

Controlling arms brokers operating from abroad:

Challenges and policy options for EU states

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Abstract

A lack of controls on arms brokers operating outside their home state remains a critical loophole in the combat of undesirable brokering activities. Policy-makers are sometimes skeptical whether extraterritorial brokering controls are cost-effective and can be implemented. This paper considers enforcement challenges of extraterritorial brokering controls and presents different policy options. It is argued that EU states should adopt a common minimum standard requiring the prohibition of violations of national and multilateral arms embargoes by nationals and/or citizens and permanent residents and wherever the activity is carried. Past successful prosecutions in EU states of brokers who violated embargoes while abroad demonstrate the viability of such controls.

Key words: Arms brokering, extraterritorial controls, European Union

Résumé

Contrôler les courtiers en armes agissant à l'étranger : Défis et options politiques dans les États membres de l'UE

L'insuffisance des contrôles exercés sur les courtiers en armes agissant en dehors de leur État d'origine demeure une lacune essentielle de la lutte contre les activités de courtage indésirables. Les décideurs politiques font souvent preuve de scepticisme quant à la rentabilité et à l'applicabilité de contrôles sur le courtage extraterritorial. Le présent article examine les défis de l'application ainsi que les différentes options en matière de politique de contrôle du courtage. Il défend la nécessité pour l'Union européenne, d'adopter une norme minimale commune exigeant l'interdiction des violations des embargos nationaux et multilatéraux sur les armes par des ressortissants et/ou des citoyens et des résidents permanents et ce, quel que soit le lieu où se déroule l'activité. Des poursuites judiciaires entamées avec succès par le passé dans certains États de l'Union à l'encontre de courtiers ayant violé des embargos alors qu'ils se trouvaient à l'étranger, démontrent la pertinence de ces contrôles.

Mots clés : Courtage en armements, contrôles extraterritoriaux, Union européenne.

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I. Introduction

Unregulated arms brokering is a critical loophole in the combat of illicit and otherwise undesirable arms transfers. Brokers mediate and facilitate transfers of military equipment between buyers and sellers. The equipment may be transferred between foreign countries and not touch the territory of the state in which the broker operates. Legislation must explicitly cover the brokering of such 'third-country' transfers to effectively contribute to the combat of the illicit arms trade. Indeed, brokers and transport agents are frequently identified as key actors in supply networks to embargoed destinations and undesirable end-users. There are also cases in which known traffickers were acquitted by national courts because legislation did not extend to the activities in question.¹

Most EU states established controls that cover brokers operating on their territory. But there is continued debate about extending controls to brokers who operate from abroad. Extraterritorial controls deny brokers the possibility to avoid controls in the EU home state by arranging transfers from a foreign state with weak or no controls. Extraterritorial controls are especially important in light of the often mobile nature of individual brokers with offices in multiple states. At the same time, controls on brokers operating abroad are notoriously difficult to enforce. They risk being flouted without national authorities becoming aware of this. Some policy-makers argue therefore that extraterritorial controls are little cost-effective and oppose their introduction into national legislation.

This paper considers challenges and policy options for extraterritorial brokering controls. It presents different types of extraterritorial controls and the relevant national and multilateral standards in the EU. It continues with a discussion of the enforcement challenges of extraterritorial brokering controls and the relevant policy options for EU states. It is recommended that EU governments develop a common minimum standard on extraterritorial brokering controls. The standard should prohibit violations of national and multilateral embargos wherever nationals and/or citizens and permanent residents conduct their activities.

II. Background

The basic requirement for the control of third-country arms brokering is a licensing requirement for individuals and entities on the national territory. Applications for brokering licenses are assessed against the national and multilateral criteria that are also used to assess applications for exports of military equipment. States that restrict their controls to only brokers operating on the national territory leave open significant legal loopholes. Brokers who facilitate illicit or otherwise undesirable arms transfers are often individual businessmen requiring little more than a fax machine, a laptop, and a mobile phone to conduct their activities. Their mobile nature allows them to easily exploit the absence of extraterritorial controls by going abroad to broker a transfer without violating the legislation of his/her home state.

To illustrate, the EU operates unilateral arms embargos against China, Myanmar, Uzbekistan, and Zimbabwe, that is, embargoes that are not imposed by non-EU states.² Without extraterritorial controls, a broker can circumvent the embargo on for example Zimbabwe by

¹ Amnesty International. 2003. *The Terror Trade Times*, (issue no.4, AI Index ACT31/002/2003). London: Amnesty International, June, p. 2.

² Council of the European Union. 2009. *List of EU embargoes on arms exports, UN Security Council embargoes on arms exports and arms embargoes imposed by the OSCE* (Council document 9616/09). Brussels: Council of the EU, 7 May.

arranging the transfer from a non-EU state that does not sanction Zimbabwe. Likewise, EU states denied 50 license applications for exports of military equipment to sub-Saharan Africa in 2007 because the transfers would have violated EU arms export standards.³ EU states would also have been obliged to deny brokering licenses for the transfers. Again, without extraterritorial controls, a broker only needs to arrange the transfer which his/her home states would deny from a state abroad that operates weaker transfer standards.

Types of extraterritorial controls

Extraterritorial brokering controls extend the licensing requirement for facilitating transfers to brokers even when abroad. Controls may differ with the range of brokers who are brought under national jurisdiction, the range of equipment that is covered, and the destinations of the transferred equipment. British legislation covers certain extraterritorial brokering activities of nationals who are also resident or established in the UK. The Finnish and Swedish legislation cover extraterritorial brokering activities of all their citizens and permanent residents, irrespective of their nationality. The Dutch legislation includes controls on brokering activities of corporations outside Dutch territory but with their main establishment in the Netherlands. Controls may also differ by either applying to all military equipment or to only certain categories considered to be of particular concern (see below).

Limited extraterritorial controls prohibit the brokering of transfers that violate arms embargoes. The prohibition applies to brokers irrespective of where the brokering activity is conducted. The extraterritorial brokering of 'acceptable' transfers to embargoed destinations, for example to multilateral peacekeeping forces, must receive a prior license by the home state. The controls do not cover the extraterritorial brokering of transfers to non-embargoed destinations. In contrast, comprehensive extraterritorial controls extend the licensing requirement for extraterritorial brokering activities to transfers to any destination. A broker is subject therefore to the controls of his/her home state wherever the brokering activity is carried out and whatever the destination of the brokered equipment.

III. Extraterritorial brokering controls in the EU

The 2003 EU Council Common Position on the control of brokering provides the multilateral framework for national brokering controls in the EU. The common position obliges states to adopt a clear legal framework for the control of persons and entities negotiation or arranging third-country transfers within their territory. Also covered are the activities of buying, selling, or arranging transfers of equipment in the ownership of the broker and involving the equipment's transfer between third states. License applications for brokering third-country transfers are to be assessed against the EU export criteria of military equipment.⁴ Two-thirds of the 27 EU states operated such controls on brokers within their territory by late 2008. States still preparing to implement common position were Cyprus, France, Greece, Ireland, Italy, Latvia, Luxembourg; and Portugal.⁵

The 2003 EU common position recommends that states "consider controlling brokering

³ Council of the European Union. 2008. *Tenth annual report according to operative provision 8 of the European Union Code of Conduct on Arms Exports* (Council document 13539/08). Brussels: Council of the EU, 1 October, p. 405.

⁴ Council of the European Union. 2003. *EU Council Common Position on the control of arms brokering* (Council document 2003/468/CFSP). Brussels: Council of the EU, 23 June.

⁵ Council of the European Union, 2008, p. 439-442.

activities outside of their territory carried out by brokers of their nationality resident or established in their territory.”⁶ Half of the EU states operate at least elements of such controls. They are Belgium; Bulgaria; the Czech Republic; Estonia; Finland; Germany; Hungary; Lithuania; the Netherlands; Poland; Romania; Sweden; and the UK. At a minimum, the controls establish judicial competence over brokers who violate national, EU, OSCE or UN arms embargoes even when abroad.

Ten states extend controls to a licensing requirement for extraterritorial brokering activities to any destination. The requirement exists for the extraterritorial brokering of all military equipment in seven of these states. The Netherlands restrict the licensing requirement to the extraterritorial brokering of automatic firearms. The UK restricts controls to the extraterritorial brokering of long-range missiles and torture equipment. Table 1 below presents an overview of different extraterritorial brokering controls in EU states.

Table 1: Extraterritorial brokering controls in EU states⁷

State	Limited controls (prohibition of embargo violations)	Comprehensive controls (licensing for any destination)
Belgium	Yes	
Bulgaria	Yes	
Czech Republic	Yes	Yes
Estonia	Yes	Yes
Finland	Yes	Yes
Germany	Yes	
Hungary	Yes	Yes
Lithuania	Yes	Yes
Netherlands	Yes	For automatic firearms
Poland	Yes	Yes
Romania	Yes	
Sweden	Yes	Yes
UK	Yes	For long-range missiles and torture equipment

IV. Enforcement challenges

Policy-makers who are critical of extraterritorial controls often cite enforcement challenges as a reason for their opposition to such controls. Enforcing brokering controls on the national territory already poses challenges. Brokers involved in illicit deals may use various means of communication, ranging from mobile and satellite phones to e-mails and faxes. They may use coded language and falsified and misleading documentation to cover their tracks. They create complex trade and transfer chains involving multiple states and actors and are adept in exploiting absent or poorly implemented controls on their activities.

National licensing and investigative authorities require experienced personnel and adequate resources to effectively monitor and scrutinise cases raising reasonable suspicion of violations of national regulations. Even then, investigative authorities are not always able to collect the evidence that is required for successful prosecutions for illicit arms brokering. In December 2004, a

⁶ Council of the European Union, 2003, art. 2.1.

⁷ The information provided in this table is based on Anders, H. and Cattaneo, S. 2006. *Regulating Arms Brokering: Taking Stock and Moving Forwards the United Nations Process*. Brussels, GRIP, Annex A, p. 33-35. The information does not reflect possible legislative developments in relation to brokering controls in some EU states since 2005.

Belgian court convicted eight people involved in an Antwerp-based diamond company for the import of diamonds from Western Africa in violation of a UN embargo. The Belgian Federal Police and the prosecutor who had investigated the case believed that the convicted persons had also been involved in illicit arms trafficking. But they could not provide sufficient evidence for a conviction on this count.⁸

Enforcing extraterritorial controls

The challenges of enforcing controls on brokers who operate abroad are even greater than enforcing those on brokers operating on the national territory. One category of actors especially difficult to control is nationals permanently residing and working abroad. The authorities of the state of the broker's nationality have no means to regularly monitor the broker's activities. They have no legal authority to conduct extraterritorial searches of commercial and private premises of the broker in cases of reasonable suspicions of wrongful doing. Controlling extraterritorial activities of citizens and permanent residents also poses challenges. But the later category of actors is monitored and investigated more easily because of their private homes and offices and regular physical presence in the home state.

National authorities may also be made aware of possible violations of arms embargoes by various foreign agencies and bodies. The Belgian Federal Police started its investigations into the diamond-smuggling activities of the Antwerp-based company (see above) in response to reports by a UN panel on embargo violations.⁹ Likewise, a Dutch court sentenced a Dutch businessman to eight years prison in 2006 for violations of the UN arms embargo on Liberia in the early 2000s. The prosecutor started investigations into the case in response to a report by a global watch-dog NGO. The case is also significant because Dutch authorities successfully collected evidence abroad and prosecuted a national for brokering activities conducted outside the Netherlands.¹⁰

V. Policy options

EU states face several policy options in relation to extraterritorial brokering controls.

- **Option 1: Restrict controls to minimum standards**

One option is to not adopt extraterritorial controls and focus on only brokers who operate on the national territory. The option complies with the minimum requirements under the 2003 EU Common Position on the control of arms brokering.

Adopting this option accepts that brokers who are resident and permanently established on the national territory can act with impunity for their extraterritorial activities. This is because national controls are easily circumvented by conducting undesirable activities abroad. Further, national authorities will have no legal basis for prosecutions of citizens and residents who operate abroad to, for example, violate arms embargoes. Not adopting extraterritorial controls on arms brokering falls below the standards voluntarily adopted in half of EU states.

⁸ United Nations Institute for Disarmament Research (UNIDIR). 2006. *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons* (UNIDIR index UNIDIR/2006/23). Geneva: UNIDIR, p. 112-113.

⁹ Ibidem.

¹⁰ Ibid., p. 104.

- **Option 2: Adopt limited extraterritorial controls**

Another option is to prohibit embargo violations of nationals and/or citizens wherever the brokering activity is carried out. The prohibition typically pertains to the direct or indirect supply, sale, and transfer of military equipment in violation of national or multilateral embargoes. The prohibition should be comprehensive and cover arms brokering, transporting, financing, and otherwise assisting, arranging, or facilitating embargo violations. Limited extraterritorial controls address an area of key concern, that is, brokers violating arms embargoes with impunity. National authorities may be made aware of extraterritorial embargo violating activities by actors under their jurisdiction by various foreign law enforcement and investigative agencies.

- **Option 3: Adopt comprehensive extraterritorial controls**

A further option is to establish a licensing requirement for brokering activities by nationals and/or citizens and permanent residents and irrespective of where the activity is carried out or what the destination is of the brokered equipment. Extending the licensing requirement to extraterritorial brokering of military equipment to any destination casts a wide control net. Comprehensive extraterritorial controls pose clear enforcement challenges, and national authorities have limited resources and capacities for effectively monitoring activities of brokers abroad. But the controls deny brokers the possibility to circumvent arms embargoes and restrictive licensing practices in the home state without the risk of facing legal sanctions in their home state. Adopting comprehensive extraterritorial brokering controls follows the example set by about one third of EU states.

VI. Conclusion

Extraterritorial controls are critical to ending the impunity of mobile brokers who circumvent the regulations of their home states by conducting undesirable activities abroad. There exist enforcement challenges, especially if brokers are requested to ask for a license for their brokering activities anywhere in the world and for transfers to any destination. But the controls create a workable legal basis for prosecutions of brokers violating national regulations. This is suggested by convictions of brokers in EU states in the last decade, including for cases of extraterritorial violations of national regulations.¹¹ Not adopting extraterritorial controls means that national authorities have to accept that brokers can continue to act with impunity and organise and facilitate undesirable arms transfers from abroad.

EU states should adopt a common minimum standard requiring the establishment of at least the prohibition of national and multilateral arms embargoes wherever national and/or citizens and permanent residents operate. The prohibition should be based on a catch-all clause that covers any activity related to the violation of embargoes and, therewith, also cover brokering and brokering-related activities for transfers that violate embargoes.

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¹¹ Various examples of prosecutions in EU states and elsewhere are cited in UNIDIR, 2006, p. 101-137.