Arms trade exception to the EU Common Commercial Policy: a soft law exception to a hard law principle

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The Treaty on the Functioning of the European Union (TFEU) ruling the Common Commercial Policy (CCP) suffers very few exceptions and article 346 organizes some of them. If this provision has not been amended, fundamentally, since its adoption, its understanding remains controversial between Member States and EU institutions although it has been rarely publicly debated. Member States often referred to it when adopting derogating national measures. It was the case in 1985, when the Italian authority exempted from custom duties imports of specifically military materials into its territory; in 1987, when Spain exempted from VAT the supply of certain armaments for Spanish armed forced or in 2005, when Finland, Germany, Greece exempted from custom duties import of military material. If all of these national measures have been considered not conform by the EU Court of Justice to the Treaty exceptions[1], the exact scope of article 346 was not fully clear even for EU institutions. The necessity for the Council of Ministers to adopt, in 1994, two acts - a Regulation and a Joint Action – to organise the control of exports of dual use goods was based on the understanding *that common lists of dual-use goods, destinations and guidelines are…. of a strategic nature and consequently fall within the competence of the Member States*[2]. The application of article 346 exceptions was made with the approval of the Commission and it was not pointed out by the Parliament during the consultation procedure. A year later, the Court of Justice invalided indirectly these dual instruments of export control[3].

Nevertheless, if export control of dual-use items is presently ruled by EU legislation adopted in co-decision by the Parliament and the Council, external trade of weapons and other military equipment are ruled by EU political decisions adopted by the Council under the Common Foreign and Security Policy (CFSP).

The present contribution intends to analyse principles ruling external trade control of weapons and dual-use items in the European Union. It will focus on the division of competences between Members States and EU institutions and more specifically on exception established by article 346.

The origin of weapons trade exception

The political motivations to include in 1958 an exception into the European Economic Community Treaty (EEC) allowing States to adopt measures necessary for the protection of their essential interests of their security, in connection with weapons trade, have not

[1] Judgment of the Court of 15 December 2009, Case c239/06, Judgment of the Court of 16 September 1999, Case c-414/97, Judgment of the Court of 15 December 2009, Case c239/06.
[2] Preamble of Council Regulation (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods, Official Journal L 367, 31 December 1994 p. 0001 – 0007.
[3] Judgment of the Court of 17 October 1995, Case c-83/94.

been widely discussed but, they seem to be inspired from a similar provision included in the General Agreement of Tariffs ad Trade (GATT) adopted within the framework of the World Trade Organisation (WTO).

Both provisions are divided into two paragraphs: the first is related to the supply of information and the second to weapons trade.

The supply of information exceptions

The paragraphs related to the supply of information prevent that a Member State shall be constrained *to furnish any information the disclosure of which it considers contrary to its essential security interests*; (GATT) or *to supply information the disclosure of which it considers contrary to the essential interests of its security* (EEC). Except the linguistic structure, the two paragraphs are almost similar. This exception has no equivalent in the EURATOM Treaty neither in the CECA one.
The scope of the term *information* has not been debated within the EU but it has been raised once within the WTO context. The findings of this debate might illustrate, all things being equal, the possible understanding of the TFEU provisions. The term *information* has been invoked in a cold war context when Czechoslovakia requested to the US to make public the list of sensitive goods and technology adopted by COCOM that could not be exported to the Warsaw Pact Members States and China without authorisation[4]. The US authority denied the access arguing that Article XXI provides that a contracting party shall not be required to give information, which it considers contrary to its security interests and therefore revealing the names of the commodities that it considers to be the most strategic could benefit from the exception. This understanding was supported by most of participating states and was not debated afterwards, leaving to participating states the right to define, unilaterally, what falls under the provision.

The weapons trade exceptions

The second paragraph of both articles is related to national measures connected to weapons production and trade necessary for the protection of state essentials security interests. If the protection of security interests remains the principal element of both texts, the GATT concentrates on measures *relating to traffic in arms and ammunitions and implement of war* while the EEC Treaty considers the *production of or trade in arms, munitions and war material*. If presently, in the trade control context, the term *traffic* is connoted negatively and refers to the fight against illicit trafficking, in the GATT its understanding seems almost equivalent to the word *trade* used by the EEC[5]. Like for the first paragraph, the two provisions are almost similar. However, the EEC constrains more precisely the recourse of the exception by its Member States. It could apply only to a list of items adopted by the Council of Ministers and could not affect the condition of competition in the internal market regarding dual-use items.

Like for the first paragraph, this exception has no equivalent in the EURATOM Treaty

[4] See Summary record of the twenty-second meeting of the Contracting Parties (third session) 8 June 1949:
<http://www.wto.org/english/tratop_e/dispu_e/49expres.pdf>.
[5] The word *traffic* is used around 14 times in several provisions of the GATT.

neither in the CECA one.

Except its numbering and the direct reference to the list of weapons, the text of the EEC exceptions is similar to the one of the present article 346 of the Treaty on the Functioning of the European Union. Therefore, since its adoption in 1958, neither the security exception principles nor the scope of the exception (the list of weapons) have been modified. Consequently, the evolution of the trade control exceptions policy has been made by the evolution of its understanding by Member States and by case laws of EU Court of Justice.

Debates within the GATT on the understanding of article XXI have occurred in a very limited numbers of cases and usually concerned the definition of the term *security* and the possibility for Member States to adopt restrictive measures. Unfortunately and contrary to the first paragraph, the context and content of the different debates were too specific to support the understanding of article 346 of the TFUE.

The scope of article 346

The scope of article 346 is constrained by the concept of essential security interests and by a list of arms, munitions and war material.

The list was adopted by Council of Ministers in 1958. It has remained confidential until 2008 when finally the Council decided to make it public available[6]. The list is divided in 15 large categories of items subdivided in broad entries. For example, category 4 includes *bombs, torpedoes, rockets and guided missiles* subdivided into two entries one include *military devices specifically designed for handling, assembly dismantling firing or detection* of weapons listed above.

Normally, the scope of the exception and consequently the possibility for Member States to adopt national measures for the protection of their essential security interests shall be strictly limited to items listed[7]. Since its adoption in 1958, the list has never been reviewed or updated and Member States consider that its wordings are sufficiently generic to cover all present and future development of military technology. This understanding might work if it is commonly accepted that the list grants to Member States room for interpretation. At first glance, the wording of article 346 – *list … of the products to which the provision of paragraph 1(b) applies* - does not seem to offer such possibility.

Nevertheless, the structure of the list and its lack of technical description induce indirectly a broad room of *manoeuvre* for Member States to incorporate almost whatever they might consider as military. For example *tanks* are a subcategory of

[6] The list is available on the EU Concilium website: <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%2014538%202008%20REV%204&r=http%3A%2F%2Fregister.consilium.europa.eu%2Fpd%2Fen%2F08%2Fst14%2Fst14538-re04.en08.pdf>.

[7] The scope of the first paragraph relating to supply of information is not constrained by the 1958 Council List and is left to Member States appreciation.

category 6 *tanks and fighting vehicles specifically designed for military use.* The list does not include a technical description of a tank and leaves a series of elements unanswered. Does it concern only combat vehicles (equipped with weapons) or also surveillance once? Are tanks' main components like caterpillar tracks, internal combustion engine, hull or turret also included in the list? All those elements are left to unilateral Member State' s appreciation.

However, to restraint the use of the exception to military items, article 346 states *that measures shall not adversely affect the conditions of competition in the internal market regarding products not intended for specifically military* purposes. The margin between those items and military items, included directly or indirectly in the list, have been considered more than once by the EU Court of Justice. As a principle, it has been recalled regularly that Member States could not invoke article 346 (1)b to justify a derogating measure when the product is certainly for civilian use and possibly for military use[8]. The Court has also rejected Member States' attempt to include in the list a civil activity that is necessary corollary to a military one[9]. Moreover, if a product comes within one of the categories of materials included in the list, that product can, if it has technical applications for civilian use which are largely identical, be considered to be intended for specifically military purposes only if such use results from its intrinsic characteristics and not solely from the one conferred by the Member State's authority.[10]

In addition, to demonstrate that the items is listed, a Member State that intends to adopt derogative measures is also constrained to prove that the measure is necessary in order to protect *its essential security interests[11]*. Therefore, the objective of the exemption shall be only the protection of Member State's essential security interests and not industrial or economic interests even if they are related to production or trade of weapons and munitions listed. Lastly, article 346 does not refer to the protection of security interests in general but to the protection of essential security interests. This underlines the exceptional character of the derogation and makes it clear that the specific military nature of the equipment is, by itself, not sufficient to justify an exception. The Court has regularly recalled that this article does not confer on Member States a *power to depart from the provisions of the Treaty based on no more than reliance on those interests[12]*.

Conclusion

Since 1958, external trade control rules of weapons and related equipment and materials have always been considered by Member States as an exception of the EU Common Commercial Policy of the EU. Consequently, any attempt to rule export of those items has been done by the coordination of national policies within the Common Foreign and Security Policy rather than by the adoption of an EU Regulation or Directive. The adoption of common criteria for arms export adopted by the European Council, in 1991 and 1992 for export of weapons, were the first outcomes of this understanding. It was

[8] See in particular paragraph 39 of Judgment of the Court of 7 June 2012, Case c-615/10.
[9] See in particular Judgment of the Court of 28 February 2013, Case c-242/12 P.
[10] Paragraph 40 of Judgment of the Court of 7 June 2012, Case c-615/10.
[11] Paragraph 22 of Judgment of the Court of 16 September 1999, Case c-414/97.
[12] Paragraph 35 of Judgment of the Court of 7 June 2012, Case c- 615/10.

followed soon after, in 1994, by the adoption of a Joint Action on the control of exports of dual use goods defining export criteria and lists of controlled items.
The judgement of the Court in 1995, stating that rules restricting export of dual-use goods fall within the scope of the Common Commercial Policy and therefore exclude the competence of the Member State, has constrained to review the ruling for dual- use items[13]. Consequently, external trade control of those goods is presently ruled exclusively by EU Regulation.

The Court has never considered the arms and munitions exception to the CCP and the Council has systematically used this exception by adopting instruments on weapons export control within the CFSP framework, with the direct or indirect consent of the Commission and the Parliament[14].

The analysis of the different exceptions organized by the TFUE and, more specifically its article 346, has not identified possibility to ground a general exception for arms and munitions. On the contrary, the use by Member States of this exception could be done only for specific cases within very strict conditions.

The reason why the present system of weapons export control has never been invalided like it has been done for dual-use items shall be found in the strong willingness of certain Member States to maintain national policies and the elaboration of EU system does not seem to be a priority for the Commission.

However, this situation might change as long as in the framework of the Arms Trade Treaty negotiation, the Commission has contested for the first time this CFSP understanding. After lengthy discussion between Commission and Council, Decision authorising Member States to sign, in the interests of the European Union, the Arms Trade Treaty has been adopted. This Decision acknowledges that the ATT includes some provisions that concern *matters that fall under the exclusive competence of the Union because they are within the scope of the Common Commercial Policy or affect the Internal Market rules for the transfer of conventional arms and explosives*[15].

[13] Judgment of the Court of 17 October 1995, Case c- 83/94.
[14] See Code of conduct on arms export adopted by the Council 1998: <http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf> replaced later by Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (Official Journal of the EU, 13/12/2008, L355/99).
[15] Council Decision 2013/269/CFSP of 27 May 2013authorising Member States to sign, in the interests of the European Union, the Arms Trade Treaty (Official Journal of the EU, 07/06/2013, L155/9).