



ARMS BROKERING CONTROLS

AND HOW THEY ARE IMPLEMENTED IN THE EUROPEAN UNION

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Summary

A number of cases of arms trafficking hit the headlines in 2009, reminding us that the problem of combating illicit arms sales is as keen as ever. Several cargos of dubious or totally illicit arms were discovered on ships and planes and there were reports of notorious arms traffickers being arrested or taken to court.

The way unscrupulous arms brokers contribute to the proliferation of weapons around the world and the threat they therefore pose to peace, security and development have clearly been demonstrated in a series of reports by the United Nations and non-governmental organisations since the late 1990s.

Arms brokering basically means facilitating and organising transactions via types of payment or payment in kind, and is perfectly legal in and of itself. When insufficiently regulated or not regulated at all, however, there is little to prevent legal arms brokers (also known as “intermediaries”) from slipping into illicit arms dealing. Moreover, arms brokers have developed the ability to get round existing controls by abusing the differences in countries’ legal systems or by operating from countries where there are weak controls or no controls at all. Poor regulation, or lack of regulation on arms brokering is therefore now seen by national and international fora as a serious gap in the fight against arms trafficking.

In 2003, European Union (EU) Member States wanted to fill this gap and adopted a Common Position on the control of arms brokering. By introducing basic control measures within the EU, the Common Position represented a great step forward in the introduction of a harmonised arms brokering control system. Six years after its adoption, however, four EU Member States still do not have any legislation on arms brokering and others still need to adjust their legislation to bring it into line with EU standards. The EU Common Position sets out minimum standards that are now seen as not going far enough to effectively tackle the activity of unscrupulous arms brokers.

The experience of several EU Member States shows us that it certainly is possible to reinforce the Common Position in many ways. It is high time that appropriate legislation was introduced.

This report examines the situation in the European Union on the control of arms brokering in three analyses carried out in 2009 and goes on to draw up recommendations.

The first part of the report briefly examines arms trafficking cases that hit the headlines in 2009, before assessing implementation of the Common Position by EU Member States. It goes on to study improvements that should be made to the EU Common Position to ensure that all Member States have the same instruments for effectively combating the involvement of their nationals and/or permanent residents in illicit arms sales and to prevent unscrupulous brokers from taking advantage of loopholes in existing legislation.

The second part of the report examines a serious shortcoming in the struggle against undesirable arms brokering, namely insufficient controls on the activities of brokers operating from abroad, also known as ‘extraterritorial brokering controls’. It sets out the problems and political options open to countries in this connection, recommending that European governments draw up common legislation to ensure better controls of arms brokering.

The third part of the report is a case study of control of arms brokering in Belgium, examining Belgian arms brokerage legislation in the light of the EU Common Position and looking at shortcomings and problems encountered in its application.

I. EU Common Position on the control of arms brokering, six years on¹

Various cases relating to arms trafficking have been in the news in the past few months, reminding us that the question of tackling illicit arms trade is as pressing as ever. Several cargoes of doubtful or totally illicit arms cargoes have recently been discovered on planes and ships, and the arrest or trials of notorious arms traffickers have also hit the headlines. These cases demonstrate the urgent need to implement effective national controls and harmonised controls between different states in order to prevent this trafficking and be able to punish those responsible. For several years now, it has been recognised at an international level that arms brokers have developed the ability to get round existing controls by exploiting differences between different countries' regulations and by arranging transfers from countries with poor or non-existent controls.

The adoption in 2003 of the EU Common Position on the control of arms brokering reflected the desire of the European Union (EU) to combat the illicit arms trade. EU Member States made the first steps in harmonised controls by agreeing on minimum common standards for controlling the activity of European arms dealers.

Six years after adoption of the Common Position, however, not all Member States have introduced legislation to control arms dealers, and others still need to bring their legislation into line with the EU Common Position. In addition, there are disparities in the quality and effectiveness of the controls foreseen in the Common Position as carried out by European countries.

Several months ahead of the fourth Biennial meeting of States to assess progress in implementing the United Nations Programme of Action on Small Arms, EU Member States must do more to ensure better control of arms brokering by their nationals and/or permanent residents. They should consider extending the scope of the Common Position by incorporating or exceeding the compulsory standards on the control of activities connected with arms brokering, like transport and financial

services, on registering arms brokers and on controlling the extraterritorial activities of their country's arms brokers. Several Member States have already introduced at least one of these three measures on a voluntary basis, measures that are increasingly recognised internationally as being essential for effective control of arms brokers. EU Member States should also consider examining each others' legislation at the Council's Working Party on Conventional Arms Exports (COARM).

This paper examines improvements to be made in the Common Position in order to ensure all EU Member States have the same measures to effectively combat the involvement of their nationals and/or permanent residents in illicit arms dealing and to ensure that unscrupulous arms dealers cannot take advantage of loopholes in existing legislation.

1. The complex nature of arms trafficking around the world

Various cases of arms trafficking hit the headlines in 2009. Several cargoes of doubtful or totally illicit arms cargoes have been discovered on planes and ships in recent months.

On 19 June 2009, some 18 cases of mines and ammunition were discovered by the Nigerian authorities on a Ukrainian plane heading for Equatorial Guinea that had made an emergency landing at Kano Airport in northern Nigeria². On 4 November 2009, a German ship, the *Franco*, carrying several tonnes of arms, munitions, rockets, grenades and anti-tank missiles made in Iran, was stopped and searched by an Israeli sea commando in the Mediterranean off the southern coast of Cyprus³. A few weeks earlier, another German ship, the *Hansa India*, was stopped by a US ship in the Red Sea, the eight containers on board containing 7.62 mm munitions for Kalashnikov-type weapons⁴. Both of these shipments had probably been sent by Iran and

2. BENNETT Jody Ray, *Small arms: destination unknown*, ISN Security Watch, 27 August 2009 - <http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?lng=en&id=105078>

3. GEBAUER Matthias and PUTZ ULRIKE, *36 containers from Iran: Israel stops German ship carrying weapons for Hezbollah*, Spiegel Online, 5 November 2009 - <http://www.spiegel.de/international/world/0,1518,659424,00.html>

4. 'Embarrassing' incident in Gulf of Suez: German ship transporting arms for Iran, Spiegel Online, 12 October 2009 - <http://www.spiegel.de/international/germany/0,1518,654596,00.html>

1. By Virginie MOREAU, 1 February 2010.

What is arms brokering?

Arms brokering definition is usually divided into two types. The first, more widespread, type covers "basic" brokering, in other words facilitating and negotiating arms deals and buying and selling arms. The second type covers activities connected with arms brokering (also known as "related activities"), covering activities like logistics, transport, insurance and financial services connected with the sale and delivery of arms.

were en route to Hezbollah. More recently, on 11 December 2009, the Thai authorities discovered 35 tonnes of explosives, rocket-launchers and components for ground-to-air missiles on board a Russian plane (a 4L-AWA) from Pyongyang (North Korea), where the arms had been loaded, that had stopped off in Bangkok to refuel. The plane's final destination is still the subject of speculation (it is reported that the cargo was probably destined for Iran, as this type of weapon tends to be used by armed non-government groups like Hezbollah or Hamas), but the plane seems to be connected with East European arms traffickers, including Tomislav Damjanovic⁵.

This last example illustrates the complex nature of the international trading networks used by illicit arms brokers to escape from international attention. According to research by Belgian research body, the International Peace Information Service (IPIS), in collaboration with the US organisation Transarms, the 4L-AWA plane intercepted in Bangkok was registered with AirWest Ltd in Georgia, and is currently owned by the company Overseas Cargo FZE based in Sharjah in the United Arab Emirates⁶. On 5 November 2009, the plane was leased to New Zealand company SP Trading, which had been bought up four months earlier by GT Group Ltd, a consultancy based in Vanuatu. The man signing the contract for SP Trading, Lu Zhang, is reported to be the director of at least 50 separate companies. A Hong Kong-based company called Union Top

Management then leased the plane from SP Trading on 4 December 2009 and arranged delivery of the arms. Union Top Management was also subject to changes shortly before the flight in question. It was bought up in Hong Kong on 2 November by another company, Easytime Development Ltd, owned by a company registered in the United Kingdom's Virgin Islands.



The Russian plane from Pyongyang intercepted at Bangkok Airport (www.beersteak.com)

The flight crew, four Kazakhs and one Byelorussian, were arrested by the Thai authorities but it is not yet clear who was behind the illicit arms transfer in question. IPIS estimates that arms traffickers are legal businessmen for 98% of their work, and are well-versed in setting up front companies as a smokescreen for their activities. Some countries try to attract foreign capital by offering relaxed registration requirements and are real tax havens.

Notorious arms traffickers have been arrested or put on trial in recent months. Victor Bout, an international arms dealer arrested in Thailand in March 2008, has been granted stay of proceedings after his request for extradition to stand trial in the United States was rejected by Bangkok in August 2009⁷. Several individuals were sentenced and imprisoned in France on 27 October 2009 as part of the Angolagate trial investigating a vast illicit arms trading network to send arms to Angola from 1993 to 1998, when the country was in the full throes of civil war⁸. Belgian arms trafficker

5. *Russian cargo plane intercepted on Asian weapons run*, Bangkok Post, 13 December 2009 - <http://www.bangkokpost.com/news/local/29156/huge-n-korea-arms-cache-seized>; BARROW-CLOUGH Anne, *North Korean arms plane linked to East European traffickers*, The Times (UK), 15 December 2009 - <http://www.timesonline.co.uk/tol/news/world/asia/article6956963.ece>

6. FINARDI Sergio, JONHSON-THOMAS Brian, DANSAERT Peter, *From deceit to discovery: The strange flight of 4L-AWA*, International Peace Information Service Report (I.P.I.S.), IPIS and Transarms, Brussels, 21 December 2009 - <http://www.ipisresearch.be/download.php?id=284>

7. Le « Lord of War » ne sera pas extradé de la Thaïlande vers les Etats-Unis, Le Monde, 11 August 2009.

8. DELAHOUSSE Mathieu, *Angolagate: le tribunal choisit la fermeté*, Le Figaro.fr, 27 October 2009. - <http://www.lefigaro.fr/actualite-france/2009/10/28/01016-20091028ARTFIG00066-angolagate-le-tribunal-choisit-la-fermete-.php>

Jacques Monsieur was also arrested in the United States on 28 August 2009 for trying to illegally export military equipment to Iran⁹.

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

EU Member States are expected to bring their domestic legislation into line with the Common Position on the control of arms brokering that was adopted on 23 June 2003 by introducing new legislation or improving existing legislation on the control of arms brokering¹⁰.

The aim of the EU Common Position is to control brokering “in order to avoid the circumvention of United Nations, European Union or OSCE (Organisation for Security and Cooperation in Europe) arms embargos or the criteria set out in the European Union code of conduct on arms exports.”¹¹ The code of conduct became a Common Position in December 2008¹².

The Common Position stipulates that the Member States must lay down a clear legal framework for the legal arms trade. Arms brokering is defined as the activity of individuals and entities negotiating or arranging arms sales, and the activities of individuals and entities purchasing, selling or arranging the purchase and/or sale of arms in their possession. The Common Position stipulates that Member States shall develop controls based on a licensing or written authorisation system for any arms brokering activity carried out on their national territory involving the sale of articles laid down in the EU’s common list of military equipment from one country outside the EU to another country outside the EU. Applications for arms broker licences must be examined in the light of the criteria set out in the EU’s code of conduct on arms exports.

9. BERGHEZAN Georges, *Splendeur et décadence du « Maréchal »*, GRIP News, No.53 – Third quarter of 2009 - http://www.grip.org/fr/siteweb/images/NOUVELLES_DU_GRIP/2009/news09-3.pdf

10. *Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering*, EU Official Journal, 25 June 2003 - http://eur-lex.europa.eu/pri/en/oj/dat/2003/l_156/l_15620030625en00790080.pdf

11. *Ibid*, Art.1,1.

12. *Council Common Position 2008/944/CFSP of 8 December 2008 laying down common rules for the export of military technology and equipment*, EU Official Journal, 13 December 2008 - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:335:0099:0103:EN:PDF>

The Common Position lays down minimum compulsory provisions but does not prevent Member States from passing more stringent legislation in their country. The Common Position therefore encourages Member States that so desire to consider controlling the arms brokering activities outside of their territory carried out by brokers of their nationality resident or established in their territory. This is known as “extra-territorial controls”. The Common Position explicitly requires Member States to control arms brokering leading to the transfer of arms between countries outside the EU but it also allows any Member State that so desires to include in its national definition of arms brokering the sale of articles listed on the EU’s military list from its own territory or from any other Member State.

Other optional measures set out in the Common Position suggest that Member States require written authorisation for arms brokering and set up a register of arms brokers, but this cannot replace the duty to have a licence for every arms brokering operation.

The Common Position also stipulates that Member States must keep for at least 10 years information about all individuals and entities granted a licence. Member States must also set up an information exchange system (covering their legislation, registered arms brokers and information about brokers and refusal to grant requests for registration or licences) and introduce appropriate penalties.

3. Assessing Member States’ implementation of the EU Common Position

The adoption of the Common Position has had a clear impact on the control of arms brokering in the European Union. The Member States seem to have made a lot of progress over the past six years but there are still disparities in quality, which therefore reduce the effectiveness of controls between European states.

3.1. Some Member States have not yet introduced legislation on arms brokering

When the Common Position was adopted on 23 June 2003, only five of the then fifteen European Union Member States had national arms controls

that were in line with the Common Position¹³. At present (January 2010), according to statements made by the Member States, twenty-one of them have arms brokering legislation that is in line with the Common Position, namely Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom¹⁴. Two Member States, France and Ireland, have legislation on the control of arms brokering that needs amending or supplementing by new legislation to bring it fully into line with the Common Position. The remaining four Member States, Cyprus, Greece, Italy and Luxembourg, do not yet have any legislation on the control of arms brokering, but are reported to be in the process of introducing measures.

Some of the Member States that say they have legislation, do not actually comply with the Common Position. This is the case with Belgium, which stated in the COARM annual report for 2003 that it complies with the Common Position although Belgian law does not cover a crucial measure in the Common Position, namely a licensing or written authorisation system for any arms brokering activity granted following examination of compliance with the criteria set out in the European code of conduct on arms exports. This results in there being no controls at the current time on arms brokering carried out from Belgium¹⁵.

Member States that do not yet have legislation on arms brokering should therefore now be called upon to meet their commitments to the Common Position. Regular review of the Common Position by the Member States at COARM would make it possible to check each Member State's progress in implementing the Common Position's measures.

13. ANDERS Holger, *European Union standards on the control of arms brokering*. Presentation at the United Nations workshops on illicit brokering in SALW, New York, 31 May, and Geneva, 3 June 2005, p.4.

14. *EU Eleventh Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, EU Official Journal, 6 November 2009 - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:265:FULL:EN:PDF>

15. MOREAU Virginie, *Pour un réel contrôle des courtiers en armes en Belgique*, GRIP Analysis, 7 September 2009 - http://www.grip.org/fr/siteweb/images/NOTES_ANALYSE/2009/NA_2009-09-07_V-MOREAU.pdf

3.2. Differences in the quality and effectiveness of controls of arms brokering

In the EU Common Position, countries agreed that every country shall adopt a range of basic measures on the control of arms brokering. As we have explained, however, this does not prevent countries from going much further and in fact the Common Position encourages them to consider taking further measures. We note that among the EU Member States that do have legislation, in addition to the control measures required by the Common Position (a licensing system for any arm brokering activity and controlling arms brokering that occurs on their national territory), several have also passed other control measures encouraged, but not actually required, by the Common Position. Several countries have decided, for example, to set up a register of arms brokers and to control arms brokerage outside their country carried out by brokers holding the passport of or residing in their country.

Member States should bear in mind that if the differences are too great between Member States' arms control systems, then unscrupulous brokers are able to take advantage of the weakest systems. The Common Position must be improved in order to achieve the same level of quality in all the Member States.

4. Suggested improvements to the Common Position

4.1. Expanding the definition of arms brokering



Jacques Monsieur (©Sylvain Piraux)

From 1993 to 1995, Belgian arms trafficker Jacques Monsieur sold munitions to Bosnian Muslims in complete violation of the international arms embargo then in force and with the complicity of a certain Marty Cappiau, who dealt with logistics on the ground to ensure the arms reached their

destination¹⁶. In 2000, 10,000 assault rifles were exported by Jordan, allegedly to the Peruvian army. They were illegally siphoned off to FARC, a Colombian Marxist guerrilla group. It was discovered that the associate of Sarkis Soghanalian, an arms broker of international repute, had initiated and organised financial dealings between Soghanalian and Peruvian arms traffickers¹⁷. Soghanalian himself negotiated the arms deal and arranged delivery. In January 2006, a US defence company, General Dynamics, contracted Tomislav Damnjanovic, a Serbian arms dealer, to transport the munitions to the Republic of Georgia to be delivered to US company Kellogg, Brown and Root on behalf of the US army. Tomislav was already well-known for his illegal sales of arms to Saddam Hussein, Charles Taylor, the Burmese junta, Islamic militias in Mogadishu and Libya (whilst it was under a UN arms embargo). Like Victor Bout, he built up his career as a notorious arms trafficker by organising the transport of illegal weapons and creating his own airlines¹⁸.

These three examples show that arranging the physical transport of arms and financing is just as important a part of arms brokering as bringing together arms buyers and sellers. The networks used for the arms trade are getting more intricate with the globalisation of the trade and those involved in both the legal and the illegal arms trade often work in close collaboration with associates who organise brokering-related services. Countries have not yet adjusted to this new situation.

Supporters of better arms sales controls are concerned about the lack of control of brokering-related activities, including services like transport, shipping, technical services, financial services and insurance. This means that an individual arranging the transport of illicit arms but who is not involved in negotiating the deal and does not own any weapons will not necessarily be covered by arms brokering controls.

This concern seems to be shared by the United Nations Group of Governmental Experts on Illicit Brokering in small arms. In August 2007, it recommended that countries should ‘ensure that such closely associated activities are adequately regulated by law, in cases of illicit brokering in small arms and light weapons involving in particular violations of United Nations Security Council arms embargoes’¹⁹. The GGE’s report defines activities closely associated with arms brokering as providing for technical assistance or training, transport, freight forwarding, storage, finance, insurance, maintenance, security and other activities²⁰.

Introducing controls on activities related to arms brokering would encourage countries to carry out stricter controls of subcontracting in arms sales and would reduce the risks of arms being diverted by identifying brokers with a history of involvement in illicit activity and refusing to licence them. In order to be effective, information should then be sent to other countries. It would also be possible for countries to require that when they apply for a licence, companies must officially declare any subcontractors they use.

Several EU Member States have already introduced controls on activities related to arms brokering. The scope of these controls varies from country to country. In **Latvia**, for example, only the brokering-related activity of transport is subject to licence, whereas in **Estonia**, all brokering-related activities are covered relating to the sale, purchase, promotion, advertising, marketing, transport, maintenance, development, manufacture, testing, storage and other services related to weapons of mass destruction or traditional weapons and their parts²¹. Other countries only concern themselves with a handful of brokering-related activities. In the **Netherlands**, any agent involved in the financing of the sale of strategic goods that occur outside the EU but carried out by Dutch

16. SERVENAY David, *Jacques Monsieur, trafiquant d’armes*, Radio France Internationale, 4 April 2001 - http://www.rfi.fr/actu/fr/articles/016/article_7246.asp

17. ANDERS Holger, *Controlling Arms Brokering – Next Steps for EU Member States*, GRIP Report 2004/1, p. 9. See: http://www.grip.org/fr/siteweb/dev.asp?N=simple&O=557&titre_page=2004-1-ENG

18. GRIFFITHS Hugh and WILKINSON Adrian, *Guns, Planes and Ships, Identification and Disruption of Clandestine Arms Transfers*, SEESAC, Belgrade, August 2007, pp. iv-ix.

19. *Report of the Group of Governmental Experts established to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons*, United Nations Document (A/62/163), 30 August 2007, Paragraph 63. iii) - http://www.poa-iss.org/BrokeringControls/English_N0744232.pdf

20. *Ibid*, paragraph 10.

21. Small Arms Survey, “Targeting the Middlemen: Controlling Brokering Activities,” in *Small Arms Survey 2004: Rights at Risk*, Oxford University Press, Oxford, p.154.

nationals or Dutch residents must have a licence²². In **Germany**, individuals and entities using planes registered in Germany or ships flying the German flag must obtain general trade authorisation for the transport of military articles outside Germany²³. In **Bulgaria**, agents registered and established in the country must obtain a licence before transporting arms between two foreign countries, even if the arms never come to Bulgaria or travel via Bulgaria²⁴. Recently, the **United Kingdom** decided that various transport-related activities must now be controlled as to the dangers related to transported goods. This means that while all transport-related activities of goods like cluster bombs, torture equipment and anti-personnel mines must be controlled, the controls do not apply to most goods on the Military List. The transport of small arms, MANPADS, and their ammunition and parts, must be authorised by the UK government, but not other related activities like financial services or insurance for the transport of this type of weapon²⁵.

4.2. Registering arms brokers

By suggesting that the Member States may also require brokers to obtain prior written authorisation to act as broker and that Member States can set up a register of arms dealers (Article 4.1), the EU Common Position considers the registration of arms brokers as a further and optional, stage in controlling arms brokering.

Registering arms dealers is viewed by the United Nations Programme of Action on Small Arms (UNPoA)²⁶ as one of three measures that should be covered in national legislation to regulate the activity of small arms brokers. UNPoA is a crucial document that countries have pledged to implement to combat the illicit trade in small arms and light weapons. Registering brokers operating on the

national territory is also encouraged by the United Nations Protocol on Firearms that EU Member States have pledged to implement²⁷.

One way of registering brokers would be a two-stage licensing process whereby any individual or entity wishing to apply for a brokerage licence must first be registered on a national register and therefore authorised to carry out arms brokering.

The most immediate advantage of an official register of arms brokers is that it can be used to check the reliability of individuals and entities wishing to carry out arms brokering before granting them a licence for any individual act of brokering. It is therefore a crucial move because it would give the national authorities the ability to prevent illicit arms deals by identifying individuals and bodies that have infringed national rules on the trade in military equipment and preventing them from obtaining a licence. Secondly, registering brokers enables countries to keep files on all individuals and entities allowed to carry out arms brokering and thereby enables records to be kept. It would also facilitate the exchange of information among countries along with international cooperation against the arms trafficking.

Several EU Member States have already incorporated an arms broker registration system in their legislation²⁸. In **Belgium**, the law stipulates that a licence must be obtained before any arms trading activity can be carried out (including arms brokering), with the aim of ensuring the honesty of individuals and bodies wishing to deal in arms. The licences are granted by the Ministry of Justice following an assessment of the licence requester²⁹. In **Spain**, all arms brokers must be registered before they start work, whether or not the goods covered by the procedure ever enter Spanish territory³⁰. **Portugal** recently amended its legislation to bring it into line with the EU

22. GREENE Owen and KIRKHAM Elizabeth, "Preventing diversion of SALW: Issues and priorities for strengthened controls," *Biting the Bullet*, London, February 2009, p. 46. See: http://www.saferworld.org.uk/publications.php/376/preventing_diversion_of_small_arms_and_light_weapons

23. ANDERS Holger, *op.cit.*, p. 9.

24. *Law on export controls of arms and dual-use items and technologies* (State Gazette No. 11/2.02.2007).

25. BERR, *Export Control Act 2002: Review of export control legislation (2007) – Government's end of year response*, December 2008, p. 5.

26. *United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*. United Nations document, A/CONF.192/15, 20 July 2001 - <http://www.poa-iss.org/POA/poahtml.aspx>

27. *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*. United Nations document, A/RES/55/255, 8 June 2001 - <http://secint50.un.org/events/smalarms2006/pdf/FirearmsProtocol.pdf>

28. The countries in question are Belgium, Bulgaria, Spain, Estonia, France, Hungary, Italy, Latvia, Malta, Poland, Portugal, the Czech Republic, Romania, Slovakia and Slovenia.

29. MOREAU Virginie, *op.cit.*, pp. 8-9.

30. 'Preventing diversion of small arms and light weapons: issues and priorities for strengthened controls,' in *Biting the Bullet report*, February 2009, p. 47.

Common Position and has introduced a system whereby brokers must register before they can request a licence. Registration involves very detailed examination by the Portuguese Security Authority and the ministries of Finance and Economy. Portugal authorises brokers from other EU countries that are registered in Portugal and therefore the Portuguese government includes individuals and entities from other countries in its database³¹.

If it is to be effective, the registration procedure requires cooperation among the various national authorities. In **Belgium**, for example, the Ministry of Justice, responsible for issuing licences, can request the views of other bodies like the federal police, the prosecution service, Customs or the state security services. Registration of arms brokers should be updated regularly in the light of new information to determine whether to retain or remove brokers from the register. In **Bulgaria**, only registered brokers can lodge requests for a brokerage licence, and registration lasts for three years³², whereas in **Romania**, authorisations last for only one year but are renewable upon request³³.

Cooperation from all national authorities is required at this stage. Perhaps countries could use their diplomatic posts and consulates to ensure that their nationals and/or permanent residents do not carry out illicit arms brokering abroad.

The example of British brokers operating in the Ukraine speaks volumes. In 2009, the United Kingdom discovered that British brokers were reported to have been authorised by the Ukrainian export control service, without the UK's knowledge, to export collectors' items from Soviet small arms stocks to end-users to whom the United Kingdom bans the export of strategic goods³⁴. Rather than an

official register of brokers, the United Kingdom has a database compiled from applications for broker licences.

An official register of brokers, regularly updated with the aid of British diplomatic posts and consulates (as is done when checking the authenticity of end users' certificates) would have enabled the British government to spot this damaging situation earlier.

The Chamber of Commons' Committee on Arms Export Controls was sent a list of English arms brokers by the deputy Ukrainian Foreign Minister during a visit to the Ukraine in May 2009, and he urged the British government to set up its own register of arms brokers³⁵.

Some countries also require brokers to keep detailed records of their transactions. In **Lithuania**, registered brokers must keep information about their deals for 10 years and on an annual basis must report the parties involved in their transactions, along with addresses and type and volume of arms negotiated, to the Police Department with which they are registered. The police also keep information about arms brokers on an online database³⁶.

4.3. Extending controls to cover brokers working from abroad

Most EU Member States have established controls on arms brokers active in their national territory in line with the EU Common Position, but more than half have also voluntarily passed legislation on extraterritorial controls, namely Belgium, Bulgaria, the Czech Republic, Estonia, Finland, Germany, Hungary, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Sweden and the United Kingdom³⁷.

The Common Position encourages (but does not require) Member States to "consider controlling brokering activities outside of their territory

31. DUARTE de OLIVEIRA Abel, *Control of arms brokering*, Presentation at the COARM-NGO Conference on the EU and arms export controls, 19 November 2009.

32. *National report on Bulgaria's implementation of the international instrument to enable states to identify and prevent, in a timely and reliable manner, illicit small arms and light weapons and the 2001 UN programme of action to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects*, 2008. - <http://www.poa-iss.org/CountryProfiles/CountryProfileInfo.aspx?CoI=30&pos=30>

33. *Romania 2008 report on implementation of the United Nations Programme of action to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects*.

34. WATT Nicholas, *Arms trade: UK dealers accused of selling Soviet weapons to blacklisted countries*, Guardian.co.uk, 19 August 2009. - <http://www.guardian.co.uk/world/2009/aug/19/british-arms-dealers-blacklisted-countries>

35. House of Commons, *Scrutiny of arms export controls (2009): UK strategic export controls annual report 2007, Quarterly Reports for 2008, licensing policy and review of export control legislation*, House of Commons, London, 19 August 2009, pp.23-24.

36. *National report of Lithuania on implementation of the United Nations Programme of action to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects*, March 2008.

37. *Implementation of the EU Common Position on the control of arms brokering*, SEESAC, Belgrade, 2009, p.16.

carried out by brokers of their nationality resident or established in their territory³⁸.

Given the fact that brokering does not stop at borders and brokers themselves are highly mobile, extraterritorial controls are essential for stopping brokers escaping from the law by moving from one country to another to carry out their undesirable business, abusing weak national legal systems or the fact that some countries do not regulate arms brokering at all. It is a fact that problems have been encountered with implementing such controls³⁹, but it is also true that introducing extraterritorial controls would create a legal basis for court cases and prevent brokers from wriggling out of controls in their country of origin by taking refuge on the other side of the border.

Extraterritorial controls are even more important in that few countries have legislation covering arms brokering elsewhere in the world. Only fifty-two countries are reported to have introduced controls on arms brokering and in twenty-five of them, the decision to introduce the controls was directly linked to implementation of the UN Programme of Action on Small Arms and Light Weapons or other instruments, like the EU Common Position on arms brokering⁴⁰.

The lack of sufficient controls on arms brokers operating abroad is a crucial shortcoming in the fight against illicit arms deals. The European Union must remedy the situation by adopting common standards on extraterritorial controls. EU Member States should, at the very least, ban the violation of national, United Nations, EU or OSCE arms embargoes by their nationals and/or permanent residents, irrespective of where the brokering is carried out. Member States could also introduce full extraterritorial controls by requiring their nationals and/or permanent residents to apply for licences for arms brokering, irrespective of where the brokering takes place and the destination of the arms being traded. Some countries restrict this obligation to certain types of weapon, like the

United Kingdom, which requires licences for the extraterritorial brokering of goods described as sensitive, namely torture equipment, cluster bombs and also, since April 2009, small arms and light weapons and MANPADS⁴¹, or the **Netherlands**, which restricts the licence obligation to brokering in automatic firearms.

5. Conclusion and recommendations

Most countries around the world these days recognise that arms brokering is a threat to peace and international security and needs to be strictly controlled. EU Member States are very aware of this, which is why they adopted a Common Position on the control of arms brokering in 2003.

Not all EU Member States, however, have their own legislation on the control of arms brokering yet, while others still need to adjust their legal systems to bring them into line with the Common Position. The measures set out in the Common Position are minimum control standards that are insufficient to deal with all problems relating to the control of illicit arms brokering within the EU and are therefore insufficient for preventing European nationals, residents and/or people established in the EU from getting involved in illicit arms trading. Some Member States have decided to go further than the Common Position and voluntarily introduce further control measures strongly recommended by the Common Position.

The end result is that there are disparities in quality and therefore efficiency between the EU Member States, differences which could be abused by unscrupulous dealers.

Recommendations

- Member States that do not yet have legislation on arms brokering should be urged to immediately implement the commitments they made under the Common Position.
- EU Member States on COARM should foresee detailed assessment of legislation in the Member States to ensure that each country has proper

38. Council Common Position 2003/468/PESC of 23 June on the control of arms brokering, *op. cit.*, Art.2, paragraph 1.

39. ANDERS Holger, *Controlling arms brokers operating from abroad: Challenges and policy options for EU States*, GRIP Analysis, 3 August 2009 - <http://www.grip.org/en/default.asp>

40. CATTANEO Silvia and PARKER Sarah, *Implementing the United Nations Programme of Action on Small Arms and Light Weapons. Analysis of the National Reports submitted by States from 2002 to 2008*, UNIDIR, New York and Geneva, 2008, p.66.

41. House of Commons, *Scrutiny of arms export controls (2009): UK strategic export controls annual report 2007, Quarterly Reports for 2008, licensing policy and review of export control legislation*, House of Commons, London, 19 August 2009, pp.17-20.

controls of arms brokering in line with the Common Position.

- EU Member States on COARM should plan a stringent review of the Common Position in order to extend its scope and include three control measures as a matter of urgency:
 - 1) Controlling activities related to brokering, like transport and financial services.
 - 2) Introducing registration of arms brokers based on regular reviews of registered brokers and effective cooperation among national authorities, with the involvement of diplomatic posts and consulates.
 - 3) A common standard for extraterritorial controls of arms brokers, including at least a ban on the violation of national and multilateral arms embargoes irrespective of where in the world countries' nationals or permanent residents actually operate.

II. Controlling arms brokers operating from abroad: Challenges and policy options for EU Member States⁴²

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.⁴³

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 not very 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 extra-territorial brokering controls. The standard should prohibit violations of national and multilateral embargoes wherever nationals and/or permanent residents conduct their activities. Note: Nationals *are* citizens.

1. Background

The basic requirement for the control of third-country arms brokering is a licence 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 mobility 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 this, the EU operates unilateral arms embargoes against China, Myanmar, Uzbekistan, and Zimbabwe, that is, embargoes that are not imposed by non-EU states.⁴⁴ Without extraterritorial controls, a broker can circumvent the embargo on, for example, Zimbabwe by arranging the transfer from a non-EU state that does not sanction Zimbabwe. Likewise, EU states denied 50 licence applications for exports of military equipment to sub-Saharan Africa in 2007 because the transfers would have violated EU arms export standards.⁴⁵ EU states would also have been obliged to deny brokering licences for the transfers. Again, without extraterritorial controls, a broker only needs to arrange a transfer which his/her home states would deny from a state abroad that operates weaker transfer standards.

44. 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.

45. 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.

42. By Holgers Anders, researcher at GRIP.

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

Types of extraterritorial controls

Extraterritorial brokering controls extend the licence 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. Finnish and Swedish legislation covers extraterritorial brokering activities of all their citizens and permanent residents, irrespective of their nationality. The Dutch legislation includes controls



Sudanese soldiers discharging an Antonov aircraft to put its contents in military trucks at the airport of El Geneina (Amnesty International).

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 licence beforehand from the home state. The controls do not cover the extraterritorial brokering of transfers to non-embargoed destinations. In contrast, comprehensive extraterritorial controls extend the licence 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.

2. Extraterritorial brokering controls in the EU

The 2003 EU Council Common Position on the control of brokering provides a 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 negotiating or arranging third-country transfers within their territory. Also covered are the buying, selling and arranging of transfers of equipment in the ownership of the broker and involving the equipment’s transfer between non-EU countries. Licence applications for brokering third-country transfers are to be assessed against the EU export criteria for military equipment.⁴⁶ Two-thirds of the 27 EU states operated such controls on brokers within their territory by late 2008, while states still preparing to implement the Common Position were Cyprus, France, Greece, Ireland, Italy, Latvia, Luxembourg; and Portugal.⁴⁷

The 2003 EU Common Position recommends that states “consider controlling brokering activities outside of their territory carried out by brokers of their nationality resident or established in their territory.”⁴⁸ 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 the controls to a licence requirement for extraterritorial brokering activities to any destination. This requirement extends to the extraterritorial brokering of all military equipment in seven of these states. The Netherlands restricts the licence 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 gives an overview of different extraterritorial brokering controls in EU states.

46. 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.

47. Council of the European Union, 2008, pp. 439-442.

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

Table 1: Extraterritorial brokering controls in EU states⁴⁹

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

3. 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 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 creating 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 of illicit arms brokering. In December 2004, a Belgian court convicted eight people involved in an Antwerp-based diamond company of 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.⁵⁰

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 the broker's commercial and private premises in cases of reasonable suspicions of wrong-doing. Controlling extraterritorial activities of citizens and permanent residents also poses challenges. But the latter 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-

49. 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, pp. 33-35. The information does not reflect possible legislative developments in relation to brokering controls in some EU states since 2005.

50. 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, pp. 112-113.

based company (see above) in response to reports by a UN panel on embargo violations.⁵¹ 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 2000. The prosecutor started investigations into the case in response to a report by a global watch-dog NGO. This case is also significant because the Dutch authorities successfully collected evidence abroad and prosecuted a national for brokering activities conducted outside the Netherlands.⁵²

4. 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 only focus on brokers who operate on 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 national territory can act with impunity for their extraterritorial activities. This is because national controls are easily circumvented, by conducting undesirable activities abroad. Furthermore, national authorities will have no legal basis for prosecutions of citizens and residents who operate abroad in order to violate arms embargoes, for example. Not adopting extraterritorial controls on arms brokering falls below the standards voluntarily adopted in half of all EU states.

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 licence requirement for brokering activities by nationals and/or permanent residents irrespective of where the activity is carried out or where the destination of the brokered equipment is. Extending the licence 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 the activities of brokers abroad. But the controls deny brokers the possibility of circumventing 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 a third of EU states.

5. 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. Enforcement challenges do exist, especially if brokers are required to seek 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.⁵³ Not adopting extraterritorial controls means that national authorities have to accept that brokers can continue to act with impunity and

51. *Ibid.*

52. *Ibid.*, p. 104.

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

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 nationals and/or 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 covers brokering and brokering-related activities for transfers that violate embargoes.

III. For a real control of arms brokers in Belgium⁵⁴

At the end of the 1990s, various United Nations reports revealed the central role played by arms brokers (also called “intermediaries”) and their activities in illegal arms trafficking and numerous violations of United Nations Security Council arms embargoes. Arms brokering essentially consists of the facilitation and arranging of transactions in exchange for a certain form of compensation or material recompense and is a perfectly legal activity in and of itself. If arms brokers are, however, insufficiently or poorly controlled, they only have to make one false move to slide across the dividing line between their legal activities and illegal arms trafficking.

Different studies have subsequently illustrated the ability of many arms brokers to get around existing controls by exploiting different national regulations or by carrying out their activities in countries where controls are weak or non-existent. International and national fora have shown that the lack of regulation or poor regulation of arms brokers has consequently created a real loophole in the fight against arms trafficking.

After reports demonstrated that international arms traffickers were using Belgian territory as a base for illegal operations, Belgium introduced regulatory provisions on arms brokering, as included in the law passed on 25 March 2003. This law aims to make all activities in the arms trade sectors subject to a preliminary licence requirement from the Ministry of Justice and impose sanctions against all arms embargo violations. It also provides Belgian legal jurisdictions with extraterritorial competences for taking action against infringements committed in Belgium or elsewhere.

Nonetheless, the adoption of a EU’s Common Position on controlling arms brokering and the regionalisation of competency in the area of the arms trade in Belgium - both of which came into being following the adoption of the law on 25 March 2003 - introduced a new dimension to controlling brokers in Belgium. The European Common Position also requires Belgian compliance with provisions adopted by Member States of the EU, of

which Belgium is also member. The regionalisation of competences has created confusion with regard to the question of locating responsibility when amendments to the law on importing, exporting, transiting and fighting against arms trafficking, are required.

Consequently, Belgium clearly needs to do something. This is compounded by a legal obligation to amend its current legislation. This situation becomes even more apparent given that a far-reaching examination of this law has revealed the absence of real control on arms brokers in Belgium and difficulties encountered with its application. Therefore, despite the fact that its legislation includes an authorisation procedure for carrying out the activity of an arms trader, rather than an authorisation procedure for each arms brokering operation, Belgium has still not solved the crucial problem of controlling brokerage activities between “third” countries, that is to say, operations that do not necessarily involve a transfer of arms through Belgium.

Belgium, therefore, is not complying with the European Union’s Common Position in this regard. It would also appear that despite being the main target of this law, no intermediaries have registered in Belgium and the Royal Decree on the legislation governing the activities of dealers is only being applied in part.

With a few months to go before the country takes over the acting presidency of the European Union, Belgium ought to be looking at how to revise its system for controlling arms brokers, in compliance with European standards.

In this paper, we will begin by examining the international and regional instruments for controlling arms brokers with which Belgium is obliged to comply. This will be followed by a presentation of the law of 25 March 2003 for controlling the activities of dealers in Belgium, together with some of the weaknesses and problems encountered within the law and its application. We will then formulate a number of recommendations.

1. Controlling arms brokering at international and regional levels

The reports of the international Commission of Inquiry about illicit arms transfers in the Great Lakes region provided a starting point for un-

54. By Virginie Moreau, 7 September 2009.

derstanding what arms brokering activities are.⁵⁵ Several assessments have also been made at international and regional levels, which testify to the determination of many countries to understand the scale of brokering activities in this field and to develop better controls in order to combat illegal arms trafficking.

1.1. At international level

Two pertinent instruments exist at an international level in the arms brokering arena. The UN Programme of Action on Small Arms and Light Weapons⁵⁶ encourages states to implement, “adequate laws, regulations and administrative procedures to exercise effective control over the production of small arms and light weapons.” “This legislation or procedures should include measures such as registration of brokers, licensing or authorization of brokering transactions as well as the appropriate penalties for all illicit brokering activities performed within the State’s jurisdiction and control” (§II.14). At international level, the document recommends the development of “common understandings of the basic issues and the scope of the problems related to illicit brokering in small arms and light weapons with a view to preventing, combating and eradicating the activities of those engaged in such brokering” (Paragraph II, 39). States are also urged to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons (Paragraph IV, 1, d).

We also note that at national level, states are urged to take appropriate measures, including legal or administrative means, against any activity that violates a United Nations Security Council arms embargo in accordance with the Charter of the United Nations (Paragraph II, 15). In practice, this means ensuring respect for arms embargoes in national legislation.

55. Valérie Yankey-Wayne. “Widening Our Understanding of Brokering Issues: Key Developments in Developing a Mechanism to Prevent Illicit Brokering in Small and Light Weapons – Scope and Implications”, UNDIR, 2007. The initial International Commission of Inquiry report is available at <http://www.grip.org/bdg/g1646.html>

56. *United Nations Programme of Action to Prevent, Combat and Eradicate Small Arms and Light Weapons in All its Aspects*, A/CONF.192/15, 20 July 2001: <http://www.poa-iss.org/PoA/poahtml.aspx>

Although the United Nations Protocol on Firearms⁵⁷ is a legally binding instrument, the provisions on brokers and brokering are not mandatory.⁵⁸ Nevertheless, they do aim to encourage states to envisage the adoption of measures for controlling arms brokerage. Article 15 of the Protocol therefore provides a few basic indications for states interested in adopting legislation. The system to regulate the activities of people involved in brokering may include one or several of the following measures: registering brokers operating within their territory; licensing or authorisation of brokering; and disclosure on the import or and export licences or authorisations, or on the accompanying documents, of the name and route taken by the brokers involved in the transaction. The Protocol also encourages intelligence to be provided about brokers and for this information to be kept on record (Art. 15,2).

In 2005, a UN Group of Governmental Experts was set up by the General Assembly to examine new measures to strengthen international cooperation to prevent, combat and eradicate illicit brokerage in small arms and light weapons (GEG)⁵⁹. In its report, the GEG defines a broker in small arms and light weapons as “a person or entity acting as an intermediary that brings together relevant parties and arranges or facilitates a potential transaction of small arms and light weapons in return for some form of benefit, whether financial or otherwise.”⁶⁰ The report also provides a detailed description of the activities of a broker, which is the first time that this has been accepted at international level. These

57. Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components, supplementing the United Nations Convention against Transnational Organized Crime. United Nations document, A/RES/55/255, 8 June 2001: <http://secint50.un.org/events/smallarms2006/pdf/FirearmsProtocol.pdf>

58. UNODC. *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p.462: http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides-Full%20version.pdf

59. United Nations. General Assembly. Resolution A/60/81 adopted 11 January 2006:

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/492/46/PDF/N0549246.pdf?OpenElement>

60. United Nations. “Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons”. Document A/62/163, 30 August 2007: http://www.un.org/ga/search/view_doc.asp?symbol=A%2F62%2F163&Lang=E

activities consist of finding business opportunities for one or more parties; putting interested parties in contact with one another; assisting parties in proposing, arranging or facilitating agreements or possible contracts between them; assisting parties in obtaining the necessary documentation and assisting parties in arranging the necessary payments. The report also highlights that “some activities closely associated with brokering in small arms and light weapons that do not necessarily in themselves constitute brokering might be undertaken by brokers as part of the process of putting a deal together to gain a benefit” (§10). These activities may include, for example, acting as dealers or agents in small arms and light weapons and providing technical assistance, training, transport, freight forwarding, storage, finance, insurance, maintenance, security and other services. The report also explains that illicit brokering is determined by the state concerned in accordance with its national laws and regulations, as well as in accordance with the state’s international obligations (Paragraph 12.).

1.2. At regional level

In connection with the regional instruments to which Belgium has to comply, the European Union’s Common Position on controlling arms brokering⁶¹ is the most important and most comprehensive document.⁶² By adopting this text, Member States of the European Union reached agreement on a series of elementary provisions for controlling brokering activities under national legislation. The legally binding nature of this European instrument requires them to comply with the provisions adopted, by either extending or improving their national legislation on the control of brokering activities.

The Common Position defines brokering activities as 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 (Art. 2,3). The arms covered by the arms brokering controls are included in the common list of conventional arms and dual-use goods.⁶³

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”. (Art. 1.1).

The text lists the obligatory provisions national regulation must include for controlling armaments brokering:

- to control brokering activities taking place within their territory (Art. 2.1);
- to establish a clear legal framework for lawful brokering activities (Art. 2.2);
- a licence or written authorization should be obtained from the competent authorities, on the basis of an assessment of the application based on the provisions of the European Union Code of Conduct on Arms Exports (Art. 3,1);
- to keep records for a minimum of 10 years of all persons and entities, which have obtained a licence (Art. 3,2.);
- to establish a system for exchange of information on brokering activities among themselves as well as with third states, as appropriate (Art. 5);
- to establish adequate sanctions, including criminal sanctions (Art. 6).

As well as these mandatory provisions, the Common Position suggests other measures states could adopt and refers to practices that already exist in certain European countries. It suggests states could require brokers to obtain a written authorisation to act as brokers, as well as establish a register of arms brokers (Art. 4.1). This would not replace the requirement to obtain the necessary licence or written authorisation for each transaction. It also urges Member States “to consider controlling brokering activities outside of their territory carried out by their nationality resident or established in their territory” (Art. 2.1).

61. Common Position 2003/468/CFSP of the Council of 23 June 2003 on the control of arms brokering: http://eur-lex.europa.eu/pri/en/oj/dat/2003/l_156/l_15620030625en00790080.pdf

62. Other regional and politically binding documents also tackling the question of arms brokering such as the OSCE document on light weapons (2000), the OSCE Best Practice Guide on National Control of Brokering Activities (2003) and The Wassenaar Arrangement (2003).

63. Council of the European Union, Common Military List of the European Union adopted by the Council on 23 February 2009: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:069:0019:0051:EN:PDF>

2. Controlling arms brokering activities in Belgium

2.1. In the context of the adoption of the law regulating arms brokering activities

Since its amendment on 25 March 2003, the Belgian law on the import, export, transit and fighting against the trafficking in arms, munitions and materials specifically used for military purposes or maintaining order, in addition to related technology, also covers arms-brokering transactions.⁶⁴

Reports by human rights organisations underpin the legal initiative to control intermediaries in Belgium. In 1997 a report by the US NGO Human Rights Watch damaged Belgium's international reputation in terms of arms trafficking. The report, "*Stoking the fires: military assistance and arms trafficking in Burundi*," asserted that Belgium had acted as a hub in international arms trafficking to Burundi since at least 1993, and questioned the efforts made by the Belgian government to put a stop to arms trafficking through Belgium, particularly at Ostend airport, identified as a central point in arms trafficking for weapons arriving from Eastern Europe en route for Africa (Angola, Burundi, Rwanda and Zaire).⁶⁵ Although the report explains that this trafficking did not necessarily involve the physical transiting of weapons via Belgian territory, it did, nonetheless, affirm that trafficking activities often began in Belgium: airfreight companies were based in the country and they stored their equipment there; mission orders were made there, as well as freight equipment servicing.

In response to this alarming information and realising that nothing could be done against armed traffickers within the framework of the law of 5 August 1991, which essentially targeted arms dealers and manufacturers established in Belgium, initiatives were taken by Belgian parliamentarians to fight against arms trafficking in Belgium. A first draft law was therefore submitted in 1998⁶⁶ by Belgian MP Dirk Van der Maelen, and an Arms

Trade subcommittee was set up at the Foreign Relations Committee, to examine the different draft laws related to legislation on the arms trade. Following lengthy discussions and many hearings by experts from the subcommittee, in addition to the introduction of a second draft law by Mr Van der Maelen in February 2000, Belgium finally introduced legislation on controlling intermediaries with the adoption of the law of 25 March 2003 amending the law of 5 August 1991 on the import, export and trafficking of munitions and materials specifically used for military purposes or maintaining order, in addition to related technology and arms brokering transactions. This law was supplemented by the Royal Decree of 16 May 2003, which governs modalities for the licence contained in the new Article 10 of the Law of 5 August 1991 (see below).⁶⁷

The adoption of this law is also part of the international and European disarmament context and struggle against the trade in light weapons, in which Belgium had already been a driving force with the adoption of the law banning antipersonnel mines in 1995 and the "Brussels Call for Action"⁶⁸ in 1998.

2.2. The law's objectives

The law of 25 March 2003 aimed to rectify the legal loophole in the Belgian law on the arms trade. Until this point, the latter did not allow for any action to be taken against intermediaries - individuals or companies - whose transactions had implications for Belgium but which did not always imply a physical passage of arms through Belgian territory or actual trafficking as such in Belgium. This is why this law specifically aimed to "criminalise arms trafficking which violates embargoes decreed by Belgium, the EU and the United Nations and which is carried out abroad by Belgian companies, Belgian citizens or foreigners resident in Belgium" and subsequently bestows a degree of universality

64. Law of 25 March 2003 amending the law of 5 August 1991 on the import, export and transiting of arms, munitions and materials specifically for military use and related technology: <http://www.grip.org/bdg/g2071.html>

65. Human Rights Watch, *Stoking the fires: military assistance and arms trafficking in Burundi*, Human Rights Watch, New York, 1997.

66. Draft law amending the law on the import, export and transiting of arms, munitions and materials specifically for military use and related technology, 1520, 1997-1998, 4 May 1998.

67. Royal Decree of 16 May 2007, which governs modalities for the licence contained in the new Article 10 of the Law of 5 August 1991 on the import, export and transiting of arms, munitions and materials specifically for military use or maintaining order and related technology

<http://reflex.raadvst-consetat.be/reflex/pdf/Mbbs/2003/07/07/82433.pdf>

68. Sustainable disarmament for sustainable development: *The Brussels Call for Action*, International Conference, 12-13 October 1998: www.grip.org/bdg/pdf/g1644.pdf

on the law. It also aims to “control all individuals operating in the nebulous zone separating the legal arms trade from arms trafficking: intermediaries, transporters, and lobbyists etc.”⁶⁹

To this end, the law of 25 March 2003 introduced three main control measures: a licence granted in advance by the Ministry of Justice to anyone seeking to work in the arms trade; a ban on arms embargo violations decreed by Belgium or any other international organisation; and extraterritorial competency for Belgian courts.

2.3. Framework for pursuing action to control brokering and related goods

The provisions for regulating brokering operations were comprehensively integrated into the law of 5 August 1991 under Title III –Combat against Trafficking in Arms and Ammunition materials for specific military use and related technology.

The regulation on brokering activities therefore supplements the regulation on import, export and transiting. It applies to the trade in arms, munitions and military material, as well as civilian weapons. It does not cover dual-use goods.

2.4. Control measures included in the law of 25 March 2003

2.4.1. Regulated brokering activities

Most national legislation on controlling arms brokering defines the broker as the person who arranges and negotiates transfers between two foreign states, in other words, actors engaged in the “brokering of transfers between third countries.”⁷⁰

In Belgium, intermediaries are defined as “anyone who, in exchange for remuneration or free of charge, creates the conditions for the conclusion of a contract to negotiate, export or deliver, or possess to this end arms, munitions or materials for specific military use or related technology

69. Belgian Chamber of Representatives. 9 February 2000. Draft law amending the law of 5 August 1991 on the Import, Export, Transit and Combat against Trafficking in Arms and Ammunition materials for specific military use and related technology and completing the preliminary title of the Code of Criminal Procedure. Doc. 50 0431/001, p.4.

70. Holger Anders and Silvia Cattaneo, *Regulating arms brokering: taking stock and moving forward the United Nations process*, GRIP Report, 2005/special edition, p. 13:

<http://www.grip.org/fr/siteweb/images/RAP-PORTS/2005/2005-hs1.pdf>

abroad, irrespective of where these goods come from or go to, whether or not they enter Belgian territory, and whoever concludes such a contract when the transport is performed by a third party” (Art. 10).

The Belgian legislator opted for a very broad definition of the activities of the intermediaries because it covers both the negotiating activities carried out within the framework of transfers between third countries and the activities performed within the framework of simple arms export operations. This definition does not therefore distinguish between export and brokering operations and therefore does not consider brokering as a separate activity. The definition also covers general activities linked to brokering through transport activities.

2.4.2. The territorial scope of controls and legal action against violations of arms embargoes

The value-added of Belgian regulation on controlling arms brokers is located in the territorial scope of its controls. Belgium is committed to controlling brokering activities taking place on its territory. Therefore, any Belgian or foreigner residing or trading in Belgium who wishes to intervene as an intermediary in the operations explained above (negotiation, export, delivery or possession of arms), must obtain a licence beforehand (with regard to the licence, see below). Controls are carried out irrespective of whether or not the goods enter Belgian territory.

The fact that a licence is mandatory means that the fight against illicit arms brokering applies to any person or intermediary of Belgian nationality residing in Belgium or trading in Belgium, even when they are carrying out or organising transactions outside Belgian territory.⁷¹ The legislator has also granted extraterritorial competency to Belgian courts pursuing individuals who have committed infringements against Belgian legislation in the fight against arms trafficking outside Belgian territory, as long as the individual in question is located in Belgium (Art. 13). Legal competence is valid even if the Belgian authorities have not received official complaints or official warnings from the authority in the country in which the infringement has been

71. Flemish Peace Institute, *The Flemish Arms Export Policy: an analysis of the legal framework*. Report, March 2007, p. 92: http://www.flemishpeaceinstitute.eu/get_pdf.php?ID=91&lang=EN

committed or if the act is not punishable by law in the country where it was committed.

Belgium has also introduced legal proceedings in its legislation against violations of arms embargoes. Article 11 effectively bans Belgians or foreigners residing or trading in Belgium from violating embargoes decreed to be in conformity with international law by Belgium or an international organisation of which Belgium is a member, such as the United Nations, the European Union or the OSCE.

2.4.3. A licensing system

Article 10 of the law of 25 March 2003 requires all activities in arms trading in Belgium to have been licenced beforehand by the Ministry of Justice, which handed this responsibility to the *Service Fédéral des Armes* in 2006.⁷² The licence requirement does not affect intermediaries alone because it covers anyone wishing to be involved in the arms trade in Belgium. Obtaining this licence is a prerequisite for being able to introduce a subsequent request for an export or transit licence from the competent authorities.⁷³ It is compulsory, whatever the origin or destination of the goods and irrespective of whether or not they enter Belgian territory.

There are two kinds of licence: a licence for an indefinite period and a licence for a specific transaction. The applicant must specify the kind of licence being applied for when lodging a request with the *Service Fédéral des Armes*, for which they must also provide a registered dealer's certificate authorising the person in question to exercise their activities covered by the law on arms,⁷⁴ a Certificate of Good Character and documents that enable the applicant and their activity to be identified.⁷⁵ The licence for an indefinite period mainly targets arms manufacturers and export companies, whereas licences for a specific operation are requested by individuals.

72. The Service fédéral des armes was created by the law of 8 June 2006 covering individual and economic arms activities at SPF Justice Directorate General Legislation, Freedoms and Fundamental Rights.

73. The prior licence requirement is not necessary for importing arms. It would appear, however, that the Flemish Region intends to extend the prior licence requirement to imports.

74. The law of 8 June 2006 covering individual and economic arms activities, Art. 5: http://www.grip.org/bdg/pdf/060609_Moniteurbelge.pdf

75. Royal Decree of 16 May 2003 on the licence mentioned in Article 10 of the law of 5 August 1991, *op. cit.*, Art. 5.

Licence requests are assessed by the *Service Fédéral des Armes*, which in turn must request the considered opinion of the following bodies⁷⁶: the federal police, the Prosecutor's Office, Customs, State Security and the governor of the area in which the request for a licence from the dealer was lodged.⁷⁷ These opinions always seek to shed light on the personality of the licence applicant.

Ultimately, a licence can only be granted to arms dealers registered at the time the request is made, who have provided evidence of good conduct and have paid a deposit guaranteeing appropriate execution of the operation in question. The details of the guarantee payment are set out in the Royal Decree of 16 May 2003, according to which the amount paid varies from a minimum of €1,000 for a licence limited to a given operation (1% of the value of the operation with a minimum value of €1,000) to €10,000 for a licence for an indefinite period.⁷⁸

It should be noted that the payment of a deposit was justified by the determination to guarantee correct execution of the operation. The law stipulates that "the deposit is not reimbursed until after the operation has been fully completed and the end-user certificate has been duly completed and received or after a voluntary cessation of a licence for a specific period" (Art. 10). Nonetheless, we now know that this system has never been applied and no deposit has ever been paid (see below).

The licence system aims to provide a guarantee of good character for natural and legal persons involved in the licence request, rather than authorising a brokering activity in itself.

2.4.4. Penalties

The effectiveness of the regulation also depends on establishing appropriate penalties and the Belgian legislator has subsequently included criminal and administrative penalties. Therefore, any violation or attempted violation of Belgian

76. Royal Decree of 16 May 2003, Art. 2.

77. Previously, in compliance with the Royal Decree of 16 May 2003, a request for a recommendation was also addressed to the licence services of SPF Économie and after regionalisation of competency over the arms trade, the request was also addressed to the licence services of the three Regions. This procedure still does not exist because the administration pointed out that time was being lost because the Regional Licence Service was unable to give its opinion before prior authorisation had been granted.

78. Royal Decree of 16 May 2003, Art. 3.

legislation in the area of arms brokering is punishable by a prison sentence of up to 5 years and/or a fine of between €10,000 and €1,000,000 (Art. 12). Anyone found guilty of such an infringement can be temporarily banned from carrying out operations covered by the regulation in question, even on the behalf of a third party (Art. 12). The provisions in the Penal Code also apply.

2.5. Measures for controlling brokering activities in practice: weaknesses and shortcomings

2.5.1. An initial observation: no intermediaries are registered in Belgium

At present, no intermediaries, in the strictest sense of the term, appear to be operating in Belgium or at least, no intermediaries have registered. No one in the Belgian civil service knows of any legal or natural person acting as an intermediary in Belgium.

The 300 or so cases processed since 2003 are requests made by arms export and manufacturing companies, as well as dealers and individuals, who require this licence ahead of any arms export or transit operations.⁷⁹

The main people targeted by the law regulating the arms trade, namely intermediaries who are legal and natural persons, therefore do not appear to have been affected by the procedures in place.

2.5.2. Non-compliance with the EU Common Position on controlling arms brokering

The main weakness in Belgian legislation is the fact that the prior licence system established in Belgium by the law of 25 March 2003 is to an authorisation system for exercising the profession of arms dealer granted following an assessment of the personality of the licence applicant rather than a licence system that authorises an operation following a detailed investigation into the operation in question.

By granting the licence, the state judges that the person is of sufficient moral character to carrying out the profession in question but it does not pre-

79. The author would like to thank the different people who answered his questions on controlling arms brokering activities in Belgium. They will, nonetheless, not be held responsible for any errors or misinterpretations that may have been included in this study.

judge authorisation for the subsequent export or import of the material.⁸⁰

In case of a prior licence request addressed to the *Service Fédéral des Armes* for a brokering operation which consists of the export of arms from Belgium, it would not have any importance, given that the operation as such should subsequently be subject to evaluation by the regional licensing service where the broker is based. The evaluation would be made with regard to export criteria such as those defined in the law of 5 August 1991.⁸¹ The situation, however, is different in case of prior licence requests involving the arrangement of an export contract, concluded from Belgium, between a company based in country A and the Ministry of Defence in country B that would not involve the transit of arms through Belgian territory.

Consequently, a licence for export (or even transit) would not be required. In the case in point, under current procedures, the brokering operation would be subject to no verification at all. Only the identity and criminal record of the applicant would be checked.

The current procedure therefore does not comply with the EU's Common Position on controlling arms brokering, which stipulates that with regard to arms control and "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" (Article 3).

Furthermore, this article of the European Common Position stipulates that licence requests or written authorisation for brokering activities should be examined with regard to the provisions of the European Code of Conduct on arms exports.⁸² However, the procedure for granting the prior licence in Belgium does not in any instance involve an evaluation on the basis of criteria from the European Code of Conduct, although these are

80. Pierre Martinot, *La gestion administrative des armes en Belgique: les documents concernant l'exportation, l'importation, le transit et la détention*. GRIP report, 2007/6, p. 6 : <http://www.grip.org/fr/siteweb/images/RAPPORTS/2007/2007-6.pdf>

81. The law of 5 August 1991 import, export, transit and fighting against the trafficking in arms, munitions and materials specifically used for military purposes or maintaining order, in addition to related technology, Art. 4.

82. EU Common Position on controlling arms brokering, *op. cit.*, Art. 3.

included in the 1991 Belgian legislation on the arms trade by the law of 26 March 2003.⁸³

This situation means that an individual can easily obtain a licence from the Ministry of Justice and then act as an intermediary for facilitating a transfer of arms between third countries to a destination and an end-user which would be considered unacceptable if the operation had been assessed according to Belgian and European Union export criteria by the competent services, namely, the licensing services of each Region and the *SPF Économie* (FPS Economy, SMEs, Independent Professions and Energy).

This prior licence requirement system results from the Belgian legislator's admirable intention to combat arms trafficking by controlling everyone operating in the arms trade. This system requires the Department of Justice to request reasoned opinions from different bodies (see point III.4.c). It provides for the possibility of investigating each applicant in order to verify the existence of possible links with criminal organisations or groups, as well as their criminal record and reputation in the international arms trafficking arena.⁸⁴ Nonetheless, we repeat, this procedure has to do more with an authorisation to exercise the profession, or even the registration suggested in the EU Common Position (Art. 4,1), than with an authorisation for the operation in question.

However, in Article 4 on the possibility of allowing Member States to require brokers to obtain authorisation for exercising a brokering activity or establishing a register of brokers, the Common Position explains that: "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 (indicated in Article. 3)."

Together with the arms dealer's certificate, this licence also performs a double function. Anyone whose activity falls within the remit of the law on arms (manufacture, repair, trade or storage of arms, weapon components or munitions) must hold the certificate granting approval for exercising one

of these activities, but this does not go far enough when dealers wish to import or export arms.

2.5.3. Doubts regarding applicability of the law regarding extraterritoriality

Many people in Belgium think that extraterritorial controls of the activities of arms brokers are inapplicable and therefore believe that this law is inapplicable too.

Nevertheless, although it is true that controls carried out on brokers operating abroad are diffi-

The case of Leonid Minin is a good case in point. This Israeli arms trafficker was involved in organising transfers of weapons to Liberia and Sierra Leone in violation of United Nations arms embargoes when he was arrested in August 2000 in Italy. Despite numerous documents found in his possession attesting to the details of arms transfers to Sierra Leone, he was released because the arms had not touched Italian soil and the Italian Supreme Court could not pursue him. Italy, which has still not adopted legislation in conformity with Common Position recommendations, could find itself confronting the same situation in a few months time, in a case involving arms trafficking to Libya and in which Vittorio Dordi, an alleged Italian arms trafficker residing in the DRC, may have played a key role. He has now been extradited from the Democratic Republic Congo and is awaiting trial. Nonetheless, he will probably not be charged because extraterritorial competency is still not in force in Italy.

cult to apply and are at risk of being circumvented without the authorities' knowledge, extraterritorial controls are essential, particularly with regard to arms embargo violations. If we consider a situation where a Belgian intermediary seeks to organise a transfer of arms to Zimbabwe, a country subject to a European arms embargo, the intermediary simply has to go to a country that is not a member of the EU and which is not applying the arms embargo with regard to Zimbabwe.

The intermediary would therefore not violate that country's legislation, although the brokering operation would be illegal under Belgian law. This case illustrates the importance of having extraterritorial controls because they constitute

83. The law of 26 March 2003 amending the law of 5 August 1991 on the import, export, transit and combat against the trafficking in arms, munitions and materials specifically used for military purposes or maintaining order, in addition to related technology, Art. 2.

84. Draft law of 9 February 2000, p. 4.

“a plausible legal basis for pursuing brokers who violate national regulation.”⁸⁵

Nonetheless, in order to be effective, extraterritorial controls must be able to rely on strengthened international cooperation, based on agreements with the countries in which the brokers are established, and on exchange of information relating to the brokers and licences refused. This also involves a broker registration, which is not currently the case in Belgium, not simply because the government is unaware of the intermediaries but also because the regulation has not included provisions on the registration of intermediaries. The Common Position also recommends that Member States establish an information-exchange mechanism.

2.5.4. A guarantee system that is simply not applied

The guarantee payment system aiming to ensure appropriate execution of a brokering operation (Art. 3, Royal Decree of 16 May 2003) has never been applied. In fact, the Royal Decree was subject to a request for annulment at the State Council, made on 5 September 2003 by the *Union des Fabricants d'Armes de Chasse et de Sport* (UFA) and S.A. Verrees & Co. The two parties contested the legality of the Royal Decree on the basis that the decree did not distinguish between those requesting a licence for a given operation and licence applicants for an indefinite period, which subsequently imposed costs that were much too high on the latter (a €10,000 guarantee). The State Council decided on 18 December 2007 to reject the request for annulment of the Royal Decree.⁸⁶ The Royal Decree therefore still exists and the Department of Justice must continue to apply it.

2.5.5. A problem of competency

In terms of ensuring Belgian legislation on controlling brokering activities complies with the EU Common Position, the question of shared competences with regard to the law of 5 August 1991, and in particular, in connection with the provisions on combating arms trafficking, is expected

to be debated in Belgium in an effort to determine which party is responsible for amending it. General confusion appears to surround this issue.

The Ministry of Justice (through the *Service Fédéral des Armes*) claims that it does not have a remit for fighting arms trafficking. The regionalisation of competencies granted Belgian Regions competence for the remaining scope of the law of 5 August 1991 on the import, export and transiting of arms, munitions and material specifically for military use or maintaining order and related technology.

The Ministry of Justice therefore considers that it does not have the power to amend the law and considers that this is the remit of the Regions. The Regions, however, consider that the fight against arms trafficking is still a federal power and it is therefore up to the federal state to amend the provisions in question, where required.

When Belgium finally complies with the EU Common Position on the control of arms brokering and adopts a licence system aimed at authorising each brokering activity on the basis of an analysis of the operation in regard to export criteria, the question will then rise of whether it is in fact the Ministry of Justice that is responsible for granting the licence.

3. Conclusion and recommendations

International and regional instruments such as the EU Common Position on the control of arms brokering recommend that Member States introduce at least three major elements into their legislation on the control of arms brokers: a licence system or written authorisation for brokering activities; registration of brokers; and penalties, such as those set out in Belgian legislation.

Although the Belgian legislator has introduced a prior licence requirement system into the regulation on brokering activities, this does not amount to an authorisation system for the operation itself because requesting a licence does not in any way imply evaluation with regard to the criteria contained in the European Code of Conduct. Belgium therefore does not comply with the European Union Common Position on controlling arms brokering. However, this kind of European regulation requires Belgium to take measures to rectify the situation as soon as possible.

85. For further information involving the challenges related to the application of extraterritorial controls, see: Holger Anders, Controlling arms brokers operating from abroad: Challenges and policy options for EU states GRIP analysis paper, 29 June 2009, p. 2 : <http://www.grip.org/en/default.asp>

86. Decision No.178.019 of 18 December 2007.

Generally speaking, the people consulted and in charge of the arms trade consider that this law is unsatisfactory and its application appears to generate enormous dissatisfaction. Firstly, the people specifically targeted by the regulation, the intermediaries in the strictest sense of the term, are not affected by the controls. None of them have in fact registered in Belgium. Secondly, the effectiveness of the extraterritorial controls on the activities of intermediaries, as included in the law, is subject to question. Although a Royal Decree exists, it is only partially applied.

Nobody appears to want to take responsibility for resolving these problems. A high level of confusion appears to prevail with regard to responsibility for this matter and who should take the initiative for resolving this situation. Furthermore, no one wants to be responsible for a law that is considered inapplicable and nobody appears in any hurry to improve matters. Ultimately, the law is only symbolic and there is no real control of brokers in Belgium.

Recommendations

In order to have legislation to properly control intermediaries and therefore actively contribute to the fight against illicit arms trafficking, Belgium should:

- prioritise the setting up of a competent authority for improving legislative provisions on the control of intermediaries in the arms trade;
- comply with the EU Common Position on controlling arms brokering and the granting of a licence or authorisation for each brokering activity;
- comply with the EU Common Position on the evaluation of licence requests with regard to the provisions of the EU Code of Conduct on the export of arms;
- introduce an intermediary-control system (focussing on cases not subject to other controls) that is coherent and supplements other controls such as those on arms exports (OSCE Practical Guides for arms brokering);
- automatically register intermediaries who have obtained a broker's licence;
- require any legal or moral person who makes a request for a licence for the import, export or

transit of arms to declare the intermediary on the import, export or transit licence, the end-user certificate and other International Import Certificate, if an intermediary is employed;

- ensure that there is a mechanism that enables Belgium to exchange information with other EU Member States on intermediaries, licence refusals, and so on in compliance with the Common Position.

Conclusion

European Union Member States should make greater efforts to improve controls of the arms brokering activities of their citizens and residents in order to combat their involvement in the illegal transfer of arms. There are disparities in the quality and efficiency of arms controls in the different Member States, which creates a situation that benefits unscrupulous brokers, whose ability to circumvent existing regulation and take advantage of the loopholes and lack of harmonisation of national regulation has been demonstrated for several years now.

In a few months' time, states will meet to examine progress in the fight against the illicit trade in small arms at the fourth Biennial Meeting of states and to assess implementation of the United Nations Programme of Action on Small Arms and Light Weapons (June 2010). States will also begin negotiations for a future international treaty on the arms trade (July 2010). At these important meetings, progress in controlling arms brokering will also be examined.

Similarly to European countries, most other states in the world now recognise the need to implement controls on the activities of arms brokers in an effort to tackle the transfer of illegal weapons. Studies have been carried out into strengthening international cooperation to combat illicit arms brokering and states have managed to develop a common understanding of the problem of illicit brokering, as set out in a report by the United Nations Group of Governmental Experts, published in 2007. Too few countries, however, possess legislation that enables them to control and punish illegal brokers.

If the European Union wishes to continue playing a key role in the fight against the transfer of illegal arms and encourage countries to develop resources for achieving this goal, then it should seize the opportunity provided by these important meetings to reinforce its controls on brokers by extending controls to the activities of brokers operating abroad and ensuring that every one of its Member States implements the controls.

Due to its geographical location, Belgium has been at the centre of many instances of arms trafficking in the past and should take advantage

of the international opportunities provided by its upcoming holding of the rotating presidency of the European Union to revise its legislation on arms brokering, analysis of which has clearly demonstrated that it is not enough to simply declare that legislation exists for it to actually have any teeth. It has to contain the minimum control measures included in the Common Position with which Belgium is obliged to comply, and could in this respect draw inspiration from best practice in other European states.

Although instruments for controlling arms brokers have indeed been adopted, states must now seek to properly implement them and continue their efforts because the complexity of transnational commercial exchange networks used by illegal arms brokers requires a globalised and harmonised response if countries wish to counter the activities of their citizens or residents involved in illicit arms sales.

Recommendations

Recommendations on the EU Common Position on arms brokering controls:

- EU Member States that still do not have legislation on arms brokering should immediately be called on to respect their commitment with regard to the Common Position.
- Member States within COARM should also provide for a comprehensive evaluation of European national legislation, in an effort to ensure that every Member State has an appropriate system for controlling arms brokering in compliance with the Common Position.
- EU Member States on COARM should seriously consider revising the Common Position in view of extending the scope and prioritising integration of three control measures:
 - 1) A control of brokering-linked activities, particularly transport and financial service activities.
 - 2) The setting up of a registration procedure for arms brokers, based on a regular review of registered brokers and efficient cooperation between national authorities, particularly diplomatic posts.
 - 3) A common standard for an extraterritorial control of the activities of arms brokers, which at the very least establishes a ban on national and multinational arms embargo violations, wherever nationals and/or permanent residents are carrying out their activities.

Recommendations on the extraterritorial control of arms brokering:

- EU states should adopt a common minimum standard requiring at least a ban on national and multinational arms embargo violations, wherever the nationals and/or permanent residents are carrying out their activities.
- The ban should be based on a “catch-all” clause covering all activities related to embargo violation and subsequently also covering other related brokering activities that seek to organise transfers in violation of embargoes.

Recommendations on Belgian Legislation on arms brokering control:

In order to have legislation allowing for the effective control of intermediaries and subsequently help to efficiently combat illicit arms trafficking, Belgium should:

- prioritise the setting up of a competent authority for improving the legislative provisions for controlling intermediaries in the arms trade;
- comply with the EU Common Position on controlling arms brokering and the granting of a licence or authorisation for each brokering activity;
- comply with the EU Common Position on controlling arms brokering and assessing licence requests with regard to the EU Code of Conduct provisions on the export of arms;
- set up a system for controlling intermediaries (focussing on cases that are not yet subject to other kinds of control) that is coherent and supplements other controls such as those on arms exports (OSCE Best Practice Guide on National Control of Brokering Activities);
- automatically register intermediaries who have obtained a broker’s licence;
- require any legal or moral person making a request for a licence for the import, export or transit of arms to declare any intermediaries on the import, export or transit licence, the end-user certificate and the International Import Certificate, if intermediaries are employed;
- ensure that there is a mechanism that enables it to exchange information with EU Member States on intermediaries, licence refusals, and so on in compliance with the EU Common Position.

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