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**Professor Takis Tridimas**

**Written Statement before the US – China Economic and Security Review  
Commission**

**Hearing on China’s Military Modernization and U.S. Export Controls**

The purpose of this statement is twofold: first, it provides a brief description of the EU security regulated export controls system and, secondly, examines the EU arms trade embargo on the Peoples Republic of China, with a view to assessing its effectiveness and the likelihood of its continuity in the near future.

**A. EU Security Regulated Export Controls System**

Since the introduction of the Common Foreign and Security Policy (CFSP) by the Treaty of the European Union in 1993, the EU has developed an increasingly sophisticated regulatory system aimed at controlling arms trade, which complements decisions imposing embargos against specific third countries, such as the embargo adopted against China. The EU regulatory system consists of measures aimed specifically at controlling exports of military equipment and measures aimed at controlling exports of dual items products, namely, products that can be used for both civil and military purposes.

**A.1. Controls on Exports of Military Equipment**

The main legal instruments applicable to exports of military equipment are the following:

- › European Union Code of Conduct on Arms Exports, adopted on 8 June 1998;
- › User’s Guide to the EU Code of Conduct on Arms Exports as agreed by the Working Party on Conventional Arms Exports at its meeting on 9 December 2005;
- › Common Military List of the European Union (equipment covered by the EU Code of Conduct on Arms Exports) adopted by the Council on 17 November 2003. The Last version of the Common Military List was published in the Official Journal of the EU on 25 May 2005 (OJ C 127, p 1);
- › Council Common Position 2003/468/CFSP on the control of arms brokering of 23 June 2003;

The European Union Code of Conduct on Arms Exports was adopted by the EU Council on 8 June 1998. It builds on the Common Criteria for Arms Exports agreed at the Luxembourg and Lisbon European Councils in 1991 and 1992. The Code is a

non-binding instrument which lays down minimum standards to be applied on export licences and includes an information exchange and notification mechanism for the denial of export licenses.

The Code lays down eight criteria on the basis of which Member States should assess export licence applications for military equipment. These criteria are the following:

- Respect for the international commitments of EU member states, 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 of human rights in the country of final destination; Member States are directed not to 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. Member States should refrain from exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts;
- Preservation of regional peace, security and stability. Member States are directed not to 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. They must take into account the existence of a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;
- The potential effect of the proposed export on the defence and security interests of the Member States and those of their allies; the Member States must take into account, inter alia, the risk of reverse engineering or unintended technology transfer;
- The behaviour of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law;
- The existence of a risk that the exported goods might be diverted or re-exported to an undesirable end-user;
- The compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account whether the proposed export would seriously hamper the sustainable development of the recipient country.

According to the Code's operative provisions, the decision to transfer or deny the transfer of any item of military equipment remains at the national discretion of each Member State. The Code requests EU Member States to circulate on a confidential basis through diplomatic channels details of licences refused together with an explanation of the reasons for the refusal (denial notification). Before any Member State grants a licence which has been denied by another Member State for an essentially identical transaction within the last three years, it must first consult the Member State which issued the denial.

The Code also requests Member States to circulate in confidence an annual report on its defence exports and on its implementation of the Code. These national reports are discussed at an annual meeting by the Council of the European Union within the framework of the CFSP. The Council publishes a consolidated report each year. So

far seven annual reports have been published. The last annual report was published on 23 December 2005 and corresponds to the calendar year 2004 (Official Journal of European Union 2005, C 328, pp. 1-288).

The Working Party on Conventional Arms Exports (hereafter COARM) has been working on the first review of the Code of Conduct. For this purpose not only Member States but also other stakeholders such as international NGOs and the defence industry were consulted. The review process at technical level is now completed. According to the 7<sup>th</sup> Annual Report *“The resulting draft constitutes a significantly updated and upgraded Code. Several new elements are to be included in the Code, thereby deepening and widening its scope of application. These elements include the extension of controls to brokering, transit transactions and intangible transfers of technology, as well as the implementation of strengthened procedures in order to harmonise Member States' export policies. It is envisaged that the new Code will be adopted in the form of a legally binding Council Common Position.”*

So far, no agreement has been reached on the new Code which must be adopted by a unanimous decision of the Member States.

The Code of Conduct is complemented by the User's Guide, the Common Military list of the European Union and the Council Common Position on Arms Brokering.

The User's Guide seeks to assist Member States in applying the Code of Conduct and clarify their responsibilities. It is intended for use primarily by export licensing officials. The latest version of the Guide was agreed by COARM at its meeting on 9 December 2005. It deals with denial notifications, licensing practices, best practices for interpretation of criterion 8 (compatibility of the arms exports with the technical and economic capacity of the recipient country) and requirements for submission of information for the EU annual report.

The Common Military List of the EU specifies the military equipment covered by the Code. It has the status of a political commitment in the framework of the CFSP. The latest version of the list was adopted on 25 April 2005 taking into account changes agreed in the Wassenaar Arrangement's Munitions List at the December 2004 COARM plenary meeting.

The Council Common Position on the Control Arms Brokering adopted on 23 June 2003 seeks to control arms brokering in order to avoid circumvention of UN, EU or OSCE embargoes on arms exports. For this purpose, it lays down a set of minimum conditions that the existing or future legislation of the Member States must meet. It includes a definition of brokering activities (Article 2.3), minimum conditions and procedure for the authorization of brokering activities (Articles 3 and 4), the establishment of a system for exchange of information on brokering activities among Member States (Articles 5 and 6), and minimum sanctions to be applied for the infringement of arms brokering regulations (Article 6).

The adoption of the Code of Conduct on Arms Exports marked a new stage in the EU's development of a common approach to arms exports as an important element

of the CFSP. However there is still work to be done. According to the seventh report, the priority guidelines identified by Member States for the near future include:

- “1. continuation of the process of harmonisation of national reports in order to promote more homogeneous statistical data for inclusion in the European Union annual report, so as to produce clearer, more transparent summary tables;
2. follow up of the implementation of the Common Position on arms brokering, taking into account the different situations of the national legislation and establishing an appropriate information-sharing mechanism;
3. development of best practices for the interpretation of criteria, moving on from criterion 8 to criteria 2 (human rights) and 7 (end use controls);
4. continued work on promotion of the principle of an arms trade treaty;
5. continuation of the policy of promoting the principles and criteria of the Code of Conduct among third countries, specifically those that have aligned themselves with the Code of Conduct;
6. provision of practical and technical assistance, when requested, for the Acceding Countries, and new neighbours in order to ensure the harmonisation of policies on arms export control and the full implementation of the Code of Conduct principles and criteria;
7. further development of dialogue with the European Parliament;
8. continued close cooperation and consultation with interested third parties, including international NGOs and the defence industry.”

## **A.2. Controls on Exports of Dual Use Items and Technology**

In addition to the measures aimed at controlling exports of military equipment, the EU regime also includes measures seeking to control the export of dual use items and technology. These measures include:

- Council Regulation No 1334/2000 setting up a Community regime for the control of exports of dual use items and technology of 20 June 2000, as last amended by Council Regulation No 1504/2004 of 19 July 2004.
- Council Joint Action concerning the control of technical assistance related to certain military end-uses of 22 June 2000 (2000/401/CFSP).

The Commission has pointed out that all EU Member States are committed to controlling exports of dual-use items and technology, in conformity with their national commitments taken as parties to the relevant international treaties of disarmament and non-proliferation and also, for most EU member States, in conformity with their commitments taken as members of the international export control regimes.

The legal basis for Council Regulation No 1334/2000 is article 133 of the Treaty establishing the European Community. According to the Commission, this is because the Court of Justice has ruled that, while the individual security interests of Member States in this field must be catered for, trade measures (including export controls) are a matter of exclusive Community competence under Article 133 (ex-113)<sup>1</sup>.

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<sup>1</sup> See [http://europa.eu.int/comm/trade/issues/sectoral/industry/dualuse/index\\_en.htm](http://europa.eu.int/comm/trade/issues/sectoral/industry/dualuse/index_en.htm), last visited 11 March 2006.

The following is a brief description of the Council Regulation included in the Commission website:

“The principle of the Regulation is that the items listed in Annex I of the Regulation cannot leave the EC custom territory without an export authorisation granted by the competent authorities of the Member States. Those authorities referred to in article 6-6 of the Regulation, are detailed in the publication in the OJ n° C270 dated 29-10-2005.

There are four types of licenses in the EU: First, the Community General Export Authorisation defined in Annex II of the Regulation (it covers exports of the items of Annex I except those listed in part 2 of Annex II) to 7 countries (United States of America, Canada, Japan, Australia, New Zealand, Switzerland and Norway). Second, National General export authorisations (These licenses do not exist in all Member States and if in force are published in Member States official journals). Third, global authorisations for "a specific exporter in respect of a type or category of dual use items which may be valid for exports to one or more specified countries". Fourth, individual licenses (generally for one exporter and covering a transaction to one end user).

Annex I is divided into 10 categories of items controlled. For example, 0 is for nuclear materials, facilities and equipment. 9 is for propulsion systems, space vehicles and related equipment. Each category is divided into five subsets which are: A (equipment); B (test and inspection equipment); C (materials), D (software) and E (technologies). There is a non legally binding nor fully reliable table establishing the linkage between TARIC codes and the Annex I which can be found on DG TAXUD website. Items in Annex IV and in part 2 of Annex II (items excluded from Community General Export Authorisation) are subsets of Annex I. Annex IV lists the items which are controlled within the single market.

Member States at national level are allowed to control additional dual use items than those listed in Annex I under specific circumstances detailed in article 4 and 5, in particular in case of exports to countries submitted to arms embargo (article 4-2) or in case of suspicion of WMD end use. An indicative list of third countries subject of negative measures at EU level can be found in the Council Webpage titled "negative measures applied to third countries" at the following address and in the DG RELEX website at this address. However these lists cannot be interpreted as the list of countries for which ALL EU MS apply article 4-2, therefore exporters are advised to check with Member States authorities the situation.

Intangible transfers of technology are also subject of export controls authorisations.

The principle is freedom of circulation of dual use items in the single market except for the limited items listed in the Annex IV of the Regulation.”<sup>2</sup>

In addition to the Council Regulation for the control of exports of dual-use items, the Council of the European Union has issued a Council Joint Action which introduces specific controls (prohibitions or authorisation requirements) on technical assistance that is intended for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons of mass destruction.

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<sup>2</sup> See [http://europa.eu.int/comm/trade/issues/sectoral/industry/dualuse/index\\_en.htm](http://europa.eu.int/comm/trade/issues/sectoral/industry/dualuse/index_en.htm), last visited 11 March 2006

## **B. EU Arms Trade Embargo on China**

The European Union Arms Trade Embargo on China was adopted by a Declaration of the European Council on 27 June 1989 as a result of the Chinese authorities repression of the students demonstration in Tiananmen Square (Declaration of the European Council, Madrid, 27 June 1989). The embargo has been in force since that date and is currently included in the list of EU embargoes on arms exports (Document of the Council of the European Union No 6254/06, 10 February 2006).

The Common Foreign and Security Policy (hereafter CFSP) was introduced by the Treaty of the European Union in 1993. When the embargo was adopted, the CFSP was not yet in place.

By contrast to more recent decisions imposing arms trade embargoes against third countries, the embargo on China was not adopted by a legally binding document such as a Council Common Position. It uses general language, leaving Member States wide discretion as its scope of application and interpretation. The Declaration of the European Council imposing the embargo is a political declaration which condemns the repression and calls Chinese authorities to respect the human rights of its people. The specific reference on the embargo calls for the

*“interruption by the Member States of the Community of military cooperation and an embargo on trade in arms with China”*

The Declaration does not clarify the meaning of the term “military cooperation” nor does it contain a list of arms that come within the scope of the phrase “trade in arms.” The United Kingdom, for instance, has interpreted this statement as a ban applying to:

- “lethal weapons such as machine guns, large calibre weapons, bombs, torpedoes, rockets and missiles;
- specially designed components of the above and ammunition;
- military aircraft and helicopters, vessels of war, armoured fighting vehicles and other such weapons platforms;
- any equipment which might be used for internal repression”<sup>3</sup>.

## **C) Effectiveness of EU Arms Trade Embargo on China**

The EU Council produces an annual report on the implementation of the EU Code of Conduct on Arms Exports, which includes information on EU arms exports to China not covered by the embargo. The seventh report states that Member States do not follow a uniform standard to compile statistics and, as a result, there are differences in the way national reporting is conducted. Efforts to further the harmonisation of reporting procedures and to achieve fully comparable statistical data are under way. The data shown below has been extracted from the Council’s annual reports for 2002, 2003 and 2004:

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<sup>3</sup> See the Foreign and Common Wealth website at [www.fco.gov.uk](http://www.fco.gov.uk), last visited 11 March 2006.

## Total EU exports to China

|                                   | 2002        | 2003        | 2004        |
|-----------------------------------|-------------|-------------|-------------|
| No of Licences issued             | 287         | 159         | 202         |
| Value of Licences issued in Euros | 209,794,157 | 415,820,913 | 340,664,219 |
| No of Licence refusals            | 17          | 43          | 37          |

## Main EU Export Countries to China

|  | 2002        | 2003        | 2004        |
|--|-------------|-------------|-------------|
| France – Value of Licences issued in Euros         | 105,431,246 | 171,530,641 | 168,900,766 |
| United Kingdom – Value of Licences issued in Euros | 79,500,000  | 112,455,000 | 147,600,000 |
| Czech Republic – Value of Licences issued in Euros | n/d         | 3,610,819   | 18,934,000  |

In 2004 EU Members issued 202 licences to export arms to China for a total amount of 340,664,219 Euros. The figure represents an 18% decrease with respect to 2003 (415,820,913 Euros). The group of EU Members that issued licences to export arms to China include Austria, Czech Republic, France, Germany, Italy, Latvia, Slovakia and the United Kingdom. The main exporters were France (50% of the total value of licences issued), the United Kingdom (43% of the total value of licences issued) and the Czech Republic (5.6% of the total value of licences issued).

According to the Common Military List of the European Union (See the updated list published in the OJ of the EU C 314/1 – C 314/26 on 23 December 2003) the main type of arms exported to China includes electronic equipment, not controlled elsewhere on the list, specially designed for military use and specially designed components therefor (ML11); aircraft, unmanned airborne vehicles, aero-engines and aircraft equipment, related equipment and components, specially designed or modified for military use (ML10); imaging or countermeasure equipment, specially designed for military use, and specially designed components and accessories therefor (ML15) and fire control and related alerting and warning equipment, and related systems test and alignment and countermeasure equipment specially designed for military use, and specially designed components and accessories therefor (ML5).

With respect to refusals of licences to export arms to China, in 2004 a total of 37 licence refusals have been reported by all EU Member States, compared to 43 refusals in 2003 and 17 refusals in 2002. The ratio of licence refusals to applied licenses was 15.5% in 2004, 21.3% in 2003 and 5.6 % in 2002. The report only provide the total number of licence refusals without discriminating by country, therefore it is not possible to examine quantitative differences on approved / denied rations as between countries.

## **D) Considerations about the Future of the EU Arms Trade Embargo on China**

The need to maintain the arms trade embargo on China has been high in the EU's CFSP agenda over the last few years. The last two EU – China summit declarations include specific references to this issue. The Chinese Government claims the measure is obsolete and constitutes an unacceptable form of discrimination which should be immediately removed. The EU, on its turn, has pledged its political will to continue to work towards lifting the embargo, conditioning its final decision on China's human rights records and stability and security in the region, in particular the PRC China – Chinese Taipei relationship and the human rights situation in Tibet.

Within the EU, some members, notably France and Germany, are keener than others to lift the embargo. It is argued that, since the introduction of several controls on arms exports at EU level such as the EU Code of Conduct on Arms Exports and the Dual Use Items Regime, the rationale for the embargo has diminished, but EU members have not yet reached a consensus on whether the conditions to lift the embargo on China have been met.

Recent favourable political conditions towards the lifting of the embargo have been somehow undermined by Chinese authorities' adoption of a Taiwan anti-secession bill on 14 March 2005. In the event the embargo is lifted, the European Council has made it clear that arms exports to China should not increase, neither in quantitative nor qualitative terms (See European Council's Presidency Conclusions – Brussels, 16 – 17 December 2004, par. 57). In addition, as stated by the seventh report (C 316/2): "Member States continue to discuss a set of temporary procedures which could be applied vis-à-vis countries for which the EU has decided to lift an existing arms embargo. These procedures would be based on specific mechanisms for notifications of licences issued for exports of military equipment by Member States, for a review of notified denials which were related solely to the embargo and for consultations in the event of a major change in a Member State export policy. This so-called 'toolbox' would complement the Code of Conduct."