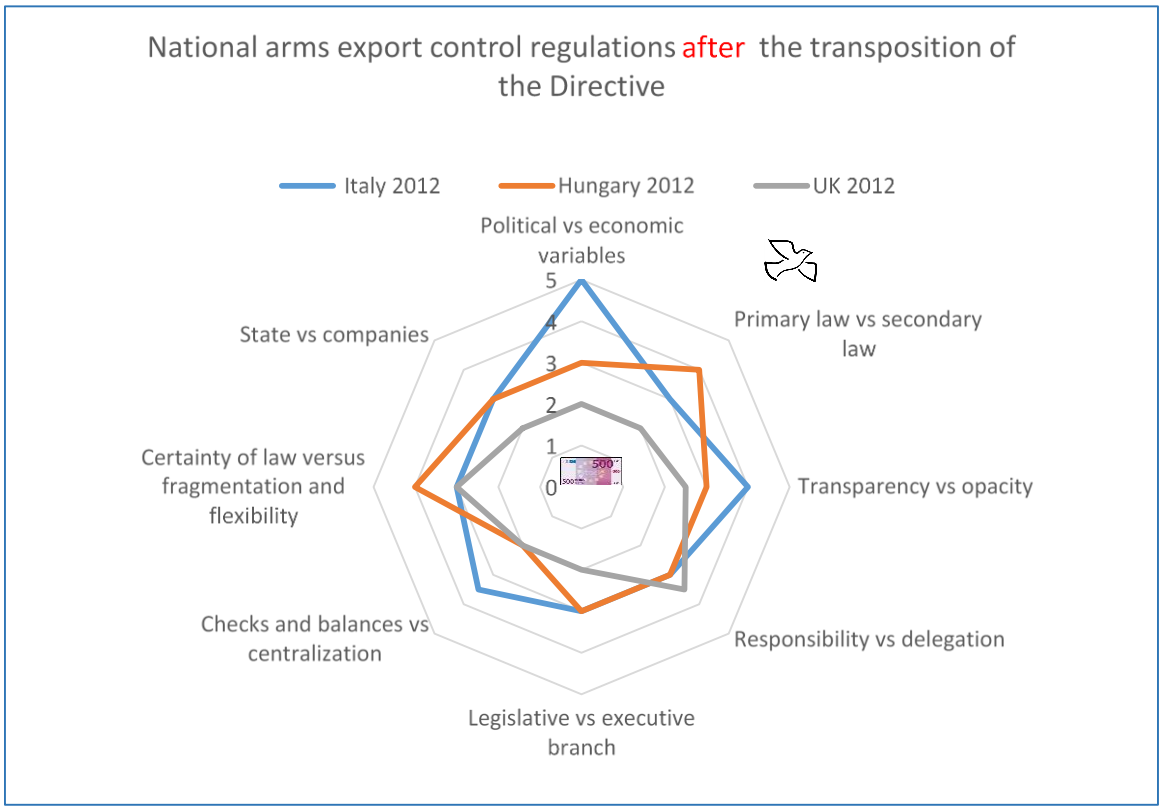
direction is towards a UK arms export model, a liberal and flexible arms export model (albeit with some contradiction that will be returned to later). Hungary has moved in a less marked and intense way once again towards a more flexible model, maintain however some pillars of their regulation untouched such as the relationships between executive, the level of transparency Lastly the UK remains stable, that is it does not register any change. This is due to the low degree of misfit between the British regulation and the ICT Directive disposals on the one hand, and to the high capacity to upload domestic regulation in the decision making phase, so that it was not necessary any formal change to national regulations but just some limited changes included in administrative decrees. Overall, it seems that UK exercises its power of attraction in respect to the other two countries.

### *2.3 Convergence around what? The direction of the Europeanisation process in the arms export control field*

According to the empirical findings, the three case studies follow different directions of domestic change and are characterised by different intensities of change. Overall the UK seems to be more or less stationary, whereas the other two approach the UK, albeit with different speed and intensity. Placing the three domestic changes in the same figurative plan shows more clearly that the three case studies tend to converge. What is interesting to note when considering these three cases is that the convergence does not occur at a middle point between the regulations of the three case studies, but rather it is tipped towards the UK pro-industry model, which seems to exercise a power of attraction.

Figure 7.1 Direction and intensity of domestic change after the transposition of Directive 2009/43/EC: Italy, Hungary and UK (changes from 2008 to 2012)




Restrictive model
Pro-industry model

The convergence can be better visualized by looking at the Figure above. At the center of the graph the value for each of the eight dimensions is 0. Thus, the center represents the ideal pro-market, pro-industry model. The external periphery, where each of the eight dimensions reaches 5, represents the ideal type restrictive model.

The first spider graph represents the starting point. It draws a picture of domestic laws on arms export control for the three case studies *before* the transposition of the Directive. Italy (blue line) with arms export regulation characterized by high values ranging from 4 to 5 for all eight dimensions (close to the ideal restrictive model); Hungary (orange line) with intermediate values, and the UK (grey line) with lower values around 2 and 3, characterizing flexible and liberal arms export regulation, nearer to the pro-industry model.

The second spider graph represents the domestic arms trade control regulation of our three case studies *after* the transposition of the Directive. At first glance, it is clear that the lines are narrowing towards the center of the spider graph. Overall, they tend to converge roughly towards a pro-industry UK model.

### *2.4 Three limits of the convergence towards a pro-industry model*

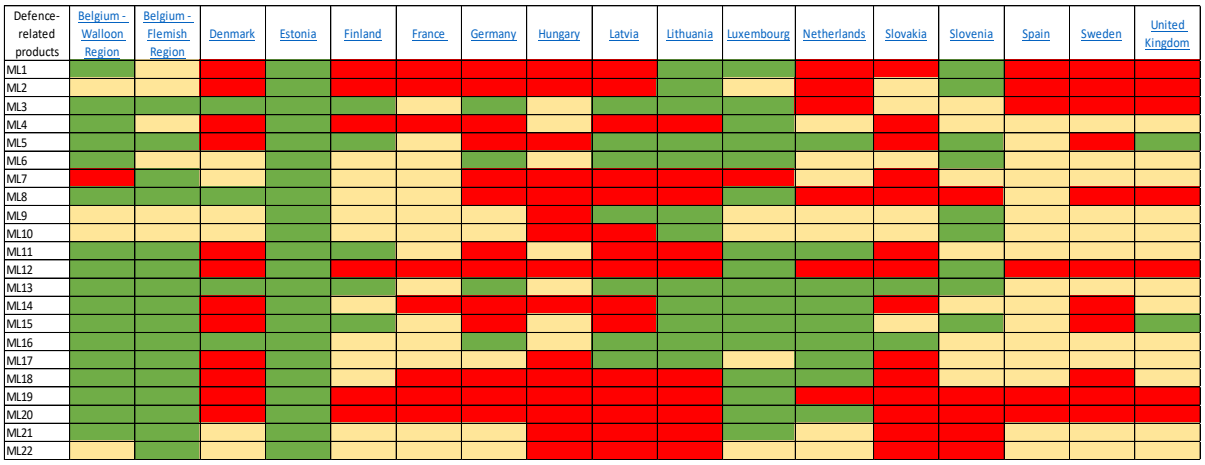
Although the pro-market model has managed to gain greater influence in EU arms control regulation, the model contains some significant limits. We emphasise three here: convergence versus harmonization, the relative and mixed rather than absolute and pure characteristics of the model, and fundamental questions about its long-term sustainability.

*A. Convergence does not coincide with harmonization.*

Despite tending to converge towards a pro-market model overall, differences exist in arms export regulations of the three case studies because each MS interprets the shape of this liberalization trajectory in different ways, according to its domestic traditions and according to the weight and alliances of national and European actors. Thus, Italy, Hungary and the UK have separately interpreted the format, the terms and conditions of new kinds of general and global licences, including some crucial aspects concerning re-exports, the kinds of arms, parts or components covered, based on their individual circumstances. This makes the overarching EU panorama extremely fragmented and particularly multifaceted, not only between countries but even within the same country. Figure 3 below shows for each MS the categories of arms which are

included in the new general licences (green) and those which are excluded.

Figure 7.2 Convergence without harmonisation: kinds of arms covered by general licences in EU countries




Source: Luc Mampaey, Virginie Moreau, Yannick Quéau and Jihan Seniora (2014) Study on the Implementation of Directive 2009/43/EC on Transfers of Defence-Related Products (Brussels: Groupe de Recherche et d'information su la paixet la securite). Available online at: http://www.grip.org/en/node/1421 (last accessed, 10 May 2016).

Other analysts and scholars also recognize this low degree of harmonization in the format and conditions for granting of the new licences introduced by the ICT Directive. According to Masson:

"the analysis of the various implementation processes at the MS level reveals at least four major trends: a) a lack of availability of the relevant documents, b) diversity of scope and structure of the documents, c) several differences regarding the conditions attached to the general licences for the certified firms and d) various definitions of what sensitive products are, which are a corollary of the multiplicity of defence-related products lists."[521]

Along the same lines using a legal perspective, Trybus and Butler state that "it is questionable to what extent the ICT achieves substantive minimum harmonization".[522] They conclude therefore, that "the simplification to be achieved through standardized licensing is undermined by the continuing diversity of national approaches to these key issues."[523]

521 Masson and Martin, (2015):6.
522 Trybus and Butler (2017): 412.
523 *Ibidem.*

In conclusion, convergence towards a pro-market, pro-industry model has not implied harmonisation. Whereas the intensity of domestic change has been high, the degree of harmonisation has been low. The actual degree of supranationalisation has been even lower considering MS did not reach an agreement around any form or supranational control, including a simple database following the transfers of parts and components of defence goods. In conclusion, paraphrasing the words of Baccaro and Howell, who were looking more generally at the neoliberal trajectories of European systems, institutions have changed in a neoliberal/pro-industry direction while remaining allomorphic.[524]

*B. The pro-market model is not pure*

The pro-industry model is not a "pure" pro-market model as it carries some internal contradictions. This is firstly because of the general nature of the arms market, which cannot be considered as just any other market sector, as it involves sensitive strategic and security variables. Thus, despite the process of privatization, which has characterized the European defense industry, the presence of the state is still strong. Focusing specifically on the UK arms export control model, it emerged that, on the one hand, the state had a light hand with regard to export procedures, leaving maximum flexibility to the executive and lightening the administrative burden. On the other hand, the British state intervened with a heavy hand in terms of subsidies to foreign companies, political and financial support, and with a high number of public personnel and civil servants paid by the state to support arms exports. Similarly, despite the principle of "value for money" proclaimed by the British government, even after the approval of the procurement directive "92% of British contracts were awarded to domestic firms".[525] Therefore what emerges is a pro-industry model which is not pure, but rather pro-export and pro-companies.[526] This approach seem to have been uploaded to the European level. In fact, the ICT Directive has the aim of lightening the administrative burden for defence materials moving within EU boundaries, while at the same time the Commission and MS are converging to invest in huge defence research funds. Overall, the model that prevails envisages the presence of the State and of the EU institutions more in terms of support than in terms of direction of the production and

524 L. Baccaro, C. Howell (2017), *Trajectories of Neoliberal Transformation. European Industrial relations since the 1970s.* Cambridge. Cambridge University press, p. 17.
525 P. Sartori, A. Marrone and M. Nones (2018) "Looking Through the Fog of Brexit: Scenarios and Implications for the European Defence Industry" Roma, IAI, July 2018.
526 C. Crouch (2005). *Postdemocraza*. Milano: La Terza.

control of the arms exports.

### *C. The pro-industry model is unsustainable in the long run*

The affirmation of the pro-industry model has created both winners and losers. The first fracture is between NGOs working towards a responsible and ethical arms export policy at the national and European levels, and companies, particularly the strongest and most integrated ones. In fact, non-governmental organisations were weakened after this Europeanisation process, whereas companies were strengthened and appeared to be winners in this process. Companies have benefited from a convergence with other EU bodies and partners aimed at liberalising the arms market, whereas NGOs have found more and more difficulties in influencing the decision-making process. For NGOs, the panorama is ever more interdependent, complex and demanding especially considering their limited resources.

By comparing different case studies and the intensity and direction of change, it can be seen that the presence of strong defence companies (Italy) corresponds to a high intensity/third order domestic change in a neoliberal direction for arms transfer, whereas in the relative absence of defence companies (Hungary) the change is much less intense and limited to only a few dimensions. However, the presence or absence of strong, experienced, networked non-governmental organisations at the national and European levels seems not to influence (or to do so marginally) the direction and intensity of change: the presence of strong articulated NGOs in Italy didn't make any relevant difference when compared to Hungary where NGOs were nearly absent. The influential power of civil society organisations appears drastically reduced compared to the Nineties.

The number of actors who feel penalised or excluded from the decision-making process and from the benefits of the directive is not limited to NGOs. According to Masson, "(t)he benefits of the ICT Directive will not be felt similarly by all MS, national authorities and defence companies. Its effects will certainly be different among MS depending on the structure of their national defence sector and its reliance on exports."[527] In the same vein Mawdsley argued that the European Commission and the EDA favoured larger arms producing states- second tiers arms supplier and few firms, and left little room for smaller states to act in their national interest and that the

527 Masson and Martin (2015): 57.

European defence market is highly concentrated.[528] In fact, smaller EU countries showed a modest or non-existent interest towards the Directive and small and medium companies complained about not being involved in the initiative phase by the Commission and were afraid that the European measures would mainly benefit big companies and prime contractors.[529] More recently at the European level, some companies working in the IT sector felt penalised by the decision to move funds for defence research.

Thus, requests from defence companies prevailed over those placed by European Non-Governmental Organisations. Within defence companies however, the needs and requests of prime contractors companies and second-tier exporters, particularly working in more integrated sectors such as aerospace, and their association, prevailed over small and medium subcontractors in the supply chain and smaller states. Still more recently strong prime contractors in the defence sector prevailed over strong IT companies in decisions about allocating research defence funds, and the DG Market prevailed over DG Research.

This progressive narrowing of the winner area has correspondingly enlarged that of those who perceive themselves to be losers and excluded by the decision-making process, which in fact are the majority.

The imbalances that emerges between the winners and losers of the Europeanisation process can offer a new light in investigating some possible causes of the dis-integration process and growing Euroscepticism, involving countries that feel excluded from the decision-making process such as Hungary as well as some sectors of the electorate who want to take back control on political decisions.

Leruth et al introduce the concept of differentiated disintegration, as the general mode of strategies and processes under which (a) MS(s) withdraw(s) from participation in the process of European integration (horizontal disintegration) or under which EU policies are transferred back to MS (vertical disintegration) and offers some suggestions for the future of the literature on European integration.[530] Copeland argues that government change can also result in de-Europeanization, and this illustrates that there is nothing unidirectional with respect to Europeanization: it can roll forward, but

528 J. Mawdsley, (2008a). "European Union Armaments Policy: options for small states?", *European Security*. 17(2-3): 367-385.

529 Castellacci, *et alii* (2014); Mampaey *et alii* (2014).

530 B. Leruth *et alii* (2019). "Exploring Differentiated Disintegration in a Post-Brexit European Union", *Journal of Common Market Studies.* 57 (5)*:* 1015.

it can also roll back.[531] Overall the pro-market pro-industry model appears imbalanced towards a small group of strong actors and if not corrected and rebalanced, is not sustainable in the long run.

## 3. Theoretical findings

As Howell notes, by bringing together different aspects of Europeanization we are not simply pursuing theory testing, but organizing concepts, selecting relevant facts and constructing narrative as well as ensuring a level of empirical reliability.[532] This moves the study away from thin causal effects towards thicker understandings and perspectives of process at work in the EU.

As recognized by several scholars, for example Graziano, Europeanisation is not a "big" theory but rather a phenomenon, an analytical tool to use and follow in order to organise the analysis of the impact of the EU at domestic level.[533] Starting from a post ontological stance the aim of the thesis was not to demonstrate a theory but to investigate how Europeanisation works in practice assessing direction and intensity of domestic change, as explained at length in Chapter 2.

However, the empirical findings of the dissertation also allow me to assess whether five of the basic theoretical assumptions elaborated and discussed by Europeanisation scholars (which were introduced in Chapter 2), are confirmed or not in the specific case of the transposition of the ICT Directive.

1. The first basic theoretical assumption consists of the theory of the goodness of fit. Drawing on Graziano and Vink, "the degree of adaptational pressure generated by Europeanization depends on the fit or misfit between European institutions and the domestic structures. The lower the compatibility (fit) between European institutions, on the one hand, and national institutions, on the other, the higher the adaptational

531 P. Copeland (2016). "Europeanization and de-Europeanization in UK employment policy: changing governments and shifting agendas". *Public Administration*, 94(4): 1136-1137.
532 Howell (2002):8.
533 Graziano (2014), p. 12.

pressures".[534] We will thus expect domestic change to occur particularly in those cases where the 'misfit' is high and the adaptational pressures are therefore strong.[535]

This theoretical assumption is confirmed in the cases of Italy and the UK. Italy was characterised by lower compatibility with the directions and spirit of the Directive. This created high adaptational pressure that led to a consistent domestic change. On the contrary in the UK which had the lowest degree of misfit with the EU Directive, the change was minimal. In Hungary which was located between the two case studies the adaptational pressure led to a domestic change, but less intensely than in Italy.

2. Another version of the goodness of fit theory focuses on compliance performance: the assumption was that successful compliance depends on the fit between European policy requirements and existing institutions at the national level: if EU policies do not match existing traditions, implementation will be contested and delayed and risk of failure.[536]

This assumption was not confirmed. In fact, Italy started with the highest degree of misfit between the domestic regulation and the Directive. The transposition in Italy required time and involved an intense public debate. However, in the end Italy complied perfectly with what was required at the EU level and even went beyond the directive's disposal in some cases. Similarly, Hungary, despite a medium misfit with the EU directive, turned out to be perfectly compliant with it, at least formally. On the other hand, the UK, despite having the least misfit with EU policy requirements, was relatively less compliant. In fact, the UK did not transpose the norm on transparency, and in particular the requirement that the value of material exported under the new licences be registered and reported to the Parliament.

Thus, the thesis ascertaining that successful compliance depends on the fit is not proven. On the contrary, particularly for the UK case, another thesis presented by Daniel Naurin at the European University Institute seems to be more fitting: the most powerful states are less generous in terms of concessions to other EU partners and to the supranational requests. He found that a representative from one of the Big 3 (UK,

534 P. Graziano, & M. Vink, (2013). *Europeanization: concepts, theory and methods.* Available online at https://www.researchgate.net/publication/303484310_Europeanization_Concept_Theory_and_Methods (last accessed 8 January 2020). Risse, Cowles, & Caporaso, (2001): 7.

535 *Ibidem.*

536 Duina (1997), Borzel and Risse (2000).

France, and Germany) is four times less likely to be generous than the average negotiators.[537]

3. A third initial assumption made by Europeanisation scholars was that governments and bureaucracies will always try to defend their existing policy tradition and not accept deviation from the *status quo*.[538]

This theoretical assumption explains only the Hungarian case but not the overall picture, which is much more multifaceted. In fact, Hungarian bureaucracies showed only a moderate interest in the opportunity to change the arms exports control system offered by the European Directive on intra-Community transfers. They did not use the Directive to sharply change domestic regulation in a pro-industry direction, like in Italy. Overall, they were quite conservative, in maintaining domestic regulation and limiting the changes to what was strictly required by domestic tradition and Hungarian paradigms.

On the other hand, Italian bureaucracy and civil servants appeared to be actors in favor of a radical change. Since 2007, they had supported the Directive as a way to introduce global reform to Law 185/90, especially as regards a new centralization process. They had the expertise to understand that the Directive would have opened an opportunity for change towards the directions of centralization and simplification.[539] Similarly, in France, according to Béraud-Sudreau, "civil servants responsible for export promotion viewed the ICT Directive as an opportunity for the simplification control processes. They convinced the newly arrived Ministry of Defence and the Elysée in 2007-2008 that simplification of French exports controls could be reached thanks to the ICT Directive". [540]

Lastly, in the UK the attitude again differs from the other two countries. In the UK, high level bureaucrats and the Secretary of State were moderately in favor of change aimed at increasing transparency over arms exports under general and global licences. However, the same Secretary of State later argued they should scale the change back due to the companies' concerns. An important difference with the other two cases is that the adaptational pressure for change, albeit weak, went in the direction of a

537 D. Naurin "Generosity in intergovernmental negotiations: The impact of state power, pooling and socialisation in the Council of the European Union", *European Journal of Political Research 54*: 726–744.
538 Duina (1997).
539 Nones and Marta (2007); Masson *et alii* (2010).
540 Béraud-Sudreau (2014): 32.

restrictive model, which was against the interests and preference of UK domestic defence companies, and opposite to what was exercised in the other two case studies. Overall, in these three case studies, bureaucracies appear to follow different directions. In Italy, they were strongly in favor of a renewal of the domestic regulation in a more liberal dimension, whereas in Hungary they were defenders of the status quo, but accepting only the changes legally required by the directive, without altering the fundamental pillars of the Hungarian law. In the UK, they were moderately and prudently in favor of a slight change towards greater transparency and a restrictive model, but were stopped by defence companies. Thus, the hypothesis ascertaining that bureaucrats are quite conservative is not confirmed in two of the three case studies.

4. A fourth thesis formulated by Europeanisation scholars is that different types of EU pressure have a differential impact on domestic change.[541] By comparing these empirical findings with those obtained by Europeanisation scholars dealing with the other EU instruments on arms exports control and transparency, the European Code of Conduct on Arms exports (as approved in 1998), it clearly emerges that different European decision-making mechanisms, in different historical periods, can reach different outcomes and can reveal different directions to the Europeanisation process. Whereas according to Europeanisation studies, the Code of Conduct brought a convergence around a mid-way solution between states with more rigorous regulations and those with more liberal regulations, the Directive favoured an imbalanced convergence towards a pro-industry model. Moreover, whereas the Code of Conduct pushed a (very slight) domestic change in the direction of a more ethical and transparent arms exports control model, the Directive favoured a change in the opposite direction towards a pro-industry and pro-company model. Whereas the principal limitation of the Code is its ineffectiveness and the risk that the pull to change is too weak and destined to end soon, the principal limitation of the Directive is the pro-market bias and other asymmetries that might render the model illegitimate and unstable in the long run.

Lastly, several Europeanisation scholars recognise that between the process of downloading EU policies and acts, and uploading domestic preferences of MS there is continued interaction and that these two perspectives are interlinked. They claim that

541 Knill & Lehmkuhl (1999).

top-down and bottom-up approaches happen simultaneously, being mutually constitutive. Börzel in particular explains that MS upload their policy preferences to the EU level through policy making processes to ease the downloading of the policies once they have been adopted.[542] The empirical findings concerning the UK cases show perfectly how these two levels are in continual interaction. In fact, the UK was initially diffident towards the proposal for a directive on intra-community transfers and concerned about the potential misfit with their domestic regulation. In order to reduce this misfit, they decided to try to change the EU regulation, instead of adapting their domestic regulation, by influencing the decision-making process. As explained by a UK functionary, the UK decided to influence the process by putting forth a set of proposals, which were very similar to their own regulation and so heavily influenced the directive. In other words, they tried to upload their domestic regulation to ease the downloading. And they succeeded because several salient aspects of the Directive are largely inspired by the UK regulation. On the other hand, the other two countries, Italy and Hungary, did not try to upload their domestic regulations to the EU level. This demonstrates both differential attitudes and the impact of various MS on the decision-making process and its outcome.

Overall, the empirical findings of the dissertation support the European integration theories, which identify a pro-industry bias in the Europeanisation process. By adopting both a Europeanisation lens and a post ontological attitude with the aim not to demonstrate a theory but to investigate how Europeanisation works in practice, the thesis had scope to reconsidering integration theories in a slightly less abstract way, and answering questions about who is empowered in the end.[543] These results show that those empowered by the Europeanisation process triggered by the ICT Directive, are the most integrated and strongest European defence companies and second-tier arms-producing MS, who were also the drivers of this kind of integration.

542 T.A. Börzel (2012). “MS Responses to Europeanization”. *Journal of Common Market Studies,* 40 (2): 193-214.

543 C.M. Radaelli and T. Exadaktylos (Eds).(2012). *Research design in European studies : establishing causality in Europeanization.*Basingstoke; New York: Palgrave Macmillan.

## 4. Directions for future research

### *4.1 Inter-institutional power dynamics in the European decision-making process and its impact on policy output: arms exports control and transparency legislation*

One empirical finding of this dissertation is that the transposition of the ICT has generated convergence towards a pro-market, pro-industry model. Europeanisation has triggered a pro-industry trajectory. At the same time, however, a side finding concerning Hungary reveals that a different EU act, the European Code of Conduct, which is the result of a different decision-making procedure, generated a different direction of the Europeanisation process towards a restrictive arms exports control model, at least in one country.

One initial study could look into the interinstitutional dynamics in EU arms exports control regulation, by comparing different decision-making processes and different institutions involved at the EU level in order to see if the direction of domestic change generated is the same or not. It might be equally interesting to see if there are differences in terms of effectiveness, legitimacy, and transparency according to different institutions and decision-making processes.

In particular, the joint decision making mode, which led to the approval of Directive 2009/43/EC could be compared with other two modes. The first is the traditional intergovernmental approach (using both unanimity and qualified majority), within the Council, whose main outcome was the Common Position 2008/944/CFSP on European Arms Exports (8 December 2008). The second is the supranational mode, which has characterised the pro-active role of the EU Commission and the ECJ. The ECJ has ruled ten times about the interpretation of Article 346 of the TFEU; the Commission has displayed all its range of powers producing communications, infringement procedures, preparatory actions and creating a group of experts to put together the ESRP (European Security Research Programme) and later the EDF (European Defense Fund).

The overall aim of this research could be to offer empirical evidence and/or assess the consistency of the outcomes from different institutions and their different trajectories, identify the prevailing direction and offer instruments to facilitate the overall coherence of the EU initiatives in the arms export control regulation.

In the same vein, it could be interesting to develop an inter-sectoral analysis in order to compare trajectories and dynamics that I discovered in arms exports control field with other fields. For example, the dynamics concerning labour law, employment and social Europe show impressive analogies with those concerning arms exports control sector. Both are biased towards the diffusion of a pro-industry model and a progressive erosion of some norms concerning labour rights. However, for example, environmental politics follows completely different patterns and trajectories, more oriented towards a more restrictive model.

### *4.2 The impact of Brexit on EU arms exports control policies*

Secondly, once again starting from the conclusions of this dissertation—that is the bias towards a pro-industry, UK-style model—another angle for future research would assess the impact of Brexit on arms exports control regulation. The dissertation showed that the UK played a very active and overpowering role in the decision-making process that led to the approval of the directive, by uploading salient parts of its domestic regulation to the EU level. Moreover, UK societal actors such as defence companies and non-governmental organizations have played a dynamic and leading role in the Europeanisation of societal actors in this field, projecting their way of work. MS have converged towards the UK model.

However, it is not clear if the bias towards a UK model is due to the weight and ability of the UK or to other national or supranational variables, such as EU institutional asymmetries or global dynamics. Actually, the theoretical framework used in this dissertation focused on assessing the degree and intensity of change but does not explain *why* there is this convergence towards a UK model.

Brexit offers a unique opportunity to cut off a very important variable (despite there being several ways the UK still influences the EU, for example via diplomats and functionaries who will remain in the EU until retirement, the continued activity of its societal actors and so on). What will happen without the UK's presence? Where will MS tend to converge? Will the bias towards a pro-export model be reduced in favor or a more restrictive one? Will the bias towards negative integration be reduced in favor of new form of positive integration?

The answers to these fundamental questions could feed the wider debate about the impact of Brexit on EU dynamics and imbalances, and which is characterized by two

different visions. On the one hand, there are those who think Brexit will be just the first step in a process of disintegration, and on the other those who claim the withdrawal of the most reluctant MS will favor positive integration, and that the EU will become more supranational as a consequence of the UK leaving.

### *4.3 Assessing the normative power of the EU in the arms exports control field using mixed methods*

The main findings of the thesis, concerning the bias towards a pro-industry arms export control model, are based on qualitative methods based only the analysis of the letter of the laws and regulations. However, considering the limits of qualitative methodology in the arms control and disarmaments field mentioned, and considering the gap between rhetoric and reality, between the letter of the law and their effective application, that characterises armament issues, it could be interesting to experiment with *a mixed methodology* in order to provide a "more complete understanding of the research problem. I could combine a qualitative methodology - based on the details of the arms exports control law - with a quantitative methodology based on arms exports control practices. In this way, the empirical findings, as they emerge from a qualitative methodology based on case study analysis and on the comparison of legislative texts, is supported by quantitative methodology aimed at investigating the direction of the arms export policies in practice.

I assume that, in a pro-export model, states export arms to countries regardless of their respect for human rights, their attitude towards the international community, their situation in terms of conflicts and tension, and their support of terrorism. In the restrictive model at the other end, MS do not export arms to countries violating human rights and fundamental freedoms. In order to measure the propensity towards a pro-industry or pro-restrictive model I could start from a very simple yet clear and effective indicator: the percentage of arms exports towards countries where the governments do not respect human rights compared to the total value of exports from the EU.

The use of mixed methods could help to understand whether MS show convergence towards a pro-industry arms export model in practice after the transposition of the ICT directive increasing their percentage of arms exports to governments in conflict or violating human rights. These methods could help to distinguish the EU dynamics from global ones, and identify the EU net value in promoting arms exports control policies

and practices oriented to prevent conflicts and protect human rights, compared to the global context.

The aim of this third branch of research is threefold: theoretical, political and methodological. The empirical findings would

a) to contribute to the theoretical debate about the weight and influence of ideas and norms in the EU CFSP, assessing the EU's normative power;

b) offer empirical evidence to the political debate concerning EU arms exports control regulations, and their effectiveness and

c) create a mixed methodology tool aimed at assessing the application and implementation of EU arms exports control instruments.

The process of Europeanisation in the field of arms export control and transparency in the period analysed has favoured convergence toward a pro-market model, characterised by increasing importance of economic factors over ethical ones, flexibility and pragmatism over binding general rules, executive power over legislative, and centralization over checks and balances, which allow the executive a wider margin of manoeuvre to implement an arms export policy on a case-by-case assessment. A similar approach might influence also the balance between preventive diplomacy and successive military intervention. It might create some problems of compatibility with the European Common Foreign and Security Policy and with the values enshrined in the Treaty of the European Union. In fact, according to Article 2 of the Treaty of the European Union, the Union is founded on the values of respect for human dignity, freedom, democracy, rule of law and respect for human rights. According to Article 21 of the TEU the European Union's action on the international scene shall be guided by the principles which have inspired its own creation, including democracy indivisibly of human rights and fundamental freedoms. More in general a pro-industry approach might reduce the role played by preventive diplomacy in favour of a successive intervention. Some EU law scholars have focused on this contradiction, analysing the ways and the extent to which values and ideals such as the promotion of the rule of law and human rights, clash with material interests of EU external relations.[544] However, the main narrative in the European Integration theories perspective in recent years, was based on a belief in the connection between the health of the defence industry

544 Presentation of the Doctoral Symposium on democracy, Rule of Law and Human Rights in Europe and the World in time of contestation, Louvain, 18 September 2018. Available at https://reconnect-europe.eu/events/doctoral-symposium,( last accessed march 2019).

and the strength of Common Security and Defence Policy. [545] It would be interesting to see how this narrative - and the concept of European security - evolves face to the new non-military threat that is addressing security and health of the people of the EU and of the whole world.

545 Barrinha (2010); Fiott (2019).

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