By the present document, the **Association Européenne de Commerce d'Armes Civiles (AECAC),** the Spanish association **Asociación Española de Comerciantes de Armerías sus Complementos y Explosivos (ACACE),** the Spanish association **Asociación Armera** and the Swedish association **Sveriges Vapenhandlareforening (SVF),** represented in this act by their respective presidents, **Mr. Yves GOLLETY, Mr. Agustín ALBERDI, Mr. Iñaki ORDIOZOLA** and **Mr. Anders LINDSTROM** with address for notification purposes at Plaza Bonanova nº4, 1º-1ª, Barcelona (Spain), Postcode 08022, give notice to the **Directorate General Enterprise and Industry of the European Commission,** of the following

COMPLAINT

for the infringement of the **Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008,** amending the Council Directive 91/477/EEC of 18 June 1991, on control of the acquisition and possession of weapons by

I. the **Kingdom of Spain**; and

II. the **Kingdom of Sweden**.

In order to ensure a better understanding of the reasons that support the present report, we hereby proceed to provide the following

PRECEDENTS

First.- On May 31, 2001, the **Protocol against the Illicit Manufacturing and of Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime** (hereinafter, referred to as the "Protocol"), was adopted at the 55th session of the General Assembly of the United Nations, entering in force on July the 3th, 2005.

Second.- On January the 10th, 2002, the Kingdom of Sweden signed the aforementioned Protocol, becoming State Party to it.

Third.- On January the 16th, 2002, the European Union signed the aforementioned Protocol, becoming Party to it.

Fourth.- For the purpose of transposing the Protocol the European Union approved the Directive 2008/51/EC of the European Parliament and of the Council of the 21st of May 2008, on control of the acquisition and possession of weapons.

Fifth.- To transpose the Directive 2008/51/EC the Kingdom of Spain approved the Royal Decree 976/2011, of July the 8th, amending the Weapons Regulation (Royal Decree 137/1993, of January 29).

Sixth.- The Kingdom of Sweden has its own national legislation regarding the subject of the Protocol: *Vapenlag, Svensk författningssamling (SFS) 1996:67, 8/02/1996* and *Vapenförordning, Svensk författningssamling (SFS) 1996:70 , 8/02/1996*.

Having briefly explained the precedents, we hereby proceed to explain the following

LEGAL GROUNDS

First.- Concerning the Kingdom of Spain

The Protocol establishes in its Article 8.1 that for the purpose of identifying and tracing each firearm, the States Parties of the Convention shall require unique marking on each firearm produced, **imported or transferred from government stocks to permanent civilian use**. This obligation does not exist, besides in the aforementioned cases, for weapons produced before the Protocol entered into force and that remain in the civil market within the same territory.

Regarding the aforesaid Article, Directive 2008/51/EC sets forth in Article 2.2 that:

> "***This Directive shall not apply to the acquisition or possession of weapons and ammunition****, in accordance with national law, by the armed forces, the police, the public authorities or* ***by collectors*** *and bodies concerned with the cultural and historical aspects of weapons and recognized as such by the Member State in whose territory they are established. Nor shall it apply to commercial transfers of weapons and ammunition of war.*"

This highlights the fact that special importance is given to historical weapons, in comparison to those that do not have this character, as firstly, they are of no danger for

organized crime and secondly, **any new, additional proof-marks may reduce the value of weapons as items of historical value.**

In principle, it is admissible under Article 3 of Directive 2008/51/EC if the Member States approve transposing regulations which are most stringent than the regulation set forth in Directive 2008/51/EC:

> *"**Member States may adopt in their legislation provisions which are more stringent than those provided for in this Directive**, subject to the rights conferred on residents of the Member States by Article 12 (2). CHAPTER 2 Harmonization of legislation concerning firearms."*

It is indeed Spain's case, which by Royal Decree 976/2011, established a more stringent regulation regarding the proof-marks in firearms than the regulation set forth in Directive 2008/51/EC.

Article 28.1 of Royal Decree 976/2011 states:

> *"**All firearms** and its fundamental pieces or essential finished components which are commercialized separately, **shall have a proof-mark** which includes the name and the brand of the producer, the land and the place of production and the production number. [...]"*

As an exception to the prior Article, Article 28.10 of Royal Decree 976/2011 disposes:

> *"**Firearms included in categories 6th and 7th, that are not susceptible of being fired and which comply the conditions established in Article 107, are exempt of the proof-mark requirement** established in the first paragraph of this article. [...]"*

Category 6th is the one of our interest hereof, which includes, amongst others, and according to Article 3 of the Royal Decree 976/2011:

> *"The **antique or historical firearms**, their reproductions or equals, which are preserved in museums authorized by the Ministry of Defence if they are dependant on any of the three armies, and the Ministry of Interior in the remaining cases."*

According to the aforementioned Articles, the antique or historical firearms **not susceptible of being fired** are exempt of the proof-mark requirement and it may seem that the Spanish regulation set forth in Royal Decree 976/2011 is not more stringent than the regulation set forth in Directive 2008/51/EC, as they both establish an exemption for historical firearms.

However, the definition that Royal Decree 976/2011 contains for the term "historical firearms" in its Article 2.14, refers to **those firearms which have relation with a fact or a relevant historical character**, when duly proved.

The definition of "historical firearm" is limited to a very concrete and specific type of firearms: those which have relation with a fact or a historical relevant character. According to this, those firearms used in several historical armed conflicts are not included in the definition.

On the other hand, the definition of "**antique firearm**" contained in Article 2.3 of Royal Decree 976/2011, includes those firearms **produced before January 1, 1890**.

This Article does neither give a satisfactory solution to the problem hereof reported, since it sets forth that firearms produced before January 1, 1890 be considered as antique, excluding them from the scope of the definition those firearms which were used on armed conflicts that took place from this date on.

According to the aforesaid, there is no doubt that the regulation established on Royal Decree 976/2011 is more stringent than the regulation established on Directive 2008/51/EC: those firearms which are not related with a fact or a relevant historical character, as well as those which were not produced before 1890, may not have the consideration of historical, nor of antiques. As a consequence, they shall be marked.

Throughout this regulation, Spain not only ignores completely the historic importance of arms that were used by the common man during periods of great historic significance such as World War One and World War Two, but also ignores those arms that are historic by way of their place within the technological advance in weaponry throughout the ages and those that are illustrative for social, political, artistic and technological developments through the ages and as such are considered part of our national heritage.

Indeed, the intention of the marking requirement in the EU regulation is to ensure the traceability of arms through the correct identification and registration in the EU Member States. This measure is understandable and deserves support as a deterrent to organised crime. However, one must bear in mind that a fundamental element of the EU Directive is that collectors and museums and the arms that they collect are specifically exempt from the provisions of Directive 2008/51/EC. This is because the EU recognises the roll of the collector as a preserver of arms for their historical and technological value.

It is contrary to the intention of Directive 2008/51/EC not only that collectors' arms have to be marked, but also that this marking has to be applied retroactively and that the obligation is even extended to firearms that are exempt because of being antique. The marking of firearms that are of interest to collectors is extremely damaging to these objects' historical integrity and value.

However, we shall not forget that throughout this regulation, Spain is not only ignoring the historical value of these firearms, reducing considerably their value; but also that, at the same time, such value reduction represents a <u>decisive barrier to the intra-EU trade</u> of these firearms with historical value.

It is true indeed that Directive 2008/51/EC allows the States to legislate in a more restrictive way than the Directive itself. However, the Spanish regulation to transpose Directive 2008/51/EC is a **handicap for the free movement of goods** (which does not collaborate in promoting the Single Market appropriated for enterprises and consumers and promoted by the EU) and that has actually already caused the disappearance of imports of firearms produced after 1890 coming from other EU countries to Spain.

As an example, Germany introduced a relevant exemption in its national regulation of transposition of Directive 2008/51/EC, regarding the proof-mark requirement for those historical firearms, more specifically, on Section 24, Subsection 1, second sentence of the Law of Firearms (*Waffengesetz*).

The last example is a proof of the fact that the problem here outlined constitutes a problem that is specific to Spanish law: neither the EU laws nor the international laws approved by the Permanent International Commission (C.I.P.) contain any such far-reaching requirements.

<u>Second</u>.- Concerning the Kingdom of Sweden

The Protocol sets forth in <u>Article 8.1.b)</u> that the States Parties, for the purpose of identifying and localizing each firearm shall:

> "***Require appropriate simple marking on each imported firearm, permitting identification of the country of import*** *and, where possible, the year of import and enabling the competent authorities of that country to trace the firearm, and a unique marking, if the firearm does not bear such a marking. The requirements of this subparagraph need not be applied to temporary imports of firearms for verifiable lawful purposes.*"

The Kingdom of Sweden, as a State Party of the Protocol has been marking the firearms imported in its territory, but also including those imported from other Member States of the EU.

However, we shall not forget that Sweden is a Member State of the EU as well and that the EU should be treated as a unique territory to the effects of the Protocols' implementation and for the preservation of the free intra-EU trade and the Single Market: any firearms' transfer from a Member State to another should not be

considered as an importation, since it is only a **movement inside the frontiers of the EU.**

This is the reason why the EU signed the Protocol as a State Party. If the Member States are allowed to approve transposition legislation of the Protocol which do not bear in mind that these States are part of a supranational organization, whose fundamental principles are the promotion of the Single Market and the free movement of individuals, goods and capital, it would not make any sense that the EU signed the Protocol as a Party of it.

The intention of the Swedish authorities to require the marking of all firearms imported from the EU Member States is a clear breach of the free movement of goods principle, enshrined in Article 34 of the Treaty on the Functioning of the European Union (TFEU), and developed in the Directive, when it states that:

> "***Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States***."

The intended restriction in the Swedish law cannot be justified on the basis of the public security grounds mentioned in Article 36 TFEU (see sentences C-473/98 *Toolex* y 5/77 *Tedeschi/Denkavit)* since there is already specific harmonization at EU level, Article 34 TFEU, which establishes the free movement of goods. Therefore the compatibility between the swedish law and the Directive should be analysed.

It is important to emphasize that Article 3 of the Directive doesn't give the Member States a *"carte blanche"* or complete freedom to adopt any national legislation regarding weapons. From a complete reading of the Directive, which definitely shouldn't be understood in isolation but as part of the *acquis communautaire* of the internal market, it can be deduced that Article 3 refers exclusively to minimum conditions that should be respected at internal level of each State (mainly, the conditions to gather and posses weapons and to be arms dealer in the resident State and the marking conditions of the armies that are produced in the own State). This is illustrated by referring to Article 3 in the text of Articles 4 bis and 5. Article 3 avoids a full harmonization of these internal conditions, respecting the different national sensitivities concerning weapons but also allowing at the same time the achievement of mutual trust between Member States by the imposition of minimum standards.

In comparison to this set of dispositions of the Directive that have a fundamentally internal dimension, there is another set of dispositions that have a cross-border dimension and on those Member States aren't entitled to establish stricter rules than the ones foreseen by the Directive. It can be said that the States accept this second set of dispositions because of the mutual trust established by the first. This second set of dispositions refers mainly to the transfer of weapons (Article 11) and to the European firearms pass (article 12). As it has further been indicated, it is for the Member State where the establishment of the marking conditions of the weapons is produced to

decide upon imposing stricter rules to the weapon producers of their country than those foreseen by the Directive. Nevertheless, as long as State A respects the marking conditions of the Directive, State B cannot make the transfer of weapons from State A harder by imposing new marking conditions.

Denying the previous reasoning is simply absurd, meaning that the States would have an absolute discretion in order to slow or even deny the free movement of civil weapons, emptying the Directive of its substance. As a matter of fact, if we affirm that Article 3 is to be applied to the whole Directive, every State could call for its invocation and this way avoid the temporal or definitive import of any weapon under any conditions. This approach would be incompatible with the "raison d'être" and with the aims of the internal market of the Directive and would reduce this instrument, in its cross-border dimension, to a nonbinding recommendation for the States.

In conclusion, the Swedish authorities must respect the conditions for weapon transference in-between States foreseen in Article 11, which don't expect additional marking. Furthermore, regardless of the specific disposition that the Swedish authorities call upon to justify the obligation of an additional marking, it would be their burden to proof that this restrictive measure is necessary, appropriate to achieve the sought aim and proportionate.

CONCLUSIONS

The European Commission, as guardian of the Treaties, must ensure that Member States comply with EU legislation.

As Spanish and Swedish authorities insist on applying a legislation that contravenes the common economic interests, we proceed, with the present report, and under Directive 98/34/EC of the European Parliament and of the Council of June 22, 1998, laying down a procedure for the provision of information in the field of technical standards and regulations, to notify the European Commission about the facts here outlined.

In particular, we report hereof the behaviour of:

I. The Kingdom of Spain

As a consequence for the refusal contained in the Spanish regulation of transposition of the Protocol to consider as historical those firearms produced subsequent to January 1, 1890, and not related with any fact or relevant historical character, having to comply with the proof-mark requirement and consequently, reducing considerably their historical value, as well as representing an important breach to the intra-EU trade and the Single Market.

II. The Kingdom of Sweden

As a consequence for the obligation set forth in the Swedish regulation of transposition of the Protocol to mark all those firearms imported into Swedish territory, including those imported from Member States. The mentioned Swedish legislation forgets that Sweden is a member State of a supranational organization such as the EU, and for this reason is obliged to fully respect the common legislation. As well as the Spanish regulation of transposition of the Protocol, the Swedish regulation means a clear breach to the intra-EU trade and the Single Market.

Brussels, 15th of November 2012

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SVERIGES VAPENHANDLAREFORENING