International arms deliveries from EU member states to Ukraine

Has something changed?

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The unprovoked 2022 Russian attack on Ukraine has led to a sharp increase in arms deliveries to Ukraine by European Union (EU) member states and others. Although international arms trade is not prohibited under international law, it is increasingly regulated and restricted. For EU member states Common Position 2008/944/CFSP on the export of military technology and equipment in particular is relevant as it sets out the criteria for reviewing arms exports. The armed conflict in Ukraine shows that member states enjoy a wide margin of appreciation for applying the criteria even though the delivery of arms to Ukraine is not without risks.

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The international armed conflict following the further[1] invasion of Ukraine by the Russian Federation (Russia) raises questions concerning various topics. One of the perhaps less conspicuous ones is the international arms trade. When the conflict was imminent and immediately after the start of hostilities several European Union (EU) member states, including the Netherlands,[2] started transferring arms and other military equipment to Ukraine.[3] For the purposes of this article arms trade must be understood broadly.[4]

These days the production of and trade in arms is not without controversy as there are no international rules prohibiting international arms trade at large. Trading arms is, therefore, allowed under international law. The idea is based on the right of a state to use armed force to defend itself against an armed attack by another state. This right to self-defence has customary status under international law; moreover, it is laid down in the Charter of the United Nations.[5] The right entails that states can have armed forces and properly equip and supply them. Since only a few states can maintain their forces without using resources from other states, they are allowed to source weapons from abroad.[6] The Preamble of the Arms Trade Treaty, which regulates the international trade in conventional arms, as well as Recital 12 of EU's Common Position 2008/944/CFSP on the export of military technology and equipment (hereafter: the Common Position),[7] explicitly refer to the right of self-defence.

At the same time, unlimited arms trade may have undesirable consequences and may lead to human rights abuses[8] and armed conflict.[9] That is why arms exporting countries regulate this trade and impose restrictions. For example, based on the eight criteria the EU set out in the Common Position, member states must consider the security situation in a country receiving arms from another member state and prevent arms supplies from prolonging a conflict.[10]

The rapid and sizable arms deliveries to Ukraine raise the question whether this conflict has brought about changes in the international arms trade and whether EU member states have given due consideration to the risks due to changes in their arms trade policies. To answer this question, we first introduce the field of export control, which includes the rules and policies concerning the arms trade. After briefly addressing arms shipments to Ukraine in the aftermath of the 2014 Russian invasion, national considerations are discussed that may form the basis of a state's decision to supply weapons to Ukraine, followed by an analysis of the practice of three EU member states that have provided Ukraine with arms: the Netherlands, Germany, and the Slovak Republic. The article closes with a brief synthesis and conclusion.

On 25-26 February 2022, the Netherlands shipped Panzerfaust and Stinger weapons to Ukraine

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1 In February and March 2014 Russia invaded Ukraine and subsequently annexed Crimea and Sevastopol.

2 E.g. Parliamentary Papers 2021-2022, 22054, no. 36045, no. 2, 2-3 and Parliamentary Papers 2021-2022, 22054, no. 358, 2.

3 For an overview, see for instance, 'Arms transfers to Ukraine', *Forum on the Arms Trade*, https://www.forumarmstrade.org/ukrainearms.html, or 'The weapons and military aid the world is giving Ukraine', *Politico*, 10 May 2022, https://www.politico.com/news/2022/03/22/ukraine-weapons-military-aid-00019104.

4 The term 'arms' does not only refer to any type of weapons, but other military goods, technology, services, and software (referred to collectively as 'items') as well. Also, 'trade' encompasses any sort of movement of military items, including export, transit, and broking (Cf. Article 2(2) of the Arms Trade Treaty (New York, April 2, 2013; entered into force December 24, 2014 (Vol. 3013 UNTS, No. 52373)).

5 Article 51 United Nations Charter (San Francisco, 26 June 1945; entered into force 24 October 1945 (1 UNTS XVI. See: https://treaties.un.org/doc/Publication/UNTS/No%20Volume/Part/un_charter.pdf.

6 The Netherlands, for instance, justifies the transfer of arms to Ukraine with reference to the right to self-defense; e.g. Parliamentary Papers 2021-2022, 22054, no. 358, 1.

7 Council Common Position 2008/944/CFSP of 8 December 2008 defining rules governing control of exports of military technology and equipment (OJ L 335, 13.12.2008).

8 Beatrix Immenkamp, 'European Peace Facility. Investing in international stability and security', *European Parliamentary Research Service*, October 2021.

9 Admittedly, it is hard to determine the impact of arms trade on the aggressiveness of states; L. Lustgarten, *Law and the arms trade, Weapons, blood and rules* (Oxford, New York, Hart Publishing, 2020) 12-13.

10 In particular criteria 3 and 4 Council Common Position 2008/944/CFSP.

Export control

The international trade in arms is part of a fledgling discipline called 'strategic trade control'[11] or 'export control'.[12] These controls are mechanisms to balance international trade and security by limiting the export and associated actions, such as transit, transfer, re-export, and brokering of strategic items. They are generally subdivided into items specially designed or modified for military use (military items) and civilian items that can also be used for military purposes (dual-use items).

National export control mechanisms are generally based on lists of controlled items for which an exporter requires a licence or other type of authorization. Whether an exporter qualifies for a licence depends on the technical characteristics of the item to be exported, the ultimate destination, the end-use and the end-user. States lay down the relevant rules and procedures in national export control legislation. In recent decades this legislation has been increasingly informed by international rules (e.g., the Arms Trade Treaty) and export control regimes such as the Wassenaar Arrangement.[13] Moreover, EU member states are also bound by the extensive EU export control legislation.

In the export control context a clear distinction is made between military and dual-use items. In EU law the distinction is even crucial as trade in dual-use items is the exclusive competence of the EU,[14] which implies that member states can only adopt national rules to the extent the EU Dual-use Regulation allows. Member states have a much wider margin of appreciation and play a more active role with respect to military items.[15] Given their importance for national security, decisions concerning these items, such as the Common Position, do not have a direct effect within the member states and, therefore, states only have to ensure that their national policies conform to the EU position.[16] Also, the provision of military assistance by member states under the European Peace Facility (EPF),[17] which includes the military assistance to Ukraine the Council decided upon in February[18] and March 2022,[19] must conform to the Common Position.

Export controls cannot be applied without considering sanctions or, in EU lingo, restrictive measures. In the absence of a generally accepted definition sanctions can broadly be described as non-armed measures taken by a state or an international organization against another state or entity to compel it to change its behaviour. These sanctions can take various forms, such as trade restrictions, asset freezes, and travel bans. Obviously, a state must consider its obligations when under sanctions in deciding whether to authorize the export of a strategic item.

The 2022 invasion of Ukraine, the Belarussian support for the operations, and the atrocities committed by the Russian military prompted an unprecedented swift and broad response of, in particular, Western states. In addition to the arms deliveries to Ukraine mentioned above, the EU and like-minded individual states, such as the US and UK, adopted a series of sanction packages targeting Russia and Belarus.[20] Although these sanctions are far from comprehensive, they cause considerable economic hardship to both states. It must be noted,

11 Quentin Michel, Veronica Vella, Lia Caponetti, 'Introduction to International Strategic Trade Control Regimes', *European Studies Unit*, University of Liège, 2021, 8.

12 'Export control' is the term of choice in the Netherlands Ministry of Defense; see Internal Directive (Aanwijzing) HDBV-012 Export Control, December 19, 2019, on, *inter alia*, compliance with export control regulations.

13 Esmée de Bruin, 'Export control regimes. Present-day challenges and opportunities', in: R. Beeres et al. (eds)., *NL-ARMS: Netherlands Annual Review of Military Studies 2021. Compliance and integrity in international military trade* (The Hague, Asser Press, 2021), 31-54. See: https://link.springer.com/content/pdf/10.1007/978-94-6265-471-6.pdf.

14 The role of the member states is discussed in: J.E.D. Voetelink, 'Verordening (EU) 2021/821. Herschikking van de EU Dual-use Verordening', in: *Militair Rechtelijk Tijdschrift* 114 (2021) (3). See: https://puc.overheid.nl/mrt/doc/PUC_697402_11/1/.

15 These items are listed in the EU Common Military List.

16 Article 29 of the Treaty on European Union (consolidated version) (OJ C326, 26.10.2012).

17 Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528 (OJ L102, 24.3.2021).

18 Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force (OJ L60, 28.2.2022).

19 Council Decision (CFSP) 2022/471 of 23 March 2022 amending Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force (OJ L96, 24.3.2022).

20 These packages included amendments to existing sanctions as well as completely new sanctions.

EU officials Ursula von der Leyen and Josep Borrell visited Ukraine in April. Slovak Prime Minister Eduard Heger was also part of the delegation PHOTO EUROPEAN COMMISSION

however, that the sanctions did not result in any major changes in EU export control law[21] leaving the EU's Dual-use Regulation 2021/821 and the Common Position unchanged. This means that EU member states have managed to process the recent arms transfers to Ukraine within the existing legal export control framework.

The run-up to the Russian invasion

After the annexation of Crimea and meddling in the Donbas region by Russia in 2014 Ukraine quickly learned that it was unable to safeguard the integrity of its borders as it lacked certain types of equipment needed for self-defence. Consequently they repeatedly asked Western countries to supply these items, leading to heated discussions among NATO member countries about whether such transfers would be appropriate. In the first instance most arms exporting countries were generally skeptical about supplying these arms. However, this situation changed around 2016 when the US administration came under heavy pressure from Congress to assist Ukraine notably when the Minsk agreements had clearly failed.[22] The Obama administration started to provide Ukraine with nonlethal security assistance, such as body armour, helmets, vehicles, night and thermal vision devices, heavy engineering equipment, advanced radios, patrol boats, rations, tents, counter-mortar radars, uniforms, medical kits, and other related items. In 2017 the Trump administration decided to extend and intensify the assistance by also providing lethal weapons to Ukraine.[23]

21 E.g. Commission Delegated Regulation (EU) 2022/699 of 3 May 2022 amending Regulation (EU) 2021/821 of the European Parliament and of the Council by removing Russia as a destination from the scope of Union general export authorisations (OJ L130I , 4.5.2022,). The US made more substantial changes; see, for instance, the changes to the Export Administration Regulations that limit the export of foreign-made products using US parts or technology to Russia and Belarus.

22 The Minsk agreements were a series of international peace agreements signed in 2014 and initiated by France and Germany. The general aim of these agreements was to end the war in the Donbas region of Ukraine.

23 S.T. Wezeman, A. Fleurant, S. Perlo-Freeman, and P.D. Wezeman, P. D., *The Impact of the crisis in Ukraine on arms transfers in SIPRI Yearbook 2015*.

In contrast to the United States, European countries have generally been much more reluctant or even publicly strongly opposed to selling weapons or other military equipment to Ukraine. During the EU summit about the Ukraine crisis in August 2014 German Chancellor Angela Merkel declared that she considered arms supplies to Ukraine inappropriate because there was no military solution to the conflict. The conflict with Russia might flare up again due to the supply of military equipment and reduce the possibility of any diplomatic solution considerably.[24]

At the end of February 2022 Russia attacked Ukraine again, largely by destroying cities, public infrastructure, harbours and military complexes. This outrageous act of aggression has led to a dramatic change in the prevailing political point of view and has catalyzed the effort to arm Ukraine. Even countries that have long been hesitant to send arms to conflict areas have reversed course and pledged assistance to Ukraine. The justification for the military support to Ukraine in policy circles is based on several political key arguments. Some advocates have made the case that military assistance to Ukraine will change Russia's calculus directly and possibly deter it from launching any further attacks. Others claim that support to the Ukrainian military can have a real impact on the country's military capabilities and enhance its operational readiness. As a result, the Kremlin would be presented with a greater challenge to achieve victory. Finally, there are also voices calling for sending additional capabilities to Ukraine, merely as a powerful message of deterrence that would raise the cost of a Russian response enormously, which might discourage them to plan future invasions of, in particular, other former Soviet states.[25]

Risk management

The desire to urgently send arms as a matter of practical and symbolic support for Ukraine has obscured some of the well-known risks associated with funneling arms to conflict zones. With the transfer of arms the expectation is that the recipient will use the weapon in accordance with the goals and interests of the supplier's policy. However, this expectation may be false and with tools of violence the consequences may be dire, especially since arms tend to be transferred to countries at war in situations of instability or human rights violations and where central government is at its weakest.[26]

Arms supplies involve complex trade-offs between perceived risks and potential benefits. The Scowcroft Centre for Strategy and Security conducted a survey among many national security experts, asking them to evaluate eleven options, all primarily military by nature, that NATO could take to strengthen Ukraine's defence. These options were evaluated based on two main criteria: military effectiveness and the risk of escalation. The findings of this survey indicated that the deployment of unmanned aerial vehicles and electronic warfare systems is recognized to be highly effective in military terms and, at the same time, entails only a low risk of escalation. On the other hand, sending close-in weapon systems or Patriot air defence missiles also appear effective in military terms, but there is a considerable risk of escalation attached to exporting these items to Ukraine.[27]

It is the responsibility of policymakers in the sending states to consider the strategic risks of transferring arms to an area of open hostilities. The discourse so far has primarily focused on short-term military benefits, which might create future security concerns since Ukraine has a long history of losing track of weapons and this risk of dispersion substantially increases during wartime. Nevertheless, when exporting states still choose to send weapons they must seriously monitor the transfer and use of these weapons. Our inability to keep track of where military equipment ends up after delivery could easily result in unintended consequences.

24 S.T. Wezeman et al, *The Impact of the crisis in Ukraine on arms transfers in SIPRI Yearbook 2015*.

25 S. Charap and S. Boston, 'U.S. Military Aid to Ukraine: A Silver Bullet?' *The Rand Corperation*, 2022, Commentary (Foreign Policy).

26 T. Galloy, 'Arming Ukraine, Understanding the Benefits and Risks of Arms Transfers', *CIFE Policy Paper* 127, 2022.

27 T. Wetzel and B. Pavel, 'What are the risks and benefits of US/NATO military options in Ukraine? Our strategic risk calculator has answers', *Atlantic Council*, 2022.

To reduce the risk, license applications for the export of military equipment from EU member states should be assessed against the eight common assessment criteria specified in the Common Position. These criteria include (1) respect for international obligations and commitments, (2) respect for humans rights and international humanitarian law, (3) the internal situation in the country of end use, (4) the preservation of regional peace and stability, (5) the national security of EU member states, allies and friendly countries, (6) the behaviour of the buyer country vis-à-vis the international community, (7) the risk of diversion, and (8) the compatibility of exports with an end user's technical and economic capacity. The first four criteria are reasons for a strict denial, while the latter criteria provide arguments for only a negative recommendation.

Considerations that should underlie the decisions concerning arms transfers to Ukraine

The risks of these arms transfers must therefore be considered and, where possible, mitigated. Below an inventory based on past experience and the current situation is given of some of the most important considerations that should underlie the decision to supply arms to Ukraine or not. At the end of this paragraph we verify whether these considerations are in accordance with the EU arms export regulations.

Consideration 1: Direct delivery risks

The process of an arms transfer is often quite long. Arms promised today may not be available for export for months or even years to come, during which the situation in Ukraine is likely to have evolved. Though these pledges have symbolic value, they may have little real effect on the battlefield. In the meantime, the symbolism of these pledges may serve to negatively influence Russian perspectives on the conflict, leading to further escalation, including more intense fighting or tactics.[28]

Even when there is timely availability of the weapons, the logistic operation will be a serious challenge. Currently, sea supply routes into Ukraine are completely cut off by the Russian Navy and aerial resupply remains severely restricted due to Russian air patrols and air defence. The only possibility of supplying Ukrainian ground forces that remains is by ground resupply routes through bordering NATO countries, mainly Poland and Romania. However, in the near future it is expected that Russia will prioritize the interdiction of external resupply into Ukraine by way of aerial and artillery bombardments, ambushes, and sabotage of rail lines. If Russia moves to shut down these resupply routes, Ukraine could lose access to materiel to continue its resistance.[29] According to unconfirmed reports from Russian news agency TASS, quoting Defence Ministry spokesman major general Konashenkov, near Odessa Russian anti-aircraft defence forces have shot down a Ukrainian transport plane, which was thus prevented from delivering a large shipment of arms supplied by Western countries.[30]

Even worse, Russian armed forces might try to seize certain arms deliveries. This might create a future security risk when these arms are used by Russian armed forces or when the more technologically advanced items are being sold to other state and non-state actors as Russia lacks the knowledge and skills to operate them. This scenario already happened only last year when the Taliban seized stockpiles of US weapons after the group overthrew the Afghan government. Also, the chaos that followed the 2011 Libyan civil war resulted in the uncontrollable spread of weapons across Africa. According to the United Nations, some of those weapons went to the terrorist groups Boko Haram and al-Qaeda via the black market.[31]

28 E. Yousif and R. Stohl, 'Under Caution: Assessing Arms Transfer Risk in Ukraine', *Stimson Centre*, 2022 Technology and Trade, commentary.

29 'Atlantic Council military fellows. Russia Crisis Military Assessment: The weapons Ukraine needs most to win the war', New Atlanticist, *Atlantic Council*.

30 D. Das, 'Russia claims it shot down military plane carrying western arms outside Ukraine's Odesa', *RepublicWorld.com*, see: https://www.republicworld.com/world-news/russia-ukraine-crisis/russia-claims-it-shot-down-military-plane-carrying-western-arms-outside-ukraines-odesa-articleshow.html.

31 N. Boisvert, 'Experts warn that Canadian weapons shipped to Ukraine could end up in the wrong hands', *CBC Politics*, 2022.

Ukraine's supporters may also worry about the prospect of Russia obtaining military technology that it may be able to copy or adapt or even sell to other countries. For example, Ukraine has received large quantities of anti-aircraft missiles from the US and its allies. In contrast, in Syria such weapons were not supplied by the US to anti-Assad fighters due to concerns that the missiles could be obtained by terrorist groups that might use them against civilian airliners.[32]

Consideration 2: Less well-trained military personnel

Even when these arms begin arriving in Ukraine their utility to frontline forces may be complicated by issues such as absorptive capacity, interoperability, and training. Many of the proposed transfers concern advanced military hardware that requires certain technical training and sustainment capacities that may be lacking in Ukraine, particularly among the civilian defence forces that have been raised since the start of the Russian invasion. While an assault rifle is relatively simple to use, a surface-to-air missile or aircraft will require additional training.

Moreover, the ability to integrate transfers from different countries involving different sets of instruction, logistics, and sustainment packages may be simply beyond the abilities of a force already stretched thin.[33] Generally, the Ukrainian military is trained on former Soviet and Russian systems and would find it easier to operate those familiar systems if they could be transferred from the stocks of European countries that have such weapons.[34,35]

Consideration 3: Black market and illicit arms trade

Once arms have been supplied it is difficult for a supplier to ensure they will be used for the originally intended purpose. Some are warning that parts of those shipments could end up on the black market or be used against the Ukrainian people by the Russian military or local paramilitary groups.

Polish soldiers patrol a rail yard during a NATO exercise. The logistics of getting weapon shipments to Ukraine is a serious challenge. Direct delivery risks of arms transfers may lead to escalation on Russia's part

PHOTO NATO

The recent past has shown how arms intended for aiding an ally in one conflict have found their way to the frontlines of other unforeseen battlefields, often in the hands of groups at odds with the interests of other states or those of civilians. This is especially true for small arms and light weapons, which run the highest risk of being lost and disappear into the illicit market, or being misused. From Afghanistan to Iraq to Colombia, well-intentioned transfers have a habit of outliving their political contexts and risk fueling new conflicts, being captured by illicit groups, or contributing to enduring insecurity.[36]

Ukraine already struggled with the dispersion of weapons long before the Russian invasion with civilians and soldiers alike funneling weapons into an expansive illicit weapons trafficking network.[37] The diversion of military-grade weapons is a profitable business in Ukraine and thousands of handgrenades, rockets, and landmines found their way from conflict zones around the Donbas region to cities and towns throughout the country. According to the 2021 Global Organized Crime Index Ukraine has one of the largest illegally trafficked arms markets in Europe, especially when it comes to small arms and ammunition. About 300,000 small arms and light weapons were reported lost or stolen between 2013 and 2015. Of these, only slightly more than 13 per cent are recovered, while the vast amount remains in circulation on the black market. In fact, Ukraine's role as a key player in the global arms trade has only grown since conflicts intensified in eastern Ukraine in recent years.[38]

Consideration 4: Nuclear escalation threat. Russia will react to arms being supplied to Ukraine and in ways that are difficult for Ukraine and its suppliers to predict. It appears that there are concerns within the EU as well as within NATO that certain arms supplies could cross the escalation threshold. Notably, states have not (yet) supplied Ukraine with long-range missiles that could be used to attack targets in Russia. Instead, all the supplies that have initially been announced involved infantry equipment for use on battlefields within Ukraine. Currently, equipment that can be categorized as more heavier items is also being transferred, which suggests that the EU members become less reluctant.[39]

> Once arms have been supplied it is difficult for a supplier to ensure they will be used for the intended purpose

More specifically, the intended transfer of MiG fighter aircraft from Poland to Ukraine shows that some parties in the US as well as other NATO members were concerned that under some circumstances such a transfer could cross an escalation threshold, especially since Russian President Putin has frequently asserted he would use nuclear force when NATO members become too directly involved, already having put the first step of this programme in motion.[40] The current actions have created the perception that NATO policy is driven by 'escalation aversion', a bias in which careful weighing of multiple risks has been abandoned in favour of avoidance of a single, worst-case outcome: nuclear war.[41]

Based on the eight EU arms export criteria specified above, arguably the risk of diversion in Ukraine (criterion 8) and the lack of knowledge

32 N. Marsh, 'Arms and Influence in Ukraine' *PRIO Blogs*, 2022; M. Ashkenazi, P.M. Amuzu, J. Grebe, C. Kögler and M. Kösling, 'MANPADS A Terrorist Threat to Civilian Aviation', Bonn: Bonn International Centre for Conversion, *Brief 47*, 2013.
33 Yousif and Stohl, 'Under Caution'.
34 J. Abramson, 'West Rushes weapons to Ukraine', *Arms Control Today*, 2022.
35 Congressional Research Service, 'U.S. Security Assistance to Ukraine', *In Focus*, 2022.
36 Yousif and Stohl, 'Under Caution'.
37 T. Giorno, 'Risk of weapons vanishing as over 20 countries send arms to Ukraine', *Responsible Statecraft*, 2022.
38 'Global Organized Crime Index', *Global Initiative*.
39 D. Malyasov, 'Ukraine to receive Panzerfaust 3 anti-tank weapons, *Defence Blog*, 28 February 2022. See: https://defence-blog.com/ukraine-to-receive-panzerfaust-3-anti-tank-weapons/.
40 Abramson, 'West Rushes weapons to Ukraine'.
41 N. Marsh, 'Supporters of Ukraine may decide to restrict supplies of arms that Ukraine wants', *Science Norway*, 2022.

and technical capabilities of the Ukrainian armed forces (criterion 7) are enough reason for not recommending arms deliveries to Ukraine. The possibility of escalation of regional instability (criterion 4) should even lead to instant denial of the arms transfer to Ukraine. Especially since Putin has regularly threatened to attack other countries if NATO member states do not stop interfering in this conflict.

However, on the one hand, this prompts the legitimate question whether these criteria are still appropriate when the consequence of a military emergency goes beyond the border of the invaded country and needs to be shared by the entire international community. On the other hand, one might argue that there are several interlinking reasons why Ukraine's supporters may become less willing to supply certain weapons in the future if they perceive that there are risks of proliferation. Such perceptions could be affected by the occurrence of cases of weapons trafficking, of Russia having obtained sensitive technology or the future degradation of command and control within the Ukrainian armed forces. These negative proliferation concerns are likely to start to dominate when peace becomes a more realistic prospect. Also, the arms deliveries might be reduced when they negatively affect the operational readiness or self-protection of the sending state, as has already been argued by the German Chancellor Olaf Scholz.[42] In the remainder of this article, a more in-depth analysis is provided of the different EU country practices related to these arms deliveries.

Country practice

The final part of this paper discusses the practice of three NATO countries from the start of the invasion of Ukraine by Russia on February 24, 2022 until June 15, 2022. For some considerations, especially those related to diversion, the type of weapon is of importance. Therefore, these are provided if countries have communicated them. The considerations that underlie this decision are described if available. We have selected three EU countries that vary in size and approach. The Netherlands and Germany are considered major arms exporting countries,[43] while the Slovak Republic has a small arms industry.[44] In contrast to Germany and the Netherlands, the Slovak Republic shares a border with Ukraine. Therefore, the country might experience a more urgent threat and have closer relationships with Ukraine, which could influence its considerations.

The Netherlands

A few days prior to the invasion of Ukraine the Netherlands started giving military assistance to the country. In the months that followed military supplies to Ukraine have increased several times. At first, the Netherlands was relatively open about the types of weapons delivered and on February 18, 2022, the Dutch Ministry of Defence obtained the first export licences for military assistance to Ukraine.[45] At the time, 3,000 helmets, 2,000 sets of body armour, 30 metal detectors, several radars, and 100 sniper rifles with ammunition, worth over 7 million euros, were sent. The Ukrainian land forces and navy were listed as end-users. On February 27, 2022, further military assistance was given. 50 Stinger anti-aircraft missiles, 50 Panzerfaust anti-tank weapons with rockets, 171 additional helmets and 85 body armour with armour plates worth 19,8 million euros were sent to the Ukrainian land forces.[46] On June 9, 2022, the Dutch Defence Secretary announced that in total over 130 million euros of materiel assistance was given.[47] Contrary to earlier announcements, the Netherlands now decided to keep the type of weapons secret.[48] Only in April, the Netherlands made public that it would send heavy weapons, such as armoured howitzers, to Ukraine.[49]

42 G. Chazan, 'Scholz defends German decision not to supply heavy weapons to Kyiv', *Financial Times*, 19 April 2022.

43 P.D. Wezeman, A. Kuimova, and S.T. Wezeman, 'Trends in International Arms Transfers, 2021', *SIPRI Fact Sheet*, 2022.

44 See the SIPRI Arms Transfers Database for the current arms export data on the Slovak Republic: https://www.sipri.org/databases/armstransfers.

45 Parliamentary Papers 2021-2022, no. 36045, nr. 2, 2.

46 Parliamentary Papers 2021-2022, no. 22054, nr. 358, 2.

47 Parliamentary Papers 2021-2022, no. 22054, nr. 366, 1.

48 House of Representatives, 67th meeting Thursday, March 31, 2022. Debate about the speech by Ukrainian President Zelensky. See: https://www.tweedekamer.nl/kamerstukken/plenaire_verslagen/detail/2021-2022/67#id55f5f3be.

49 Parliamentary Papers 2021-2022, no. 22054, no. 362, 1; Pariamentary Papers 2021-2022, no. 22054, 363, 1.

PHOTO MANHHAI

Ukrainian soldiers in the Donbas region. Based on the current EU's Common Position, the risk of diversion of weapons in Ukraine (criterion 8) is sufficient reason for not recommending arms deliveries to the country

In addition, by way of several parliamentary papers on the military assistance to Ukraine the Dutch House of Representatives was informed about the underlying considerations.[50] First, the effect of the delivery to Ukraine on the Dutch operational readiness is discussed per type of weapon.[51] Most weapons delivered, such as the helmets and the body armour, have no impact on the operational readiness as they are surplus equipment. Although the export of anti-tank weapons causes the operationally-ready stock to drop below the norm, these weapons were already planned for replacement. Despite the fact that the exports of the radars and ammunition have an effect on the Dutch operational readiness, that effect is considered acceptable. All in all, the bulk of the weapon deliveries does not affect operational readiness.

Second, compliance with the Common Position is taken into consideration.[52] The effect of the export on the security context, international human rights and humanitarian law,[53] the internal situation in the country of final destination,[54] regional stability,[55] and the risk of diversion is set out.[56] From the assessment it follows that the export is in line with most of the listed criteria of the Common Position, except for criterion 7, which is on the diversion risk. As explained, Ukraine has a large black market for illicit arms trade.[57] Especially concerning the rifles and ammunition there is

50 Parliamentary Papers 2021-2022, no. 36045, no. 2, 3-7; Parliamentary Papers 2021-2022, no. 22054, no. 358, 3-9.
51 See for example Parliamentary Papers 2021-2022, no. 22054, no. 365, 1-4.
52 Ibidem, 4-8; ibidem 3-7.
53 Council Common Position 2008/944/CFSP criterion 2.
54 Ibidem, criterion 3.
55 Ibidem, criterion 4.
56 Ibidem, criterion 7.
57 'Global Organized Crime Index', *Global Initiative.*

a high diversion risk.[58] Furthermore, the risk that weapons originating from the Netherlands end up in Russian hands is briefly discussed. Although the Netherlands acknowledges this risk the country decides that it is not decisive. In parliamentary papers it is stated that Ukraine has the right to self-defence and therefore the Netherlands has decided to provide military assistance despite the diversion risk.[59] In the parliamentary papers that have been published between April and June the considerations are not made public. However, it is mentioned that compliance with the Common Position is ensured through a fixed procedure.[60]

In the paragraph on possible considerations it is discussed that the fact that Ukrainian military personnel is less well-trained could influence a country's decision to supply military goods. The Dutch parliamentary papers bear out that this has indeed been taken into account by the Netherlands. For most types of supplied military equipment, such as helmets and body armour, no training is required. However, for other types of equipment, such as sniper rifles, radars, metal detectors, and armoured howitzers, training is necessary. For this reason, training is provided.[61]

Germany

Over the past few months Germany has been struggling with the question whether to supply weapons to Ukraine and, if so, what type of weapons to supply. On January 19, 2022, when the tensions in Ukraine were increasing but no invasion had taken place yet, the German government declared during a press conference that it would not send lethal weapons to Ukraine. Defensive weapons were considered an option but only if they were not used for lethal purposes. Nevertheless, it was emphasized that the agreement between the three coalition parties stated that no weapons could be sent to crisis areas, thereby ruling out military assistance in case of an invasion by Russia.[62] February 27, 2022, marked a sudden shift in the German position towards military assistance. On that day German Chancellor Scholz announced in a public statement that Germany would start the supply of defensive weapons because Russia had attacked Ukraine.[63] In April Germany went even further announcing that it would send heavy weapons such as seven armoured howitzers.[64] However, the country was criticized for not providing enough support to Ukraine because of the slow delivery of the weapons. In response Scholz stated on June 1, 2022, that Germany would support Ukraine with advanced weaponry such as air defence missiles.[65]

In contrast to the Netherlands, from the beginning of the invasion onwards Germany decided to remain secretive about the exact weapons supplies to Ukraine, although the federal government released some information about its military assistance. Between February 24 and March 1, 2022, 1,000 Panzerfaust anti-tank weapons and 500 Stinger anti-aircraft defence systems were sent.[66] In addition, another 50 anti-tank weapons and nine Howitzer D-30s, both with accompanying ammunition, were provided to Ukraine.[67] However, the German federal government repeatedly pointed out that information about export licences would be kept secret because of safety and public welfare considerations.[68] On March 30, 2022, it was made public that 240 million euros would be made available to the European Peace Facility for military aid.[69]

Some considerations underlie the German position and the sudden shift therein. At first,

58 Parliamentary Papers 2021-2022, no. 36045, no. 2, 7.
59 Ibidem.
60 Parliamentary Papers 2021-2022, no. 22054, no. 363, 1; Parliamentary Papers 2021-2022, no. 22054, no. 363, 1; Parliamentary Papers 2021-2022, no. 22054, no. 365, 1.
61 Parliamentary Papers 2021-2022, no. 36045, no. 2, 8-9; Parliamentary Papers 2021-2022, no. 22054, no. 363, 1.
62 Government Press Conference January 19, 2022.
63 Policy Statement by Olaf Scholz, Chancellor of the Federal Republic of Germany and Member of the German Bundestag, February 27, 2022.
64 'Bundestag stimmt für Lieferung schwerer Waffen an die Ukraine', *Bundestag*. See: https://www.bundestag.de/dokumente/textarchiv/2022/kw17-de-selbstverteidigung-ukraine-891272.
65 'Kanzler Scholz zur Ukraine: Wir helfen in umfangreicher Art und Weise', *Bundestag*. See: https://www.bundestag.de/dokumente/textarchiv/2022/kw22-de-generalaussprache-896288.
66 Written question to the Federal Government in February 2022, Question no. 539.
67 Written question to the Federal Government in February 2022, Question no. 538.
68 Written question to the Federal Government in March 2022. Question no. 69.
69 Written question to the Federal Government in March 2022. Question no. 308.

Germany did not want to give assistance in the form of weapons because, in accordance with the coalition agreement, no weapons could be provided to conflict areas.[70] Thus, in line with criterion 3 of the Common Position, Germany did not want to intensify tensions in Ukraine. However, when Russia invaded Ukraine, Scholz addressed the violations of international law by Russia and Ukraine's right to self-defence in order to justify German military assistance. Moreover, he stressed the fact that democratic values had been tarnished.[71]

Initially, the choice of the type of German weapons to be sent seems to have been determined by two main considerations. In the first place, Germany was clearly focused on conflict prevention, thus at the beginning of the conflict all known military deliveries were defensive by nature.[72] However, Germany stepped away from this idea with the announcement of the supply of advanced and heavy weapons. Second, most weapons that have been supplied are surplus equipment and often compatible with existing Ukrainian materiel. For example, the Howitzer D-30s are of Soviet origin and were used by the former DDR.[73] It seems as if Germany is also taking the operational readiness of its own defence forces into account as there are indications that the supplies of surplus weapons are drying up. Therefore, it was suggested to deliver arms directly from Germany's weapons manufacturers.[74]

The Slovak Republic

The Slovak Republic has also provided military assistance to Ukraine. On February 26, 2022, the Slovak government decided to donate military materiel worth 2.6 million euros and material from the federal material reserves worth 8.4 million euros. These donations include 12,000 pieces of ammunition, 10 million litres of diesel, and 2.4 million litres of kerosine.[75] One day later, Prime Minister Eduard Heder declared that another 486 air-defence missiles, anti-tank rockets, and 100 air-defence launchers would be arranged.[76] Further, the Slovak Republic has offered to send MiG-29s to Ukraine. However, this delivery is only possible if these fighter aircraft of Soviet origin are replaced by substitute fighter planes such as F-16s. On April 8, 2022, it was confirmed by the Slovak Prime Minister that the country had sent an S-300 air-defence system to Ukraine.[77] On June 2, 2022, the Slovak Ministry of Defence announced a further delivery of eight Zuzana 2 howitzers that are considered to be modern weapons.[78]

In contrast to the Netherlands and Germany, the Slovak Republic was prepared to provide Ukraine with heavy armament at an early stage of the conflict. For example, the S-300 air defence system is one of the largest weapon systems a NATO country has supplied so far.[79] It is possible that the Slovak Republic is more willing to make certain decisions because it shares a border with Ukraine and might therefore experience a more imminent threat. In addition, the country is currently undergoing a massive influx of refugees from Ukraine, which might influence the public debate. Prime Minister Eduard Heger has stressed that the delivery of the S-300 does not mean that the country becomes part of the conflict.[80]

Various considerations seem to underlie the Slovak weapon supplies as the country takes its own operational readiness into account. Although the MiG-29 fighter aircraft were planned to be phased out it has emphasized that the replacement of these aircraft must have

70 Government Press Conference January 19, 2022.
71 Policy Statement by Olaf Scholz, Chancellor of the Federal Republic of Germany and Member of the German Bundestag, February 27, 2022.
72 Ibidem.
73 Written question to the Federal Government in February 2022. Question no. 538.
74 See for example 'Habeck verspricht Genehmigung für Rüstungsexporte in die Ukraine', *Augen geradeaus!*: https://augengeradeaus.net/2022/03/habeck-verspricht-genehmigung-fuer-ruestungsexporte-in-die-ukraine/ and corresponding Written question to the Federal Government in March 2022, 308.
75 See for example *Webnoviny*: https://www.webnoviny.sk/slovensko-posiela-na-ukrajinu-vojensky-material-cesko-aj-gulomety-a-ostrelovacie-pusky/.
76 Twitter, Eduard Heger, 27 February 2022. See: https://twitter.com/eduardheger/status/1498055152045015046?s=20&t=GkEvYU5usModyzDZRmqLHw.
77 Twitter, Eduard Heger, 8 April, 2022. See: https://twitter.com/eduardheger/status/1512380240399376389?cxt=HHwWisC4ufDEif0pAAAA.
78 'Slovakia to deliver eight Zuzana 2 howitzers to Ukraine, says ministry', *Reuters*, 1 June 2022. See: https://www.reuters.com/world/europe/slovakia-deliver-eight-zuzana-2-howitzers-ukraine-says-ministry-2022-06-02/.
79 A. Higgins, 'Hiding in Plain Sight, a Soviet-Era Air Defense System Arrives in Ukraine', *The New York Times*, 14 April 2022.
80 Facebook, Eduard Heger, 8 April 2022. See: https://fb.watch/cqGNUp6Qj9/.

taken place before they could be delivered to the Ukrainian air force.[81] As a neighbouring country of Ukraine this consideration might weigh heaviest for Slovakia. Again, mainly weapons of Soviet origin have been sent to Ukraine, possibly for two reasons; first, because these types of weapons are likely to be most compatible with those currently in use by Ukraine. Second, the risk of technology ending up in Russian hands will be reduced. However, often weapons have been adapted to NATO systems, which must be removed before a transfer of these weapons to Ukraine can take place.[82]

Synthesis and conclusion

Right before and immediately following the Russian invasion of Ukraine several countries, including EU member states, started to give Ukraine substantial military assistance, which gave rise to questions about the international

A Dutch armoured howitzer. Both the Netherlands and Germany sent this kind of advanced, heavy weapons to Ukraine, which require additional training

arms trade. This article explored whether the conflict has brought about changes in the international arms trade and the EU legal framework and whether EU member states have given due consideration to the risks involved in these changes.

The EU legal framework regulating international arms transfers has not changed substantially since the start of the conflict, hence other factors are likely to have affected the decision whether or not to provide Ukraine with military assistance. Several considerations may underlie the decision not to supply certain types of arms, such as direct delivery risks, the fact that Ukraine has less well-trained military personnel, the effect on the black market and illicit arms trade, and the nuclear escalation threat. In addition, the risk of the diversion of weapons, the lack of technical knowledge, and the possibility of escalation may lead to a negative recommendation for arms deliveries to Ukraine based on the Common Position. From the practice of the Netherlands, Germany, and the Slovak Republic it follows that the countries have taken their own operational readiness into consideration. Moreover, the Netherlands explicitly bases the assessment of the arms export to Ukraine on the criteria of the Common Position by looking at the effects on the security context, human rights, stability, and diversion. At the beginning of the conflict Germany stressed that it would not provide lethal weapons to conflict areas; however, this statement was followed by a sudden u-turn announced by its Chancellor. The Slovak Republic, on the other hand, has provided heavy weapons but stressed that it did not want to become involved in the conflict.

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The increasing arms deliveries from EU member states to Ukraine signals an evident change in the policy regarding the application of the review criteria included in the Common Position. As these criteria have not been subject to change in the past period it is clear that the member states have a considerable margin of appreciation in applying the rules. Against the backdrop of the ongoing armed conflict at the borders of the EU it is understandable that EU members use the policy space the Common Position offers to the largest extent possible. However, arms transfers to Ukraine are not without risks EU member states must continuously be aware of and apply the safeguards required whenever possible. ■

81 J. Curtis and C. Mills, 'Military assistance to Ukraine since the Russian invasion', *House of Commons Library*, 2022, Number 9477.

82 Ibidem.