

Implementing the EU Common Position on the control of arms brokering: progress after two years

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Abstract

The paper reviews the developments in EU member states regarding the implementation of the 2003 EU Common Position on the control of arms brokering. The paper indicates that while good progress is made, there remain important loopholes and weaknesses in EU controls. The paper urges EU member states to continue their efforts to establish high common standards on brokering controls by, among other, strengthening the EU Common Position and promoting adequate next steps on global and regional levels.

Executive summary

The concern by European Union member states about the grave human costs associated with unregulated arms brokering is clearly reflected in their adoption in June 2003 of the EU Common Position on the control of arms brokering. The need for adequate controls in EU member states on those arranging and facilitating arms transfers was amply demonstrated in 2002 by a judgement of the Italian Supreme Court. Specifically, the court was trying a case of an individual charged with arms trafficking in violation of UN embargoes regarding Liberia and Sierra Leone.[1] The Supreme Court acknowledged the defendant's role in illicit arms transfers though also concluded that it could not prosecute the case. The reason for this was that the trafficked weapons had originated and were transferred outside Italian territory.[2] The judgement is all the more ironic because Italy has stringent controls on the brokering of weapons that enter, transit or leave Italian territory.

This report reviews the progress made by member states in establishing adequate controls on brokering and, in particular, in implementing the EU Common Position. It is suggested that two years after its adoption, 2/3rds of EU member states have national legislation which is in conformity with the Common Position's core provisions. Further, most of these states have adopted controls that are encouraged but not required under the Common Position. At the same time, there remain significant loopholes and weaknesses, especially in relation to controls on 'brokering-related' activities and on extraterritorial brokering. There is also a need to further develop and implement common approaches allowing for the adequate exchanges of information between EU member states and third states. It is recommended therefore that EU member states continue their efforts to establish high common standards in the EU on the control of arms brokering.

In particular, EU member states should aim for the EU-wide implementation of the Common Position by June 2006 and strengthen relevant information exchanges stipulated in the Common Position. Further, EU member states should hold consultations on steps to combat the involvement of transportation and financing agents in illicit and otherwise undesirable arms transfers. EU member states should also build consensus on amending the Common Position to stipulate a clear ban on extraterritorial brokering and brokering-related activities in violation of arms embargoes. This should be complemented with a recommendation to license extraterritorial brokering of small arms and light weapons. In addition, EU member states should promote adequate further steps on global and regional levels to combat undesirable arms brokering.

Annex A of the paper contains the text of the EU Common Position on the control of arms brokering. Annex B provides a state-by-state review in EU member states of relevant legislation and regulations on the control of arms brokering.

1. The EU Common Position on the control of arms brokering

The Common Position on the control of arms brokering^[3] is legally binding for EU member states insofar as they are obliged under the Treaty on European Union to ensure the conformity of their national legislation with the Position's provisions (art.1.2). The Common Position aims to prevent arms brokering in 'circumvention of arms embargos by the UN, EU or OSCE, and of the criteria stipulated in the EU Code of Conduct on Arms Exports' (art.1.1). Its core provisions are that member states 'establish a clear legal framework for lawful brokering activities' taking place within their territory (art.2.2) and that they 'establish sanctions, including criminal sanctions, to ensure the effective enforcement of controls' (art.6).

In particular, EU member states have to establish a licensing system for the brokering of items on the EU Common List of Military Equipment involving transfers of such items from one country outside the EU to any other country outside the EU. License applications for such brokering must be assessed against the criteria of the EU Code on Arms Exports (art.3.1). Activities subject to licensing are negotiation or arrangement of transfers between two third countries, including cases where the military equipment is bought or sold by the broker (art.2.3).

Apart from these obligatory elements, the Common Position contains references to more far-reaching controls on arms brokering. This includes an affirmation that member states may require brokers to register with national authorities (art.4.1). Further, the Position contains the encouragement that EU member states 'consider controlling brokering activities outside of their territory' carried out by brokers under their jurisdiction (art.2.1).

EU member states also committed to the establishment of an information exchange mechanism between themselves and with third states (art.5.1). This will entail exchanges of information on legislation and denials of applications for brokering licenses (art.5.2). The information exchange mechanism will thereby facilitate consultations between member states on denied licenses as well as on cases where several member states are involved in the control of the same brokering transaction.

2. Current state of implementation

2.1 Licensing third-country brokering

When adopted in June 2003, about 1/3rd of the then fifteen EU member states had national legislation in place that stipulates a licensing requirement for third-country brokering of items on the EU Common List of Military Equipment. Two years later, this figure has increased to 2/3rds of the now twenty-five member states. These countries, together with the year of adoption of relevant legislation, include [Austria](#) (2001), [Belgium](#) (2003), the [Czech Republic](#) (2004), [Estonia](#) (2003), [Finland](#) (2002), [Hungary](#) (2004), [Latvia](#) (2004), [Lithuania](#) (2004), [Malta](#) (2003), the [Netherlands](#) (1996/97), [Poland](#) (2004), [Slovenia](#) (2002), [Slovakia](#) (2003/04), [Spain](#) (2004), [Sweden](#) (1992), and the [UK](#) (2004).

In most of the remaining EU member states, there are ongoing processes to amend national legislation to ensure conformity with the Common Position. In [France](#) and [Italy](#), existing regulations on brokering involving transfers of military equipment across national borders have to be complemented with controls on third-country brokering. In [Germany](#), existing brokering controls for 'weapons of war' have to be extended to cover other equipment listed in the EU Common Military List. EU members still having to introduce controls on brokering in their national legislation are [Cyprus](#), [Denmark](#), [Greece](#), [Ireland](#), [Luxembourg](#), and [Portugal](#).

2.2 Registration requirements for arms brokers

Requiring the registration of persons and entities wishing to engage in trade in military equipment allows for adequate prior screening of applicants and oversight of the numbers of those so authorised. Many states have integrated a registration requirement for brokers into their broader registration schemes related to the manufacture and trade in military equipment. Registering brokers in these states therefore serves as a gateway and precondition for applying for licenses for individual brokering transactions. Applicants are generally denied a registration if for example found to have previously violated national arms control regulations. If a registered person or entity is found to have violated obligations, the broker may be taken off the register, thereby losing the right to engage in arms trade activities.

Member states requiring a registration for those wishing to engage in the trade of military equipment on the EU Common Military List, or more specifically to act as a broker, include Belgium, the Czech Republic, Estonia, France, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, and Spain.

Estonia deserves special mention in this context for a very detailed and transparent registration scheme. Persons and entities wishing to act as brokers under Estonian jurisdiction must obtain a registration in the State Register of Brokers of Military Goods, as well as a general authorisation for the specific military equipment they are authorised to broker.^[4] The register, together with summary information on the brokers, the date of their registration, and the categories of military equipment they are authorised to broker, is publicly accessible on the internet.^[5]

2.3 Extraterritorial controls on arms brokering

Those engaged in undesirable brokering are widely understood as highly mobile and able to operate from a multitude of countries. In absence of extraterritorial controls, brokers may consequently easily circumvent controls in their home state by conducting undesirable transactions from a state abroad. For example, a EU broker may be aware of the opportunity for a transfer to a destination or end user for which it is unlikely that a license would be granted under the EU Code of Conduct criteria. The broker therefore merely has to step outside the country of residence and conduct the brokering activity from a state abroad with weak licensing criteria or no controls on brokering at all.

Importantly, this activity will, in absence of extraterritorial controls by the home state, not be in violation of regulations of either the home state or the state from which the activity is conducted. Further, even if the activity is illegal in the state where carried out, the broker may escape sanctions by returning to the home state. This will be the case where there is no mutual agreement on co-operation in criminal matters providing for extradition between the home state and the state where the activity was carried out.

The recommendation contained in the EU Common Position that member states consider controlling extraterritorial brokering by those under their jurisdiction therefore represents a welcome development. At the same time, the recommendation does not provide any indications as to how member states may control extraterritorial activities. This lack of detail reflects the still limited degree to which there have emerged common understandings among EU member states regarding the policy options available for implementing the recommendation. As a review of regulations in those EU member states which operate extraterritorial controls reveals, there have developed policy approaches, which range from comprehensive to more restricted controls.

2.3.1 Licensing brokering of any military equipment to any destination

The most comprehensive form of extraterritorial controls is the requirement for brokers to also apply for brokering licenses for any item on national and EU arms control lists when operating outside national territory or outside the EU. The guiding principle behind this approach, adopted by about 1/3rd of EU member states, is that brokers are only granted a license for extraterritorial activities if this license would also be granted if the broker acted within national territory. This approach consequently avoids that a broker may act in full legality when arranging from abroad transfers unlikely to be granted in the EU because of for example concerns regarding the human rights record of the recipient or risks of diversion. EU member states with a licensing requirement for extraterritorial brokering of any item on national arms control lists include Belgium, the Czech Republic, Estonia, Finland, Hungary, Poland, Slovakia, and Sweden.

It is also worth pointing out in this context that most national definitions of brokers operating abroad but falling under national jurisdiction are more comprehensive than the recommended standard in the EU Common Position. To recall, the EU Common Position recommends to consider controlling extraterritorial brokering activities by 'nationals resident or established' in a member state. In contrast, most states with extraterritorial controls also include brokers of foreign nationality resident or established in their territory, and/or nationals that are resident or established in a foreign country.

2.3.2 Licensing brokering of certain equipment to any destination

Some EU member states have adopted or plan to adopt licensing requirements for extraterritorial brokering in relation not to any item on national and EU arms control lists, but for certain categories of equipment considered to be of particular concern. The UK for example requires a license for extraterritorial brokering of long-range missiles and torture equipment, but not for other conventional weapons categories.[6] The German amendment to brokering controls is expected to require licensing of extraterritorial brokering of small arms and light weapons though not to require licensing of extraterritorial brokering of heavy conventional weapons.[7]

This approach of requiring licenses for extraterritorial brokering for only certain military equipment does evidently not create a legal framework to prevent and sanction the activities of brokers who arrange from abroad undesirable transfers of other equipment. The approach, albeit limited, does however suggest itself as a highly desirable minimal standard for EU member states. This is, in view of the grave concerns regarding their proliferation and misuse, especially the case for small arms and light weapons.

2.3.3 Banning brokering of sanctioned equipment to embargoed destinations

A third and more restricted approach than that of licensing extraterritorial brokering of any or certain military equipment to any destination is that of focussing controls on activities related to the brokering of equipment to embargoed destinations and end users. To clarify, this approach is included in the regulations of those EU member states which require licensing of any equipment to any destination. Further, the approach obviously does not address extraterritorial brokering of undesirable arms transfers to destinations and recipients who are not under an arms embargo. Banning brokering of sanctioned equipment to embargoed destinations, whether conducted at home or abroad, does however close a significant loophole in those countries, which do not operate a licensing requirement for extraterritorial brokering to any destination.

One EU member state which does not have a licensing requirement for extraterritorial brokering of military equipment, but which has explicitly banned in national legislation extraterritorial brokering in violation of embargoes, is the Netherlands. That is, Dutch nationals, irrespective of whether operating from Dutch or from a foreign territory, may not engage in arms trade activities that may involve the transfer of sanctioned goods to a destination or end user under embargo by the Netherlands.[8] Importantly, this creates the basis for legal sanctions if a broker under national jurisdiction is found to have brokered military equipment to an embargoed destination.

Another example is the UK which, albeit not licensing extraterritorial brokering in all military equipment, has banned brokering and other acts to facilitate transfers to destinations under national or multilateral arms embargoes to which the UK is party.[9] The ban applies both to any person within the UK and, when abroad, to any UK national who is also a UK citizen.[10] Likewise, the amendment to German brokering controls is expected to include a ban on brokering activities by those under its jurisdiction of any military equipment and irrespective from where it is carried out if the transfer would violate German arms embargo regulations.[11]

2.4 Information exchanges between member states

Information exchanges are an essential requirement for the effective realisation of the Common Position's aims. For example, it is at present generally not feasible for national authorities to identify in a timely and reliable manner whether an applicant for a registration or individual license is considered as an undesirable broker in another member state. Exchanges of information on denied registration applications will help to counter this situation. Further, exchanges of denials of individual licenses will greatly facilitate a coherent policy by EU member states that avoids one member state granting a license for an essentially identical brokering transaction previously denied by another member state.

So far, information exchanges have mainly taken place in relation to national legislation and license denials among member states and with Norway. The specific arrangements for information exchanges stipulated by the Common Position however still need to be established.[12] The delay in the creation of these arrangements may be explained by a primary focus among EU member states over the last years with establishing adequate national controls on arms brokering. Establishing the arrangements can therefore be seen as a second phase in the implementation of the Common Position that member states now have to address.

3. Remaining weaknesses

There remain significant weaknesses in the EU Common Position and most national regulations. It must be emphasised that these weaknesses and loopholes risk undermining the effectiveness of regulations adopted so far. In particular, they continue to facilitate undesirable brokering activities by those considered to be of prime concern, that is, highly mobile commodity traders and their associates who operate independently and for their own profit rather than under contract for the lawfully operating defence industry. In other words, there is a clear risk that regulations adopted so far are increasing burdens for lawfully operating brokers and companies while not adequately combating the activities of those, who purposefully circumvent national controls and risks of legal sanctions.

3.1 Controlling transportation and financing services

A major concern in this context is the continuing absence of adequate regulations on the activities of those who provide 'brokering-related' services for arms transfers. As clearly indicated by report of UN panels on embargo violations and others, actors of key concern in relation to illicit arms transfers are often commodity traders who, if not providing for example contract negotiation services, provide transportation and financing services. The UN group of governmental experts on small arms reporting in 2001 therefore concluded that controls on transportation and financing for arms transfers must form an integral part of efforts to combat illicit and otherwise undesirable arms transfers.[13]

To illustrate, the individual charged in Italy in 2002 for violations of UN embargoes on Liberia and Sierra Leone did not always negotiate the arms transfers he facilitated. Rather, he indicated opportunities to business associates who undertook 'core-brokering' services, while he provided false documentation for the transport of arms and ammunition.[14] Regrettably though, the definitions of brokering in the EU Common Position and in most national controls do not necessarily cover such 'brokering-related' activities. This means that those who facilitate illicit arms transfers by providing transportation and financial services continue to escape the risk of legal sanctions on their activities.

One of the few examples to the contrary is Estonia, which includes in its national definition of brokering the provision of "assistance or funds" in relation to brokering of military equipment.[15] Another

example is Germany. Thus, a general trade authorisation is required for persons and entities operating aircraft registered in Germany or ships sailing under German flag that transport weapons of war outside the territory of Germany.[16] Such an authorisation is however not required for German residents and citizens who transport military equipment outside Germany on ships and aircraft registered in a foreign country.

3.2 Lacking controls on extraterritorial brokering activities

As indicated, a growing number of EU member states is operating controls on extraterritorial brokering activities. At the same time, there remain several EU member states which view the imposition of extraterritorial controls on those falling under their jurisdiction with scepticism. The lack of extraterritorial controls in these states remains a cause of great concern. Thus, it not only implies that those falling under their jurisdiction can circumvent controls by operating from abroad. It also implies that these states risk becoming the states of choice for brokers who want to reside or have a company established in the EU, while being able to engage in unregulated activities from abroad.

Worth mentioning in this context is also the argument sometimes made that extraterritorial brokering controls would be made redundant by a global instrument on the control of brokering. This would arguably only be the case if strict conditions were met. One of these would be the adoption of an international Arms Trade Treaty clearly stipulating the obligations of states under international law in relation to licensing arms transfers and brokering activities. Further, all states would need to have the capacity, resources, and willingness to strictly enforce controls on brokering activities taking place within national territory.

Even if these conditions were met though, it still would be the likely case that standards and their application in the EU will be more restrictive than in other regions. In other words, opposing the adoption of extraterritorial controls in EU member states because of an international instrument on brokering controls that may or may not be developed in the future seems ill advised. For example, it would not necessarily combat extraterritorial brokering by EU residents to destinations under a EU arms embargo but not under embargo from the state where the activity is carried out.

3.3 Information exchanges on undesirable arms brokers

A further concern is whether all EU member states have the national mechanisms in place that allow for identification and exchanges of information on those considered as undesirable brokers by national authorities. As mentioned, undesirable brokers include for example those who are suspected or are found guilty to have engaged in illicit arms trade activities. For those EU member states operating registration schemes, this seems a rather straightforward process. Thus, information on a broker who has a registration application denied or is barred from the register can easily be collated by the competent national authorities. This information can then be made available to other EU member states, the authorities of which may otherwise not be in a position to conduct timely and reliable background checks on foreign applicants for registrations or licenses. In turn, this will help prevent this broker from conducting brokering activities from another EU member state.

In contrast, authorities in those EU member states not operating a registration requirement tend to argue that they keep adequate oversight over brokers under their jurisdiction by relying mainly on the keeping of records on brokering licenses. Countries operating such registries of licenses but not a registration requirement for brokers include among other Finland, Germany, and Sweden. However, relying exclusively on registries of licenses can entail certain weaknesses. For example, it seems not always the case that national authorities have at their disposal adequate mechanisms allowing for the prior screening of a license applicant who has not been previously active in the state where the application is made.

Further, it is not clear whether these EU member states are adapting their registries on licenses and the information shared with other member states to include information on undesirable brokers. That is, it is not clear whether a EU member state will inform its partners not only on licenses that were denied because the transfer would be undesirable under the EU criteria, but also where licenses were denied because the broker is considered to be an undesirable actor in arms trade activities.

4. Conclusions and recommendations

EU member states are making good progress in the implementation of the EU Common Position on the control of arms brokering. Further, most EU member states have opted for a registration requirement for brokers as well as for controls on extraterritorial brokering of third-country arms transfers. This indicates that there is a substantial number of states accepting that the effective prevention of undesirable arms brokering requires control standards that are more far-reaching than the minimal standards required under the Common Position.

At the same time, there remain significant weaknesses in EU control standards on arms brokering. Moreover, the effectiveness of more far-reaching regulations in many EU member states risks being undermined by the absence of equivalent controls in other EU member states. There are therefore good arguments for further efforts by EU member states to build on and develop the common minimal standards of the Common Position. In particular, it is recommended that EU member states:

4.1 Aim for EU-wide implementation of the Common Position by June 2006

It is regrettable that in some states legislative amendments to ensure conformity with the Common Position seem to languish for several years already at the drafting or approval stages and continue to be accorded low priority by the competent authorities or parliaments. The relevant EU member states should aim to ensure conformity of national legislation with the Common Position by June 2006. The EU-wide implementation of the Common Position by this date would send an important signal at the 2006 UN Review Conference on Illicit Small Arms and Light Weapons that the EU is serious in its commitment to combat illicit brokering.

4.2 Strengthen information exchanges

The information exchanges required under the Common Position on denials of brokering licenses will contribute to harmonised licensing practices among EU member states. Member states should go further though by also exchanging information and enhancing transparency on brokering licenses granted by them. Specifically, EU member states should include information on granted licenses in their annual reports on arms exports under the EU Code of Conduct. This should include information on the destination, type, and quantity of the brokered military equipment. In turn, this will allow for the same level of public scrutiny that EU member states have accepted in relation to arms export licenses granted by them.

Further, EU member states still need to design the specific information exchange arrangements stipulated under the Common Position. As mentioned, this should include exchanges of information on persons and entities considered by national licensing authorities as undesirable brokers. This requires that EU member states have in place adequate mechanisms that allow for the national collection and exchange of such information. It must be emphasised that a national registration requirement remains good practice in this context that should be adopted in all EU member states. States without a registration requirement must at a minimum ensure that their national systems allow for the timely and reliable collection and exchange of such information.

One the level of the EU, member states should also consider the creation of a European register on convictions and disqualifications of persons or entities in relation to violations of national arms controls regulations in member states. EU member states instructed the EU Council General Secretariat in March 2004 to examine measures for the establishment of such a register in relation to terrorist offences.^[17] EU member states should extend this instruction to the establishment of a register of information on undesirable arms brokers in the EU.

In addition, EU member states should consider exchanging information on their experiences in the implementation and enforcement of brokering regulations. For example, court cases on illicit arms trafficking are generally the result of intelligence tip-offs or investigative research but not because systematic controls revealed possible violations of national regulations. This indicates that states should build common understandings on possible ways of strengthening the systematic verification of

compliance by brokers with their obligations. Further, it seems that those who engaged in illicit arms brokering and are prosecuted are often tried under different national legislation. This may indicate the desirability that EU member states consider ways to raise awareness among law enforcement agencies, including the judiciary, about the existence and scope of national regulations on brokering.

4.3 Build consensus on amending the Common Position

As argued here, the EU Common Position contains certain loopholes and weaknesses that must be remedied if EU member states are to effectively prevent and combat illicit and otherwise undesirable arms brokering. EU member states should therefore build consensus on amending and strengthening the Common Position. In particular, EU member states should, on national and EU level:

4.3.1 Adopt adequate controls on transportation and financing services

It is of critical importance that EU member states develop common understandings and standards to control the activities of those under their jurisdiction who provide transportation and financing services for arms transfers to third countries. Comprehensive controls in this regard would stipulate the same registration and licensing standards for the provision of 'brokering-related' services as for exports and 'core-brokering' activities. At the same time, it has to be acknowledged that there is at present little support for the establishment of such comprehensive controls in EU member states. However, rather than therefore not addressing the lack of controls on brokering-related activities at all, EU member states should investigate the scope for more limited controls.

A common minimal standard in this regard should be the requirement that those providing transportation and financing services must obtain a general activity license and are covered by prohibitions to participate in arms transfers to embargoed destinations and end users. The same minimal standard should be applied to those providing transportation services for arms transfers to third countries on aircraft registered or ships flying the flag of a EU member state. These limited controls, while avoiding the administrative burdens cited by EU member states in opposition to comprehensive controls on brokering-related activities, would enhance national oversight and create the legal basis for prosecutions for those involved in embargo violations.

4.3.2 Ban of extraterritorial activities violating arms embargos

It is not acceptable that brokers may simply step outside the territory of EU member states to arrange arms transfer that would not be licensed if conducted from within the EU without facing the risk of legal sanctions by their home state. This is especially the case in relation to transfers to destinations and end users who are under an arms embargo. In consequence, the Common Position must be amended to stipulate a prohibition in national legislation of unauthorised extraterritorial activities in relation to arms transfers to embargoed destinations.

The prohibition should clearly stipulate that persons and entities under the jurisdiction of a EU member state may not engage in brokering or brokering-related activities when abroad that may involve transfers of sanctioned military equipment to a destination or end user under an arms embargo by the UN Security Council, the OSCE, the EU, or a national embargo by the EU member state. It should be noted in this context that EU member states already have such extraterritorial prohibitions for crimes of exceptional gravity such as war crimes and crimes against humanity, terrorism, piracy, and trafficking in human beings.^[18]

4.3.3 Licensing of extraterritorial brokering of small arms and light weapons

As indicated, EU member states with comprehensive controls on extraterritorial brokering require a license for the brokering of any military equipment to any destination. This standard is essential to preventing and combating brokers circumventing national and EU licensing criteria by operating from abroad. It is highly regrettable therefore that several EU member states consider their responsibility to prevent undesirable arms transfers facilitated by their residents and citizens to exist only if the brokering activity is carried out within national territory. EU member states should consequently continue to work towards the EU-wide adoption of comprehensive extraterritorial controls.

At a minimum though, EU member states should amend the Common Position and adopt on national levels, where not already the case, the emerging good practice of licensing extraterritorial brokering in relation to military equipment of particular concern. Given the grave consequences associated with their illicit trafficking, destabilising accumulations, and misuse, this equipment should cover the EU Common Military List's categories on small arms, light weapons, and related ammunition. In addition, it is desirable that EU member states extend for the purposes of controlling extraterritorial activities, where not already the case, the scope of brokers under their jurisdiction to go beyond the currently restricted definition used in the Common Position.

4.4 Promote adequate further steps on global and regional levels

Controls on arms brokering in the EU can only be truly effective if complemented by adequate measures on the global and on regional levels. It is therefore a welcome development that an increasing number of states outside the EU are operating and adopting brokering controls. These states include Bulgaria, Israel, Japan, Nicaragua, Norway, Romania, South Africa, Switzerland, the Ukraine, and the USA.^[19]

Further, states have committed themselves under legally binding instruments to establish national controls on brokering in small arms and light weapons in Southern Africa, as well as the Great Lakes and Horn of Africa. Politically binding commitments and model regulations have been adopted and developed in the Organisation of American States, and the OSCE. In addition, Wassenaar member states have committed to the control of arms brokering, and discussions on the establishment of sub-regional standards on brokering controls have taken place in Western Africa and in the Arab League.^[20]

EU member states should continue in this context to support and engage with third states and partner organisations to develop common understandings on the problem of unregulated brokering in small arms and light weapons. They should also promote concrete follow-up to the UN broad-based consultation to enhance international cooperation in combating illicit SALW brokering. Of particular relevance here is the resolution expected to be adopted at the 60th session of the UN General Assembly First Committee in the autumn of 2005 on the creation of a group of governmental experts on SALW brokering. EU member states should promote a mandate of the group of governmental experts that covers the consideration of the feasibility of an international instrument to combat illicit SALW brokering in all its aspects.

Such an international instrument to set out common minimal standards on regulating SALW brokering remains a fundamental need for the global combat of brokering in violation of embargoes and national controls. Further, it is important that the mandate builds on and further develops the analysis of the UN group of experts which reported in 2001 on the feasibility of controlling arms brokering and brokering-related activities.^[21] This implies that 'illicit SALW brokering in all its aspects' should cover consideration of controls on transportation and financing in relation to SALW transfers.

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Annex A: EU Common Position on the control of arms brokering

EU COUNCIL COMMON POSITION 2003/468/CFSP of 23 June 2003 on the control of arms brokering

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the European Union, and in particular Article 15 thereof,

Whereas:

- (1) In implementing the European Union Code of Conduct on Arms Exports Member States have agreed to address the problem of control of arms brokering.
- (2) Member States have continued and deepened their discussions on arms trafficking and brokering activities and have reached agreement on a set of provisions for controlling these activities through national legislation, as set out below.
- (3) Most Member States already have in place or are in the process of adopting national legislation on the subject.
- (4) In the Fourth Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports Member States have agreed to continue deliberations in the area of arms brokering on the basis of the guidelines already approved, with a view to adopting a Common Position on the subject.
- (5) In the Wassenaar Arrangement Participating States agreed on a Statement of Understanding to consider the adoption of national measures regulating arms brokering activities.
- (6) The United Nations Programme of Action on Small Arms and Light Weapons (SALW) commits States to develop adequate national legislation or administrative procedures to regulate small arms and light weapons brokering activities, and undertake further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering of small arms and light weapons.
- (7) The United Nations Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against transnational organised crime requires States Parties to establish a system for regulating the activities of those who engage in brokering,

HAS ADOPTED THIS COMMON POSITION:

Article 1

1. The objective of this Common Position is to control arms brokering in order to avoid circumvention of UN, EU or OSCE embargoes on arms exports, as well as of the Criteria set out in the European Union Code of Conduct on Arms Exports.

2. In order to achieve this objective, Member States will ensure that their existing or future national legislation on arms brokering is in conformity with the provisions set out below.

Article 2

1. Member States will take all the necessary measures to control brokering activities taking place within their territory. Member States are also encouraged to consider controlling brokering activities outside of their territory carried out by brokers of their nationality resident or established in their territory.

2. Member States will also establish a clear legal framework for lawful brokering activities.

3. For the purposes of paragraph 1, brokering activities are activities of persons and entities:

— negotiating or arranging transactions that may involve the transfer of items on the EU Common List of military equipment from a third country to any other third country; or

— who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country.

This paragraph shall not preclude a Member State from defining brokering activities in its national legislation to include cases where such items are exported from its own territory or from the territory of another Member State.

Article 3

1. For brokering activities, a licence or written authorisation should be obtained from the competent authorities of the Member State where these activities take place, and, where required by national legislation, where the broker is resident or established. Member States will assess applications for a licence or written authorisation for specific brokering transactions against the provisions of the European Union Code of Conduct on Arms Exports.

2. Member States should keep records for a minimum of 10 years of all persons and entities which have obtained a licence under the terms of paragraph 1.

Article 4

1. Member States may also require brokers to obtain a written authorisation to act as brokers, as well as establish a register of arms brokers. Registration or authorisation to act as a broker would in any case not replace the requirement to obtain the necessary licence or written authorisation for each transaction.

2. When assessing any applications for written authorisations to act as brokers, or for registration, Member States could take account, inter alia, of any records of past involvement in illicit activities by the applicant.

Article 5

1. Member States will establish a system for exchange of information on brokering activities among themselves as well as with third States, as appropriate. A specific arrangement for such exchange of information will be established. This arrangement will take particular account of the case where several Member States are involved in the control of the same brokering transaction(s).

2. Information will be exchanged, inter alia, in the following areas:

- legislation,
- registered brokers (if applicable),
- records of brokers,
- denials of registering applications (if applicable) and licensing applications.

Article 6

Each Member State will establish adequate sanctions, including criminal sanctions, in order to ensure that controls on arms brokering are effectively enforced.

Article 7

This Common Position shall take effect on the date of its adoption.

Article 8

This Common Position shall be published in the Official Journal of the European Union.

Done at Brussels, 23 June 2003.

For the Council
The President
G. PAPANDREO

Annex B: National regulations on arms brokering in EU member states

Austria - In conformity with the EU Common Position

The legislative framework for brokering controls is given by the amendment in 2001 of the War Materials Act and the Foreign Trade Act.[22] Brokering is defined as the activity where a person domiciled or resident in Austria allows or effects the transfer of goods from one country outside the customs union of the European Union to another country outside the customs union of the European Union (War Material Act, art.1.4; and Foreign Trade Act, art. 3.3). Brokering is subject to individual licenses, which are assessed on the same conditions as export licenses. Violations of this legislation may be punished by a monetary fine or imprisonment of up to two years (War Material Act, art. 7.2; and Foreign Trade Act, art. 17.1).

Belgium - In conformity with the EU Common Position

Brokering activities in Belgium are regulated by amendments in 2003 to the 1991 Law on the Import, Export, Transit and Combat against Trafficking in Arms and Ammunition.[23] Belgian nationals as well as foreign residents and dealers in Belgium require a license to negotiate, export or deliver abroad, or possess to this end, military equipment, or intervene as intermediary in these operations. This license requirement applies irrespective of the origin or destination of goods and whether or not the goods enter Belgian territory. An intermediary is whoever, for profit or free of charge, creates the conditions for the conclusion of a contract entailing the above operations, or whoever concludes such a contract if the transport is undertaken by a third party (Law of 25 March 2003, art. 15 (amending art.10 of the Law of 1991)).

All persons and entities wishing to trade arms and ammunition require a prior registration. Further, a legal obligation exists to conform to Belgian legislation even if brokering activities are carried out in a foreign country. The Belgian jurisdiction has the competence to hold trial over persons accused of having violated Belgian legislation on arms brokering outside Belgian territory if the accused is found on Belgian territory. This competence also exists if the Belgian authorities have not received a complaint or official notification by the authorities in the country in which the alleged violation took place as well as if the activity is not punishable in the country where it was carried out (ibid., (amending art.13 of the Law of 1991)).

As a means to enhance delivery security, a deposit is payable for brokering transactions. The deposit is paid back after the completion of the operation and the receipt of an end-user certificate or after the voluntary cessation of operations under an indeterminate license (ibid. (amending art. 10.3 of the Law of 1991)). Violations and attempted violations of the Belgian legislation on arms brokering are punishable by imprisonment of up to 5 years or a monetary fine (ibid. (amending art.12 of the Law of 1991)).

Cyprus - Amendment to implement EU Common Position in preparation

Arms control regulations in Cyprus are based on the Defence (Exportation of Goods) Regulations of 1993, the Defence (Exportation of Goods) Order of 31 March 2000. Several Ministerial Decrees have been issued over the last years to ensure conformity of national arms export controls with the obligations of Cyprus stemming from its membership of multilateral arms control regimes. They included the Ministerial Decree 354/2002 for the Regulation of Arms Exports, Obligations of the Republic of Cyprus in compliance with the EU Code of Conduct on Arms Exports of 26 June 2002. A further decree to implement the EU Common Position is currently in preparation. It is expected that brokering controls will be modelled on those of Belgium.[24].

Czech Republic - In conformity with the EU Common Position

Controls on foreign trade in military equipment are laid down in Act No. 38/1994.[25]. While not explicitly mentioned in this Act, brokering fall within the scope of the definition of foreign trade activities. It was amended by Act No. 357/2004, effective since 9 June 2004, to make a clear reference to brokering activities and therewith establish a clear regulatory framework for controlling such activities as required under the EU Common Position on brokering controls. Trade in military equipment covers the handling of military equipment abroad, including EU member states, as well as mediating activities such as contract negotiations (Act No 38/1994, art.2). Any such trade activity is subject to an individual license, granted on a case-by-case basis (ibid., art.14.1).

Trade in military equipment is restricted to corporate persons who are citizens and permanent residents of the Czech Republic, and who have been granted a permit for such trade (ibid., arts. 6.1 and 7.1). Those granted the permit are entered in the State Company register as a precondition for applying for individual licenses. The requirement for licensing also exists for brokering activities carried out abroad. A person who has made a business deal with a foreign partner involving military equipment without a permit or licence shall be punished by a prison term of from one to eight years, or the winding up of his business activity, or by a financial fine (ibid., art. 29.2).

Denmark - Amendment to implement EU Common Position in preparation

The legal basis for the control of brokering activities in Denmark is given by the Consolidated Act No. 918 of 9 September 2004 of Weapons and Explosives. A bill was introduced on 30 March 2005 to amend the Weapons and Explosives Act so as to also cover brokering controls. The amendment now has to be approved by parliament. Under the new legislation, a license will be required on a case-by-case basis for intermediary activities. Specifically, licenses will be required for negotiating or arranging transactions, as well as buying or selling military equipment, including those in the ownership of a broker, which involve transfers of the equipment between countries outside the European Union.[26]

Estonia - In conformity with the EU Common Position

The basis for Estonian export controls on military equipment is given by the Strategic Goods Act of 17 December 2003, which entered into force on 5 February 2004.[27] It covers 'services related to military goods', which include brokering activities. Brokering activities are defined as 'providing or making available information, practical assistance or funds with a view to arranging or negotiating the arrangement of transactions relating to military goods that involve the transfer of goods from a foreign country to another foreign country'. Also included is the 'acquisition of military goods located in a foreign country with a view to transferring the goods to another foreign country' (Strategic Goods Act, art. 3). As broker is defined as a person engaged in these activities receiving financial or other gains therefrom (ibid., art. 38).

A license requirement for brokering activities exists 'regardless of the residence of the service provider who is a natural person or seat of the service provider who is a legal person or through the business activity of an Estonian service provider in a foreign country' (art. 4.2.4). Further, brokers who have received a deal-specific license must report on their provision of services to the competent national authorities on a three monthly basis and irrespective of whether or not services were provided during the specified time period (art. 27.3).

A precondition for deal-specific licenses is a registration in the state register of brokers of military goods (art. 39). This register was established by Regulation No. 60 of 9 March 2004, which entered into force 18 March 2004.[28] Its purpose is to maintain records on the persons engaged in brokerage of military goods. The list of persons entered in the state register of brokers of military goods is public (Strategic Goods Act, art. 10.4). A broker may only obtain deal-specific licenses for the brokering of military goods for which he or she was registered (ibid. art. 39.2).

Registration may be refused if, among other, the applicant knowingly submitted false information or documents, violated in the previous five years Estonian regulations on import, export and transit of strategic goods, including brokering activities, or violated an international sanction (art. 41.2). A

registration shall be deleted from the registry if, among other, new facts become evident which, had they been known at the time of registration, would have resulted in a refusal of registration, or the person entered in the register fails to comply with Estonian regulations on trade in strategic goods (art. 43).

Finland - In conformity with the EU Common Position

Brokering controls came into force in Finland in December 2002 following an amendment to the 1990 Act on the Export and Transit of Defence Material.[29] The Act defines brokering as an activity where parties are brought together in order to conclude a contract concerning export or transfer of defence material between third countries (Act 242/1990, art. 1.1). This definition also applies to private persons or legal entities engaged in acquisitions and transfers where products enter into the legal possession of the broker as well as to mediation without direct acquisition of goods. Licenses are granted on a case-by-case basis (ibid., art. 2.a.1). License applicants may also be required to provide an end-use certificate, issued by the competent authority in the country of final destination (art. 4.3).

The Ministry of Defence keeps a database of all granted licenses. They are public documents and can be consulted at the ministry.[30] A licensing requirement also applies to Finnish citizens, corporations or foreign residents considered permanent residents of Finland wishing to engage outside Finnish territory in brokering defence materials between third countries (ibid., art. 2.a.2). Violations of the Defence Material Act, including its provision on brokering controls, may entail a fine or imprisonment of up to 4 years (ibid., art. 7.1).

France - Amendment to implement EU Common Position in preparation

Controls on brokering of military equipment involving transfers across national borders in France were adopted in January 2002 through a modification of the Decree 95-589 on the application of the 1939 Decree on War Materials, Weapons and Munitions.[31] Under this secondary legislation, brokering controls are integrated in those on the manufacture and trade in war materials. Entities engaging in the manufacture or trade of these materials, including the activities of their intermediaries or sales agents, must register with the relevant state authorities (Decree No. 95-589, art. 6).

Intermediary activities are defined as all commercial or profit oriented operations which aim at bringing together persons wishing to conclude a contract for the buying or sale of war materials or with the aim of concluding such a contract on behalf of one of the parties (ibid., art.1). Intermediaries also have to maintain a register in which they note, from the first contacts, the name of the entities brought in contact, the contents of the operation and its status. This obligation to maintain a register equally applies to operations involving the buying or selling of war materials located outside France. The registers are subject to controls by the relevant authorities and authorisation holders must provide a six-monthly report on their activities to the Ministry of Defence (art. 16.1-3).

Insofar as mediation activities with a view to negotiating or arranging arms exports from France are concerned, secondary legislation from October 1992 is applicable.[32] Following its amendment in March 2002, the distribution of war materials and their presentation to obtain foreign orders, the submission and acceptance of offers and the negotiation of contracts entailing the cession or delivery of war materials abroad, including industrial property rights, require a preliminary license Order of 2 October 1992, art. 3). Once a contract involving the export of war materials from France has been successfully negotiated, an export license is required (ibid., art. 7).

Not included in the French control system so far are brokering activities involving mediation of contracts and buying and selling relating to war materials located abroad. Thus, brokers need not presently apply for licenses for specific operations involving war materials located abroad once they registered with the relevant authorities. A law project to establish a licensing requirement on a case-by-case basis for the brokering of war materials located outside France by persons or entities resident or established in France is still to be considered by the French parliament.[33]

Germany - Amendment to implement EU Common Position in preparation

Brokering controls were included in the 1961 Law on the Control of War Weapons by an amendment in 1978. [34] Persons and entities wishing to mediate a contract involving the acquisition or transfer of war weapons located outside German territory or wishing to show that the opportunity for the conclusion of such a contract exists require a license. The license requirement equally applies for persons and entities wishing to conclude a contract involving the transfer of war weapons located outside German territory. Transport agents require a general authorisation for transfers of weapons of war between third countries if the weapons are transported on ships sailing under German flag or on air carriers registered in Germany (War Weapons Control Act, arts. 4.1 and 4.a.1-2).

For controls to be applicable, at least one element of the brokering operation has to be linked to German territory. Such a linkage exists if, for example, the interested contract parties meet with the broker on German territory, or if telephone calls or faxes related to the operation in question are sent from or are received in Germany. Arms dealers further have to keep a register on weapons they have exported or that are in their possession (ibid., art. 12.2). It is not clear however whether such record-keeping also pertains to weapons transferred between two third countries. Violations of the law, including its provisions on brokering activities, may entail a prison sentence of 1 to 5 years, and in grave cases up to 10 years (art. 22.a.1-2).

In order to implement the EU Common Position on brokering, an amendment of German export legislation is currently under preparation. The amendment will extend brokering controls to military equipment such as pistols and revolvers, which are not covered by the German war weapons list. A significant advance is expected with the introduction of a ban on brokering activities in military equipment by German residents operating from a third country in relation to transfers originating or destined to an embargoed country. Further, there will be a licensing requirement for engaging in extraterritorial brokering of small arms and light weapons between two third countries.[35]

Greece - Amendment to implement EU Common Position in preparation

Controls on import, export and transit of military equipment are laid down by Law 2168/1993 on Issues related to Arms, Ammunition and Explosives. The law does not stipulate brokering specific controls. However, an amendment to Law No 2168/1993 is currently under preparation to include, among other, controls on the activities of brokers. The amendment is expected to clearly define the specific activities understood as brokering and subject to licensing, as well as a registration requirement.[36]

Hungary - In conformity with the EU Common Position

The Hungarian legislation on arms brokering is based on Government Decree 16/2004 on the licensing of the export, import, transfer and transit of military equipment and technical assistance.[37] The Decree entered into force on 1 May 2004. It covers brokers carrying out activities to 'achieve the purchase or sale of military equipment between parties from two or more countries'. This specifically includes 'arranging transactions, acting as intermediary between contracting parties, identifying the possibility of the transaction to either the buyer and seller, as well as buying or selling on its own account' Decree 16/2004, art. 1.2-3).

In order to 'act as a representative, agent, broker or intermediary in respect of military equipment or technical assistance', entities and persons have to be registered in the state's company register or the registry of sole entrepreneurs. Such registered persons or entities must then obtain an activity license. This license is a de facto and activity specific registration. It can either be 'general, covering any product, country of transaction, or it can be specific, covering only a particular product, country or transaction'. If brokers wish to engage in talks with foreign partners about a transaction, they have to apply for negotiation license. Holding a valid negotiation license is a precondition for a contract license necessary to conclude a contract. The licensing obligations exist irrespective of whether a broker operates within or outside the territory of the Republic of Hungary (ibid., arts. 2.2.c and 7.1).

Licenses for brokering activities are assessed by the Hungarian Trade Licensing Office on a case-by-case basis and against the criteria of the EU Code of Conduct on arms exports. Brokers have to submit the competent authorities a monthly list of licenses and details of completed transactions (art. 6.2). The Hungarian Trade Licensing Office keeps records of all brokering licenses for a minimum of ten years, and takes into account when assessing brokering licenses, records of past illicit activities by the applicant.[38]

Ireland - Amendment to implement EU Common Position in preparation

Ireland's control system for exports of strategic goods currently does not cover brokering activities. A review of this control system was completed in July 2004 and recommended, among other, the introduction of new primary legislation to control brokering of military equipment. In January 2005, the Government approved the introduction of such new primary legislation. Work on the legislation is ongoing.[39]

Italy - Amendment to implement EU Common Position in preparation

Italian legislation on trade in military equipment with foreign partners is based on Law No. 185 of 1990.[40] The law provides for a two stage licensing scheme that is complemented by a registration requirement. Registration is limited to nationally resident entrepreneurs and established companies. These persons and entities require, if they wish to manufacture, import, or export military equipment from, through, or to Italy, a registration in the National Register of Companies (Law No. 185, art. 3.4.a-b). This registration is a precondition for applying for a contract negotiating license if the person or entity has identified an opportunity for such a trade activity. If a contract is successfully concluded, an import, export, or transit license is required (ibid., art. 10.1).

While not covering third-country brokering, Italian legislation requires licenses for contract negotiations related to transfers of military equipment across Italian borders. Also, license applicants must provide with their request information on brokering fees, if present. Further, all financial transactions related to transfers touching Italian territory must be notified to and authorised by the Minister of the Treasury (art. 27.1-2). In addition, insofar as exports are concerned, exporters must identify involved shipping agents and require from carriers and transport agents adequate information on the transport route and arrangements. Exporters must keep such documentation for a minimum of 10 years (art. 19.1). Exporters must provide the competent national authorities with documentation verifying the correct delivery of the exported equipment (art. 20.1.b). Violations of Italian legislation on trade in military equipment are punishable by fines, imprisonment of up to six years, and disbarment from the National Register of Companies (arts. 23 and 24).

An inter-ministerial working group is currently preparing an amendment to national legislation to also cover brokering activities related to transfers of military equipment that does not cross Italian borders, and therewith to ensure conformity with the EU Common Position.[41]

Latvia - In conformity with the EU Common Position

Controls on arms brokering in Latvia are stipulated in the Law on the Circulation of Strategic Goods which came into effect on 1 May 2004. Brokering is defined as an intermediary deal performed by a businessman registered in the State Register of Enterprises or by a foreign company owned by citizens or permanent residents of Latvia. The Law was adopted to implement Latvia's international obligations in its arms export and transit control system. It retakes the brokering controls that were previously stipulated in the Regulation on Control of Strategic Goods of 16 December 1997. The regulation stipulated that transit transactions of strategic goods between two third countries is subject to licensing. Licensing is further conditional on prior registration in the State Register of Enterprises and authorization by the Ministry of Defence to trade in military equipment.[42]

Lithuania - In conformity with the EU Common Position

Brokering controls in Lithuania are based on the Law on Export Control of Strategic Goods, which entered into force on 1 August 2004, and the Law on the Control of Arms and Ammunition of 2002. Brokering activities are defined as 'activities of legal entities and physical persons, resident or registered in Lithuania, who negotiate or arrange transactions that may involve the transfer of items on the Common List of Military Equipment from the territory of Lithuania, of other EU state or a third country to any other third country.' Applications for brokering licenses are decided on a case-by case basis and granted individually for each transaction.[43]

Brokers of 'military-type weapons' must register with the Police Department under the Ministry of the Interior. Brokers in this category of weapons must report once a year on their activities to the Police Department, including on parties to transactions, weapons types and quantities. Ownership of such weapons other than by the government is prohibited. Brokers in other types of military equipment have to complement license applications with documents allowing export control authorities to gain a clear picture of the parties and items involved. Penalties for violations of Lithuania's arms control legislation include administrative and financial penalties, as well as imprisonment. Imprisonment for illicit brokering may be for up to three years, and, for illicit trafficking across state borders, ten years.[44]

Luxembourg - Amendment to implement EU Common Position in preparation

The legislative framework regarding trade in military equipment is given the Law of 15 March 1983 on arms and munitions as well as the Regulation of the Grand Duchy of 31 October 1995 relating to importation, exportation and transit of arms, munitions and equipment specifically intended for military use and related technology. No brokering specific stipulations are contained in these texts. An amendment to implement the EU Common Position is currently underway.[45]

Malta - In conformity with the EU Common Position

Malta's controls on arms brokering are based on the Military Equipment (Export Control) Regulations, amended in 2003.[46] As broker is defined any natural or legal person engaged in brokering activities. Brokering activities are defined as negotiation or arranging of transaction involving the transfer of military equipment from any country, including Malta, to any other country. Brokering activities include buying, selling or arranging the transfer of such items that are in their ownership from any country, including Malta, to any other country. Brokers must obtain a license to act as broker as well as an authorisation for deal-specific transfers of military equipment (Law No 376 of 2003, arts. 2 and 3).

The Netherlands - In conformity with the EU Common Position

Controls in the Netherlands on brokering in strategic goods are based on the Financial Transactions related to Strategic Goods Order of 1996, which stipulates a licensing requirement for Dutch residents for 'financial transactions' related to transfers of strategic goods between two third countries outside the European Community.[47] In practice, involvement in 'financial transactions' covers the brokering activities of negotiating and arranging arms transfers, including cases where the broker enters into ownership or sells the equipment.[48]

Controls on brokering of strategic goods are complemented by controls on the brokering of equipment covered by the 1997 Arms and Ammunition Act.[49] The equipment covered by this act includes automatic firearms and therefore certain military small arms and light weapons. In contrast to brokering of strategic goods, brokering in equipment under the Arms and Ammunition Act requires a prior registration. Licensing requirements apply to Dutch citizens resident in the Netherlands, legal bodies and corporations established in the Netherlands, and corporations outside Dutch territory but with their main establishment in the Netherlands.[50]

Further, applicants for a brokering transaction must provide an end-user certificate. Licenses for brokering and financial operations may cover specific operations (individual license), or operations to one or several destinations (global license). Violations of Dutch legislation on arms control may be fined and/or carry a prison sentence of up to six years.[51]

Poland - In conformity with the EU Common Position

Polish regulations on arms brokering are based on the Law of 29 November 2000 'On international trade in goods, technologies and service of strategic importance for the state, and also for maintaining international peace and security'. [52] The Law was amended on 2 July 2004 to implement, among other, the EU Common Position. Specifically, brokering services are defined as activities by national or legal persons consisting in negotiating, business consulting, and assistance in the execution of contracts in relation to the transfer of items of strategic importance from one country to another. Also covered are the purchase, sale or organisation of any transfer, including forwarding, of items of strategic importance from one country to another (Law of 29 November 2000, art. 3.5.a.a-b).

The Law stipulates that trade, including brokering, in items of strategic importance may only be carried out on the basis of a license providing for the scope of the licensed activity. This applies to brokering of both dual-use items and military goods (ibid., art. 6.1-2). Brokering services may be authorised under individual, general, or a global license (arts. 7.1 and 7.4). Applicants for brokering licenses are required to submit to the competent national authorities information on, among other, types of items of strategic importance, their description, value and quantity; the intended use of items by the end-user; and the country of final destination. Further, license applicants are obliged to take any action necessary to deliver items declared in the license to the end user (art. 9.1-5).

Before applying for a brokering license, natural and legal persons engaging in trade in items of strategic importance are required to be registered in the National Register of Entrepreneurs. This is complemented by a de facto registry on arms brokering licenses. That is, the Polish trade control authority maintains a registry on all issued individual and global licenses (art. 21.1-3). In addition, any natural or legal person trading in items of strategic importance is obliged to keep records of this trade (art. 25.1). Foreign trade, including the provision of brokering activities conducted outside Poland, is generally prohibited unless specifically authorised (arts. 2 and 3.8). Trade activities not duly authorised may be punished by imprisonment for a term of one to ten years, as well as financial penalties (art. 33.1).

Portugal - Amendment to implement EU Common Position in preparation

Current Portuguese legislation on arms control does not stipulate specific controls on arms brokering. An amendment to national legislation is currently under consideration by the relevant ministries.[53]

Slovakia - In conformity with the EU Common Position

The legislative basis for brokering controls is provided by Act No. 179/1998 Coll. on Trade in Military Material, as amended by Act No. 26/2002 Coll. on Conditions and Monitoring of Import, Export and Mediator Activities as to Products and Technologies that are Subject to International Monitoring Regimes.[54] The amendment entered into force on 1 September 2002. It stipulates that 'only Slovak companies and individuals, both inside and outside the Slovak territory, may be licensed to engage in the country's arms trade'.

The amendment defines brokering activities as 'an activity of the mediator directed to a foreign party interested to have the possibility of entering with a third party into a contract covering the production, acquirement, or sale of military material including activities and services allowing therefore'. Brokering activities, including brokering of transfers between two third countries, require a prior registration by the broker as well as an individual license. Brokers must inform the competent authorities on their

activities over a given period of time. Sanctions for violations of legislation include financial penalties and imprisonment of up to eight years.[55]

Slovenia - In conformity with the EU Common Position

The legal framework for export controls on military equipment is given by the Decree No. 18 of 2003 on Licences and Authorisations for Traffic in and Manufacture of Military Weapons and Equipment, and the Defence Law No. 103 of 2004. Brokering is only permissible for commercial companies, institutions or other organisation registered to trade in military equipment and after reception of an individual, deal-specific license. Illegal trade in military equipment is a criminal act and punishable by imprisonment of up to five years.[56]

Spain - In conformity with the EU Common Position

In July 2004, Spain adopted the Royal Decree on the Regulation for the Control of the External Trade of Defence Material, Other Material and Dual Use Products and Technologies (1782/2004).[57] The decree, implements among other the EU Common Position by imposing an individual licensing requirement for brokering activities (ibid., art. 18). Brokering activities are defined as negotiation or arrangement of transactions implying transfers of items on the EU Common Military List from one third country to any other third country, as well as buying, selling or arranging the transfer of said items in their ownership from one third country to any other third country (art. 2.1.d). Further, physical and legal persons wishing to engage in foreign trade in defence material, including brokers, must obtain a prior registration (art. 9).

The Decree expressly authorises the competent Spanish authority to exchange information with states member to the European Union and third states on registered brokers, records of brokers as well as on denials of applications for registration and licensing (art. 7.4). In cases when several member states participate in the control of the same brokering transaction, immediate consultations with these states will be held. Consulted states may raise objections within ten working days to the granting by Spanish authorities of a license for the brokering transaction in question. Such objections will be binding on Spanish authorities (art. 7.5).

Sweden - In conformity with the EU Common Position

The framework for brokering controls in Sweden is given by the 1992 Military Equipment Act and its related Military Equipment Ordinance. Both these regulations entered into force in January 1993.[58] The act stipulates that the supply of military equipment, defined as the sale, transfer, offer for sale, loan, gift or intermediation, as well as of inventions concerning military equipment and methods for the production of such equipment, requires a license. This licensing requirement also pertains to Swedish authorities, companies and persons who are resident or permanently domiciled in Sweden wishing to engage in supply activities abroad (Act 1003 of 1992, arts. 2; and 4.1-2). Applications for licenses for the supply of controlled goods located abroad to a buyer located abroad must include information on the applicant, on the equipment in question, on the person or entity making the equipment available, on the buyer and end-user of the supplied equipment as well as the intended supply date (Ordinance No. 1303 of 1992, art. 7). Likewise, a license is required for the supply of controlled goods located abroad to a person or entity located abroad (Act 1003 of 1992, art. 5).

Companies and persons holding a license for supply activities have to notify the competent national authorities prior to submitting tenders and are further obliged to submit regular reports to relevant authorities on their marketing activities conducted abroad (ibid., arts. 11 and 12). The competent authorities also keep records of all applications for brokering licenses, which, in practice, means that there exists a registry of brokering licenses. Violations of the Military Equipment Act, including the provisions regarding the supply of equipment located abroad to a recipient located abroad, may result in a fine or imprisonment of not more than four years (art. 26).

United Kingdom - In conformity with the EU Common Position

In 2002, the UK adopted revised primary legislation, which stipulates new regulations on the trade in restricted and in controlled goods.^[59] The controls extend to the acquisition or disposal, movement, and activities which facilitate transfers of military equipment (Export Control Act, art. 4.2.a-c). Controlled goods cover the items of the EU Common Military List. Restricted goods are defined as long-range missiles and equipment used in torture. In October 2003, the British government presented to parliament two draft orders to implement the Export Control Act. The orders entered into force in May 2004.^[60]

The Trade in Goods (Control) Order establishes a licensing requirement for brokering activities within the UK related to the transfer of controlled and restricted goods from one third country to another third country (Order No. 2765 of 2003, arts. 3.1-2 and 4.1-3). For brokering of restricted goods, a license is also required by UK persons operating outside the UK (*ibid.*, art. 3.4). As UK persons are defined UK nationals who are UK citizens (Export Control Act, art. 11). Brokering-related activities of transportation, financing and insurance services are excluded from the licensing regime.

The Trade in Controlled Goods (Embargoed Destinations) Order prohibits, unless licensed, the brokering of controlled goods to destinations under national or multilateral arms embargoes to which the UK is party. The ban applies both to any person within the UK and to any UK person outside the UK (Order No. 318 of 2004; art. 3.1-4).

[1] See Frontline World (2002) *Sierra Leone: Gunrunners*. Available at <http://www.pbs.org/frontlineworld/stories/sierraleone/minin.html>

[2] See Amnesty International (2003) Italian courts release arms dealers. Available at http://web.amnesty.org/pages/ttt4-article_2-eng

[3] European Union. 2003. *Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering*. *Official Journal of the European Union*, 25.6.2003, L. 156/79f.

[4] See Estonia, *Regulation No. 60 of 9 March 2004 on the Establishment of the State Register of Brokers in Military Goods*.

[5] See *State Register of Brokers in Military Goods* at http://www.vm.ee/eng/kat_153/4920.html

[6] See UK, *Trade in Goods (Control) Order*, 31 October 2003.

[7] Information kindly provided by the German Federal Ministry of Economics and Labour, phone and e-mail, June 2005.

[8] Information kindly provided by Ministry of Economics of the Netherlands, telephone, July 2005.

[9] See UK, *Trade in Controlled Goods (Embargoed Destination) Order*, 11 March 2004

[10] see UK (2004) *Trade in Controlled Goods (Embargoed Destinations) Order 2004*.

[11] Information kindly provided by the German Federal Ministry of Economics and Labour, phone and e-mail, June 2005.

- [12] Information kindly provided by EU Council Secretariat, e-mail, May 2005.
- [13] See United Nations. 2001. *Report of the Group of Governmental Experts established pursuant to General Assembly resolution 54/54 V of 15 December 1999, entitled "Small arms "*. UN Document A/CONF.192/2, 11 May, para. 62ff.
- [14] See Frontline World (2002) *Sierra Leone: Gunrunners*.
- [15] See Estonia. 2003. *Strategic Goods Act of 17 December 2003*, art. 3.2.1.
- [16] Germany. *War Weapons Control Act of 20 April 1961* (as amended), art.4.1.
- [17] European Union. 2004. *Council Declaration on Combating Terrorism*. European Council, 25.3.2004, p.4f.
- [18] See United Nations, 2001, *op. cit.*, para.71. See also Pottmeyer, Klaus. 2003. 'Arms Brokerage – EU einigt sich auf Gemeinsamen Standpunkt zur Waffenvermittlung' in *Außenwirtschaftliche Praxis*, Bundesanzeiger Verlagsgesellschaft, Köln, September 2003, p.335.
- [19] See Small Arms Survey. 2004. *Rights at Risk*. Oxford University Press: Oxford, p.157.
- [20] For a summary of these initiatives, see UN Department for Disarmament Affairs. 2004. *Background paper for the broad-based consultations on further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons*.
- [21] See United Nations, 2001, *op. cit.*, para. 59ff.
- [22] Austria. *Federal Law of 18 Oktober 1977 on imports, export and transit of war material* (as amended); and Austria. *Federal Law on import and exports of goods of 1995* (as amended).
- [23] Belgium. *Law of 25 March 2003 modifying the Law of 5 August 1991*. See also the implementing order: Belgium. *Royal Order of 16 May 2003 on implementation of article 10 of the Law of 5 August 1991 on the Import, Export, Transit and Combat against Trafficking in Arms and Ammunition*.
- [24] Information kindly provided by Cypriot Ministry of Foreign Affairs, e-mail and telephone, 25 May 2005.
- [25] Czech Republic. *Act of 15 February 1994 to regulate trade in military equipment with foreign countries Act No. 38/1994* (as amended).
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