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Abstract

- Brokering is a separate category of activity in the international trade in military materials and dual-use goods. Brokers act as intermediaries to facilitate transactions between producers, buyers, or vendors. Military materials include small arms and light weapons (SALW) and other conventional weapons. Dual-use items are goods that can be used in both civil and military applications. Military materials and dual-use goods are generally treated as separate items in the national and international regulations on brokering and arms import, export, and transit (IE&T).

- After the role of brokers in violations of arms embargoes was exposed, the United Nations (UN), the Wassenaar Arrangement (WA), the Organization for Security and Co-operation in Europe (OSCE), and the European Union (EU) each adopted either legally or politically binding documents in order to halt illicit brokering. Belgium is bound by these initiatives.

- In Belgium, competences regarding trade in military materials and dual-use goods, including brokering, have been allocated to several administrative bodies. Since 2003, the Regions have received the competence to act in matters concerning the import, export, and transit of military materials and dual-use goods (foreign arms trade). The federal administration is still the competent authority for, among other things, the import and export of goods for the Belgian armed forces and police, the internal (domestic) arms trade, the possession and manufacturing of arms, and the accreditation of various categories of arms traders. Aside from the federal and regional authorities, the provincial governors are also assigned a role in the control regime.

- Since 2003, and prior to regionalisation of the competences for the control of the arms trade, Belgium has joined a small leading force of some 40 states that have had in place a legal framework for the control of brokering in military materials. In Belgian regulations, the term "*tussenpersonen*" (intermediaries or middlemen) is used instead of "brokers". Two Belgian acts stand out:

    - In 2003, Title III "towards the combating of the illegal arms trade" was added to the Belgian Law of 1991 concerning the IE&T of military materials. This law pertains to an established list of military goods and imposes the obligation to submit an application to the FPS-Justice (Federal Public Service for Justice, or Ministry of Justice) for a preliminary licence to act as intermediary or middleman in arms transactions (hereafter referred to as 'broker').
    - The so-called Weapons Act of 2006 also contains provisions with respect to brokers: it deals with domestic trade in firearms and imposes the obligation on receive brokers to receive accreditation from the provincial governor.

- The Belgian legislation provides a legal basis for assessing the reliability of *brokers* in transactions involving military materials. However, Belgium does not exercise control over brokering *activities*. This is not in line with international agreements, some of which emphasise that the control of brokers constitutes a complementary measure that cannot replace the control of brokering activities.

- Belgian legislation provides for sanctions on brokers who fail to abide by the legal obligations (the possession of a licence or accreditation to act as broker) or violate arms embargoes. The effect, however, is very limited because of the absence of control of brokering activities.

- In actual practice, the Belgian regime misses its target: since 2003, not a single broker has completed the prescribed procedure. The legal regulation has failed to adequately control the brokers in foreign trade in arms and military materials because there are no measures to identify brokers, and as a consequence they can freely conduct their activities.

- Concerning the control of brokering in the trade in dual-use goods, EU Council Regulation (EC) 428/2009 is of direct force and application. In addition, in cases of trade in goods transacted through European brokering services that may be used in weapons of mass destruction (WMD), a national licence is required.

- Belgium still needs to embed the operative provisions of Regulation 428/2009 in its national legislation to make them fully effective. Specifically, Belgium must establish criminal sanctions by decree and concrete modalities governing the licensing procedure. It should also establish the manner in which brokers and traders in dual-use goods will receive relevant information and the manner in which brokers are required to keep records or registers.

- Belgian policy on the control of brokering is essentially only symbolic in character. By adopting legislation, Belgium has taken the problem off its political agenda. The legislation does not meet the objective of controlling brokers and imposing sanctions on illicit brokering activities: hence, Belgium is not in compliance with international agreements, has in practice not implemented legislation, and has not established correct procedures.

- The Belgian regime for the control of brokering needs substantial improvement. With a global perspective on the combating of illicit arms trade, in general, and from insights into the specific characteristics of brokering, in particular, the present report makes the following recommendations:

- With respect to the regime for brokering in military materials, substantial improvements are needed: to enact the appropriate legislation and establish the scope of application, effective control measures, ensuring compliance, cooperation and information exchange.
- With respect to the regime for brokering in dual-use goods, the operative provisions of Regulation 428/2009 need to be incorporated in Belgian law, and in particular the absence of criminal sanctions and well-described procedures must be addressed and remedied.

Introduction

In September 2009, the media reported that the notorious Belgian arms trader Jacques Monsieur had been detained in the United States on charges of illegal arms exports to Iran.[1] H is arrest came as the result of a sting operation that revealed how he had tried to purchase parts for F-5 combat aircraft and ship them from the USA to Iran via Colombia or the United Arab Emirates. These goods have since 1995 been under a US trade embargo. As a result, he is being prosecuted for breaches of US legislation on arms trade. In addition, Jacques Monsieur is also charged with conspiracy, money laundering, and smuggling. He faces 65 years imprisonment, but since he is entering a guilty plea his sentence is likely to be reduced to five or six years in prison and a fine of $250,000.[2]

In spite of his notoriety as an arms trader and a broker (he is known by the nicknames 'the fox' and 'the field marshal'), this is actually the first time that he has been apprehended for his illicit (direct or intermediary) activities,[3] although he has been imprisoned in Iran for espionage. In Belgium and France, his sentences were merely conditional prison terms for illicit arms trade activities. As concerns the allegations of illicit activities conducted since the 1990s as a middleman acting from within Belgium, the Belgian courts have not succeeded in securing a conviction.[4]

The case of Jacques Monsieur is not an isolated example of the impunity with which brokers are able to conduct unauthorized brokering activities. Several reports and publications have stressed the difficulty in trying to prosecute these malafide brokers.[5] With this in mind, initiatives have been developed in various international forums to control brokering within the bounds of the broader problem of control of the arms trade.

1 X (author unknown), 'Belg gearresteerd in VS wegens wapenhandel met Iran- 'X, 'Belgian national arrested in the US for arms trade with Iran ', in *De Standaard*, 3 September 2009; X, 'Belg pleit onschuldig aan wapenhandel met Iran' - Belgian national pleads 'not guilty' of arms trading with Iran, in *De Standaard*, 11 September 2009; S.S. HSU, 'Man Indicted in Plot to Ship Jet Parts to Iran', in *The Washington Post*, 3 September 2009.

2 X, 'Belg pleit schuldig aan wapensmokkel' – Belgian national pleads guilty of arms trading with Iran, Knack.be, 24 November 2009.

3 For a profile sketch of Jacques Monsieur see G. TIMMERMAN, 'Verbrande spionnen zijn waardeloos' – Exposed spies are worthless, in *De Standaard*, 4 September 2009; X, 'Het einde van de veldmaarschalk' – The end of the Field Marshal, in *De Standaard*, 4 September 2009.

4 GRADUATE INSTITUTE OF INTERNATIONAL STUDIES GENEVA, 'Chapter 3: Fuelling the Flames: Brokers and Transport Agents', in *Small Arms Survey 2001: Profiling the Problem*, Oxford University Press, 2001, p. 106, available at http://www.smallarmssurvey.org/files/sas/publications/year_b_pdf/2001/2001SASCh3_full_and pdf.

5 B. WOOD and J. PELEMAN, *The Arms Fixers, Controlling the Brokers and Shipping Agents*, Oslo, International Peace Research Institute, PRIO Studies 3/99, November 1999, 139 pp., http://www.prio.no/NISAT/Publications/The-Arms-Fixers-Controlling-the-Brokers-and-Shipping-Agents/; E. CLEGG and M. CROWLEY, 'Controlling Arms Brokering and Transport Agents: Time for International Action', Briefing 8, BASIC International Alert, Saferworld, February 2001, 24 pp., http://www.saferworld.org.uk/; P. DANSSAERT and B. JOHNSON-THOMAS, 'Illicit brokering of SALW in Europe: lacunae in Eastern European arms control and verification regimes', in *Disarmament Forum*, Antwerp, International Peace Information Service, 2009, pp. 35-42, http://www.ipisresearch.be/arms-trade.php.

For an exhaustive overview of these initiatives, we refer the reader to the report "*The International Framework for Control of Brokering in Military and Dual-use Items*".[6]

The present report specifically scrutinises the Belgian regime for the control of brokering. Creating such a regime is fraught with many challenges and constitutes an interesting but very complex subject at the same time. It entails both the control of domestic arms trade conducted for the purpose of assuring (internal) public order and the licensing policy pertaining to the IE&T of military materials and dual-use goods in the context of foreign security policy. This interconnectivity requires intensive cooperation among the various services of several ministerial departments, spread over a number of administrative strata.

A thorough analysis needs to take into account all these factors. In addressing this complex issue, this report first describes and analyses the current Belgian regime for the control of brokering and then presents conclusions and recommendations in the final chapter.

6 K. VAN HEUVERSWYN, *The International Framework for Control of Brokering in Military and Dual-use Items*, Flemish Peace Institute, 2010.

The objective and methodology

1 Objective

The **objective o**f this study is to analyse the Belgian regime for the control of brokering in military materials and dual-use items by addressing two important questions:

- To what degree are Belgian regulations compliant or in agreement with the country's international and EU obligations?
- How effective is the Belgian control regime? Is Belgium successful in organizing comprehensive control of brokering?

The *scope* of the study encompasses both military and dual-use items.

- Control of brokering entails the control of transactions that fall under the term brokering and/or the control of the persons and organisations that negotiate or arrange brokering transactions.
- The following aspects are part of the control regime in Belgium:
  - the legal framework that prescribes obligations with respect to brokers and/or the transactions of brokering (registrations, licences, etc.);
  - the criminal sanctions imposed in cases of non-compliance with these obligations;
  - the organisation of competences;
  - and the operational organisation of control, includingimplementation of the legal provisions, on the one hand, and supplementary administrative practices, on the other.
- 'Military materials' are conventional weapons, which includes SALW; dual-use items are goods that may have both civil and military applications.

Five **specific aspects** require special attention in the context of the present study:

1 **The international context:** As is the case in many other areas, Belgium is not entirely at liberty to organize the control of brokering as it pleases. International and EU legal prescriptions and moral obligations determine its policy, so any study evaluating Belgian policy needs to take account of the international and European framework[7] and test the Belgian organisation for *compliance* with those prescriptions.

2 **The Belgian internal allocation of competences:** An overview of the relevant legislation requires that all the competent authorities have adequate knowledge of and full insight into Belgium's internal allocation of competences. This is an especially complex requirement because it operates on two administrative levels, since 2003 also including the trade in arms and dual-use goods. With respect to the evaluation of the current Belgian regulation, it is important to define which authorities are competent at which administrative competence levels and how the internal coherence of Belgian regulations is ensured.

7 For an exhaustive overview of the international initiatives regarding the control of brokering, see K. VAN HEUVERSWYN, *op. cit.*

3 **Additional administrative practices:** Aside from the legal context, which is determined by the internal allocation of competences, administrative practices play an important role. In this manner, normative (supranational) obligations can be validly satisfied without recourse to a formal legal framework.
4 **The distinction between military and dual-use items:** These types of goods are generally treated as separate items in the regulation, and only exceptionally as a joint policy theme. The study of all the relevant provisions implies listing and examiningthe specific provisions concerning brokering in military materials and those pertaining to brokering in dual-use materials.[8]
5 **Brokering as a specific category of the arms trade:** Brokering is a specific category of the arms trade, sometimes considered an offshoot of IE&T and sometimes treated as a separate category. Legally, brokering distinguishes itself in two areas of the arms trade, specifically IE&T; first, because the transactions, either including or excluding the trader(s) involved, fall outside the jurisdiction of the controlling authority, and, second, because brokering entails activities other than IE&T. As a result, a different approach is needed from the one that is common for 'traditional' arms trade through IE&T, e.g., one that is strictly delineated territorially and the activities of which are precisely defined. Special attention needs to be given to mechanisms that enable the control of specific activities and the typical cross-border aspects of brokering.

2 Presentation of the research findings

The present study contains a description (Chapter 1) and an analysis (Chapter 2) of the Belgian regime for the control of brokering. The description distinguishes between the legal framework *(de lege)* and administrative practice *(de facto)*. The analysis tests the Belgian regime for *compliance* and effectiveness.

Concerning compliance, Belgian legislation and practice are tested against the country's supranational obligations. We examine whether Belgian regulations are satisfactory on the basis of the following four criteria: (1) the prescribed measures, (2) to whom (which persons) and (3) to what (which activities) they apply, and (4) the types of materials for which they are valid.

With respect to effectiveness, we examined whether Belgium (aside from its supranational obligations) has introduced a conclusive regulation with regard to the control of brokering, with a focus on three aspects. First, we looked at how the competences concerning arms trade in Belgium are organized and where brokering fits into the picture. Second, we tested to find the degree to which Belgian control of brokering has so far been effective, that is, whether in practice it meets the objectives of the legislators, whether it ensures compliance with the legal prescriptions, and whether Belgium has taken sufficient account of the specific characteristics of brokering. Finally, we investigated whether the Belgian

8 There are no legal instruments to regulate the control of both military *and* dual-use goods.

regime is internally coherent, that is, whether there is adequate harmonisation and complementarity between the relevant legal statutes.

Chapter 3 presents an overview of the identified strengths and weaknesses in the Belgian control regime and offers recommendations for an effective and *compliant* legal framework. The recommendations take into account Belgium's supranational obligations, good practices, recommendations of experts in the field, and the specific characteristics of brokering as well as the findings of the present analysis.

3 Methodology

This study is based on a review of the literature on the subject, discussions with experts in the field, especially NGOs, and interviews with the competent Belgian administrations. We wish to thank the experts and officials who were kind enough to collaborate with us. The literature we consulted is listed in the bibliography.

Concerning our inquiries with the competent officials, we proceeded, in analogy with the Delphi method,[9] in three phases: a telephone inquiry, interviews based on a questionnaire, and a follow-up review of the processed responses with possible feedback.

9 For an explanation of the Delphi method as a survey technique for experts, see J. ELLIOTT, S. HEESTERBEEK, C.J. LUKENSMEYER, N. SLOCUM, *Participatieve methoden, Een gids voor gebruikers – Participative methods, a User's Guide*, Dutch edition with the Flemish Institute for Scientific and Technological Aspects Research, January 2006, p. 113 *et seq.*

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Description of the Belgian regime for the control of arms brokering

This description of the Belgian regime for the control of brokering in the arms trade presents both an explanation of the legal framework and a discussion of the supplementary administrative practices. We describe the competent authorities (section 1.1), the prescriptions in the current regulation with respect to measures and procedures (regime *de lege*, 1.2), and how those prescriptions are being implemented in practice (regime *de facto*, 1.3).

1.1 Allocation of the relevant competences

The competences concerning the trade in military materials and dual-use goods, including brokering in this trade, have in Belgium been allocated to several different authorities. Until August 2003, the competence for trade in military materials, nuclear materials, and dual-use goods was exclusively a federal jurisdiction.

The Special Act of 12 August 2003 regionalized "*the import, export, and transit of weapons, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology, as well as* dual-use *technology and equipment*".[10] Since then, the three Belgian Regions have been assigned responsibility for processing licensing applications for the IE&T of military materials and dual-use goods to, from, and on their territories. They have the competence to adopt their own legislation in that area. Until the present day, not a single regional legislator has actually used this competence. In the expectation of the moment when this will happen, the federal legislation (which pertains only to military materials) remains in force.[11]

10 Article 2 of the Special Law of 12 August 2003 amending the Special Law of 8 August 1980 on institutional reform – see *Belgian Official Journal* (hereafter *BOJ*) of 20 August 2003 – assigns the following competences to the Regions (author's translation):
"Article 6, §1, VI, first subparagraph, 4°, of the Special Law of 8 August 1980 on institutional reform, repealed by the Special Law of 16 July 1993, is recovered in the following extract:
4° The import, export, and transit of weapons, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology, as well as dual-use technology and equipment, without prejudice to the federal competence regarding import and export related to the armed forces and the police and in implementation of the criteria established in the Code of Conduct of the European Union in the section pertaining to the export of arms".

11 Art. 94, §1 of the Special Law of 8 August 1980 on institutional reform, *BOJ*, 15 August 1980.

All other competences have been retained under federal jurisdiction: among them are the import and export of materials for the armed forces and the police, the internal arms trade, the possession and production of arms, the recognition and accreditation of diverse categories of arms traders, and the trade in nuclear goods.

The following are some of the competent federal administrations (FPS or Federal Public Service) and their areas of competence:

- The FPS–Justice, which among other things concerns itself with issuing licences to arms traders and brokers;
- The FPS–Interior, which is responsible for issuing licences for the stocking of firearms (and licences for arms possession);
- The FPS–Economy, with responsibility for the preliminary authorisation of the export of nuclear materials;
- The FPS–Foreign Affairs (within its general competence for foreign and security policy), responsible for the analysis of countries with respect to international security and respect for human rights, international information exchange about arms trade, etc.[12]

In addition to the federal and regional authorities, the provincial governors also play a role, by virtue of their deconcentrated competence, as agents of the federal government,[13] *in casu* on instruction from FPS-Justice.

1.2 The legal framework

The legal framework, including that for brokering, differs depending on whether transactions pertain to arms and military materials or to dual-use items. Both categories of goods are treated separately, on the basis of specific legislation. We also treat these regimes in the same distinct way.

12 For an assessment of applications for import, export, and transit licences, the Regions may have access to information from Foreign Affairs (country analyses, human rights situation), based on Common Position 2008/944/CFSP. The operative provisions have been laid down in the Cooperation Agreement of 17 July 2007 between the Federal State, the Flemish Region, the Walloon Region, and the Brussels Capital Region on the import, export, and transit of arms, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology, as well as dual-use technology and equipment. See *BOJ*, 20 December 2007.

13 Memorandum of explanation with the bill of 7 February 2006 bearing on regulating economic and individual activities involving arms, *Parl. Doc Represent.*, 2005-2006, no. 2263/1, p. 25 (hereafter Explanatory Memorandum to the Weapons Act).

Until recently, there existed a legal framework only for the control of brokering in *"arms, ammunition, and materials specifically intended for military use or for law enforcement purposes"*, hereafter referred to as 'military materials'. Since 27 August 2009, Belgium has begun to work with a regime for the control of brokering in dual-use items, as imposed by a European Regulation, the provisions of which are directly applicable to and within Belgium (and the other EC member states).

In the next sections we describe the existing control of brokering in military materials in Belgium, as well as the regime for the control of brokering in dual-use items.

1.2.1 The legal framework for control of trade in military materials

Belgium's legal basis for the control of arms trade, including brokering, is regulated primarily[14] by the Law of 5 August 1991 and the implementation decision of 8 March 1993.[15] The Law of 1991 removed military materials from the general IE&T Law of 1962.[16][17]

The Law of 1991 introduces a licensing requirement for the IE&T of military materials and describes the assessment criteria against which licence applications must be tested.[18] The Royal Decree (RD) of 1993 establishes the technical and procedural terms.

14 A number of aspects are also regulated in the general Weapons Act of 2006, which is also discussed further in the description of the legal framework.

15 Law of 5 August 1991 on the import, export, and transit of and against the illegal trade in arms, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology, *BOJ*, 10 September 1991; Royal Decree of 8 March 1993 regulating the import, export, and transit of arms, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology, *BOJ* of 6 April 1993.

16 Law of 11 September 1962 on the import, export, and transit of goods and associated technology, *BOJ* 27 October 1962 (IE&T Law).

17 Art. 1, 2nd paragraph of the Law of 5 August 1991; for an explanation with the context see S. TAVERNIER, H. VERVENNE and C. WILLE, 'Wapenhandel en wapenbezit' – Arms Trade and Arms Possession, in G. VERMEULEN (ed.), with the cooperation of F. DHONT, *Aspecten van Europees materieel strafrecht – Aspects of European material criminal law*, Antwerp-Apeldoorn, Maklu, 2002, p. 145.

18 Art. 3 and following Law of 5 August 1991.

As long as there is no regional legislation, this federal legislation shall serve as the basis of the Regions' policies in this area.[19]

1.2.2 The legal framework for control of the illegal arms trade, including brokering

On 7 July 2003, the *Belgian Official Journal* published two laws in amendment of the Law of 1991. In the Law of 25 March 2003, Title III was added to the Law of 1991 (author's translation): "*Combating the illegal trade in arms, ammunition, and materials specifically intended for military use and associated technology*".[20] The name of the law was correspondingly adapted by the additional phrase "*and the combating of the illegal trade in*".[21] Among other changes, the Law of 26 March 2003 expanded the scope of application "*for military use*" to "*for military use or law enforcement*".[22] An existing practice was legally embedded with these adaptations[23] (further on in the text, 'military materials' refers to both categories of

19 A Flemish decree is being drafted. See VLAAMSE REGERING, Regeerakkoord 2009, Een daadkrachtig Vlaanderen in beslissende tijden. Voor een vernieuwende, duurzame en warme samenleving - FLEMISH GOVERNMENT, Coalition Agreement 2009, A decisive Flanders for decisive times. Towards an innovative, sustainable, and welcoming society, 15 July 2009, p. 85; the previous coalition agreement of 2004 already intended to draft a specific Flemish decree: VLAAMSE REGERING, Regeerakkoord 2004-2009, Vertrouwen geven, verantwoordelijkheid nemen - FLEMISH GOVERNMENT, Coalition Agreement 2004-2009, Inspiring confidence, assuming responsibility, July 2004, p. 77; see also VLAAMSE REGERING, *Vijfde jaarlijks verslag en elfde halfjaarlijks verslag aan het Vlaams Parlement over de verstrekte en geweigerde vergunningen voor wapens, munitie en speciaal voor militair gebruik dienstig materieel en daaraan verbonden technologie* - FLEMISH GOVERNMENT, Fifth annual report and eleventh semi-annual report to the Flemish Parliament about the granted and denied licences for arms, ammunition, and materials especially designed for military use and associated technology, period 1 January 2008 to 31 December 2008, p. 4, available at http://iv.vlaanderen.be/nlapps/data/docattachments/20090312_Jaarverslag_2008.pdf.

20 Art. 15 of the Law of 25 March 2003 amending the Law of 5 August 1991 on the import, export, and transit of arms, ammunition, and materials was specifically intended to apply to military use and associated technology. *BOJ*, 7 July 2003 (p. 36095 *et seq.*).

21 Art. 2 of the Law of 25 March 2003.

22 Art. 4 of the Law of 26 March 2003 amending the Law of 5 August 1991 on the import, export, and transit of arms, ammunition, and materials specifically intended for military use and the associated technology, *BOJ*, 7 July 2003 (p. 36106 *et seq.*). To conform to the law, the implementation decision of 8 March 1993 was amended by the RD of 2 April 2003 by the expansion of the scope of application (1) in art. 1 to include arms used in law enforcement and (2) by the addition to the list in attachment of a category of arms designed for law enforcement purposes, the RD of 2 April 2003 in amendment of the RD of 8 March 1993 towards regulating the import, export, and transit of arms, ammunition, and materials especially designed for military use and associated technology, *BOJ*, 7 July 2003 (p. 36108 *et seq.*).

23 Bill of 16 October 2002 regarding the amendment of the Law of 5 August 1991 on the import, export, and transit of and against the illegal trade in arms, ammunition, and materials specifically intended for military use and associated technology, *Parl. Doc. Represent.*, 2002-2003, no. 2083/1, p. 3.

arms, e.g., those 'for military use' and those for 'law enforcement', including ammunition and associated technology).

It is important to note that these amendments were adopted a few months before the transfer of the IE&T competences from the federal level to the Regions (in March and August 2003). The competence for combating illegal trade, however, was not transferred but remained under federal authority. The provisions with respect to the combating of illegal trade introduced a new type of licence – the preliminary licence – for various categories of individuals actively trading in military materials or facilitating such trade (brokering).

1.2.2.1 Licensing requirement for brokers pursuant to the Law of 1991 (military materials)

Measures

Since Title III was introduced in the Law of 1991, military materials may no longer be transacted, traded, exported, or delivered to foreign countries, or be stocked for that purpose, without a valid licence to that effect. This regulation also applies to anyone acting as a broker in such transactions.

The licensing requirement is also imposed upon Belgian nationals and on foreigners who are based in Belgium or conduct their activities there. It is of no consequence whether the transaction is conducted for free or for a fee, what the goods' origins or destinations are, or whether they are physically present on Belgian territory (art. 10, para. 1).

The applicants can apply for a licence of indefinite duration or for only a specific operation (art. 10, para. 1).

Definitions

The law describes a broker as follows (art. 10, para. 2, author's translation):

> "any person who, either against payment, or not, creates the conditions leading to the conclusion of an agreement for the purpose of transacting, trading, exporting, or delivering to a foreign country, or for that purpose holds in his possession, arms, ammunition, or especially designed materials for military use and associated technology, irrespective of the origins and the destinations of the goods and irrespective of their possible presence on the Belgian territory"

Also considered to be a broker is (author's translation):

> "any person who concludes such an agreement when the transport of the goods is carried out by a third party"

In this description, the activities of brokers are clearly distinguished from those of arms traders and transporters: brokers are not themselves the direct principals of the trade, the export, the delivery, or the transport of arms; rather, they create favourable conditions for the conclusion of an agreement, or they conclude an agreement while leaving the material handling or the execution thereof in the care of a third party.[24]

Conditions[25]

The Belgian Minister of Justice issues the licences under the conditions as determined by law. A licence can be granted only to arms traders who have been accredited under the law and who:

- at the time of the application fully satisfy all legal conditions to be accredited as arms traders (art. 10, para. 3, 1°). This accreditation is based on the so-called Weapons Act[26] (see *section* 1.2.2.2);
- satisfy the moral conditions required with respect to the activities in question and who have not been guilty of any acts that constitute a grave violation of professional deontological principles, and whereby confidence in the applicant is bound to be compromised; in the process it is of no consequence whether the applicant has been convicted in this regard (art. 10, para. 3. 2).

In addition, it shall be incumbent on the applicant to pay a guarantee (art. 10, para. 3), the modalities of which are described in the RD of May 2003.[27] The amount of the guarantee depends on whether the licence is for indefinite duration (€10,000) or for a specific transaction only (% of the value, but a minimum of €1,000). The amount of the guarantee serves to ensure the correct execution of the operation in question and compliance with the legal provisions that apply.

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24 For the discussion on the formulation of the description of a broker, see e.g. Report on behalf of the Committee on Foreign Relations dated 7 February 2001 in the bill amending the Law of 5 August 1991, *Parl. Doc.* Represent. 2000-2001, no. 431/7, p. 4.

25 The conditions entered into the Law of 1991, as amended in 2003, are not unequivocal. This descriptive section does not discuss the various possibilities of interpretation and the practical problems that might or could result on application of the procedures, but see section 2.3.3.

26 Law of 8 June 2006 bearing on the regulation of economic and individual activities involving arms, *BOJ* 9 June 2006

27 Royal Decree of 16 May 2003 concerning the licence referred to in article 10 of the Law of 5 August 1991 on the import, export, and transit of and against the illegal trade in arms, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology, *BOJ* 7 July 2003.

Reimbursement of the guarantee shall be made following conclusion of the licensed operation and after the duly completed end-user certificate has been delivered (in case of a licence for a specific transaction) or on voluntary withdrawal of a licence of indefinite duration.

The Minister of Justice shall be entitled to limit, suspend, or revoke the licence by reasoned decision and to order seizure of the guarantee in the event the individual involved (art. 10, para. 4):

- no longer satisfies the required licensing conditions;
- fails to abide by the applicable regulation in force;
- has left the issued licence dormant for more than one year;
- is found to be conducting other activities that, in combination with the licensed activities, threaten to undermine public order;
- has been issued the licence on the basis of the provision of incorrect information.

The relevant and applicable modalities to this effect are described in detail in article 6 of the RD of 16 May 2003 (see the description of the procedure in section 1.2.2.3 b).

The Belgian regime for the control of illegal brokering is thus based on control of the brokers themselves, not the individual transactions they are engaged in, even in the case of an application for one specific transaction.

Finally, there is a separate provision prohibiting traders and brokers from transacting, executing, or delivering the goods in question if such activities constitute a violation of an embargo that Belgium, or an international organisation of which Belgium is a member, has imposed (art. 11).

Control of financial transactions

The Law of 25 March 2003 also extended the control of financial transactions of the arms trade to include the activities of brokers. Credit and insurance institutions may grant credit or insurance coverage only to a licensed trader or broker.[28] On the request of competent authorities, all information must be provided and inspection must be allowed of documents, correspondence, and other records, on the basis of which compliance with the Law of 1991 can be ascertained. This provision also pertains to importers, exporters, executors of transit shipments and their personnel, traders and brokers, credit and insurance institutions and their personnel, as well as all other individuals who, either directly or indirectly, are involved in transacting, trading, exporting, and delivering military materials or in brokering activities.[29]

28 Art. 14 of the Law of 5 August 1991, as amended by art. 10 of the Law of 25 March 2003.

29 Art. 15 of the Law of 5 August 1991, as amended by art. 11 of the Law of 25 March 2003.

Scope of application – types of weapons

The provisions of Title III are only valid for military materials, not for dual-use *items* (see section 1.2.3). The goods that are part of military materials are determined by Royal Decree,[30] namely, in the attachment to the RD of 8 March 1993.[31] The most recent revision of the list dates back to 2003. The RD of 2 April 2003[32] extended the range of military materials with weapons used for law enforcement purposes and adaptations by analogy with the European Common List of 13 June 2000.[33] The then existing list was at that time replaced by a revised one.

The Belgian legislation makes a distinction between military materials:
- of which the IE&T are prohibited: the 1st category of the Annex (art. 3, para. 1)[34];
- of which the export and transit are allowed under the condition of a licensing requirement: the 2nd category, section 1 of the Annex (art. 3, para. 2)[35];
- of which the import is allowed under the condition of a licensing requirement: the 2nd category, section 2 of the Annex (art. 3, para. 2).

The goods banned under the 1st category comprise, among others, chemical and biological weapons, environmental modification techniques, and weapons and ammunition that are prohibited in pursuance of the Weapons Act (see also section 1.2.2.2). Such materials may not be traded; in other words, no accreditation or licence as trader or broker may be issued for them.

The goods that are not included in the 2nd category, and for which an import or export licence is required, are those for which the traders and brokers also need a preliminary licence issued by the Minister of Justice (cf. art. 10).

Sanctions

The law imposes criminal sanctions on violations and attempts at violations of articles 10 and 11 and the corresponding operative provisions of the RD of 16 May 2003 (art. 12): imprisonment from 1 month to 5 years and/or a fine of €10,000–1 million. The court may further impose a temporary prohibition on any further such transactions, even for a third party. The Minister of Justice is to be apprised of the verdict or the decision that imposes the sanctions.

30 Art. 1, b of the Law of 5 August 1991.

31 Royal Decree of 8 March 1993 regulating the import, export, and transit of arms, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology, *BOJ*, 6 April 1993.

32 See footnote 22.

33 See: Report to the King on the Royal Decree of 2 April 2003, *BOJ*, 7 July 2003, p. 36109.

34 See also art. 2 of the Law of 5 August 1991.

The general provisions with respect to offences and their punishment in Book I of the Criminal Code also apply to violations against this Title.[35] The same sanctions also apply for non-compliance with the provisions pertaining to the control of financial transactions connected with arms trade and brokering, including attempts to that effect.[36]

Extraterritoriality

Finally, the law provides in the competence of the Belgian courts the pronouncement of judgement on offences committed abroad when the suspected party is apprehended on Belgian soil. In this process, no complaint or official communication needs to have been lodged with the Belgian authorities. Furthermore, the competence of the Belgian courts remains in force irrespective of whether the act in question is punishable in the country where it was committed (art. 13).

With this provision, as well as its description of a broker, Belgium exercises extraterritorial jurisdiction in a twofold sense. By instituting as the basis for the prosecution of illegal arms trade (art. 13), *and* as condition for legal brokering (the licence in art. 10), a personal rather than a territorial criterion, the activities conducted outside Belgian territory are also regulated and, where necessary, made subject to criminal sanctions.

Evaluation criteria

The Law of 26 March 2003 provided *inter alia* for the replacement of the original article 4 (of the Law of 1991) whereby the number of assessment criteria for licensing applications for export and transit was considerably extended.[37] Given that the Law of 25 March 2003 introduced a licensing regime for (brokers) *persons*, not for their *activities*, and given the wording of the new article 4, these assessment criteria are applicable only to export and transit, not to other activities of arms trade, such as brokering.

Regarding brokering transactions, for the time being only article 11 is in effect, which pertains to embargoes (with reservation for the considerations in the analysis, see section 2.3.2.2).

The same is true for the provisions introduced by the Law of 26 March with respect to the exchange of information on denied licences (new art. 4bis) and to the information that the

35 The provisions in Book I concern the general provisions with respect to offences and their sanctioning.

36 The sanctions in art. 12 for the transacting, the exporting, the delivering, and the activities of brokering; those in art. 8 for IE&T.

37 The original criteria pertained only to Belgium's external interests, the international objectives that Belgium pursues, respect for human rights, and a number of aspects related to the situation in the recipient country (originally art. 4). The expansion in the new article 4 concerns criteria relating to Belgium's international obligations, including compliance with arms embargoes, national security in EU member states, friendly nations and allies, the threat of terrorism and international organized crime, and the risk of diversion of goods.

government is required to submit to the federal Parliament (replacement of current art. 17).[38] These information-exchange obligations and the requirement to report to Parliament thus do not apply to matters concerning brokering, since the authorities in this instance do not assess a specific transaction but rather the person who facilitates the execution of the transaction.

1.2.2.2 Preliminary accreditation of brokers pursuant to the Weapons Act of 2006 (arms)

In the context both of the regulation on the IE&T of strategically important goods as a function of foreign policy (Law of 1991) and of the regulation on domestic arms trade and the possession of arms (Weapons Act 2006), the question of brokers arises. The accreditation modalities for brokers in both areas are regulated in the Weapons Act of 2006.[39] Indeed, in order to be granted a broker's licence from the FPS–Justice on the basis of the Law of 1991, the applicant must in advance have *"met all legal conditions in order to be accredited as arms trader"*(art. 10).[40] The conditions and the procedure for such an accreditation were established in the Weapons Act of 2006, described below. The relation between both these procedures (on the basis of the Law of 1991 and the Weapons Act) is discussed in greater detail with the analysis of the internal coherence of Belgian regulations (section 2.3.3).

Definitions

The Weapons Act describes a broker as follows (art. 2, 2°, author's translation):

> "any person who, either against payment, or not, creates the conditions leading to the conclusion of an agreement with the object of manufacturing, repairing, modifying, offering, acquiring, transferring firearms, or any other method of making firearms available, plus parts and components or ammunition thereof, irrespective of their origins or destinations and irrespective of the possible presence of the goods on the Belgian territory, or who concludes such an agreement when the transport is executed by a third party"

38 Articles 3 and 5 of the Law of 26 March 2003, respectively.

39 Law of 8 June 2006 bearing on the regulation of economic and individual activities involving arms, *BOJ*, 9 June 2006.

40 The conditions in the Law of 1991, as amended in 2003, are not unequivocal. See also section 2.3.3.

The definition of a broker in the Weapons Act is thus broader than that in the Law of 1991 on the IE&T and the illegal trade in arms. The activities specified in the Weapons Act include the manufacturing, repair, modification, offering, acquisition, transfer or any other method of making firearms available, plus parts and components or ammunition thereof.[41] For all these activities, an accreditation as broker is required by the governor.

The Law of 1991 deals with three types of activity: the organizing, export, and delivery of military materials (or possession of such materials for that purpose). For the conduct of these activities, the issuance of a licence by the FPS-Justice is additionally required. The various descriptions of a broker reflect the varied jurisdiction of these two laws: control of the possession of, bearing of, and the domestic trade in arms (Weapons Act),[42] ***versus*** control of the foreign trade in military materials (Law of 1991). It was, in effect, the explicit intent of the legislator that not all persons who are required to be accredited according to the Weapons Act should also have to apply for a licence with the FPS–Justice.[43]

Scope of application

The Weapons Act's scope of application – important for the interpretation of the kinds of (brokers) persons and types of (brokering) for which an accreditation is required – also differs from that in the Law of 1991. The Weapons Act is, indeed, mainly oriented towards 'firearms'[44] (see also the definition of arms trader and broker), while the Law of 1991 applies to 'military materials'.

The Weapons Act distinguishes between prohibited weapons, freely accessible weapons, and weapons requiring a licence (art. 3 §1, §2 and §3).

41 The summary of the bill explicitly mentions the transport as a brokering activity; see Explanatory Memorandum to the Weapons Act, *op. cit.*, p. 3.

42 See Explanatory Memorandum to the Weapons Act, *op. cit.*, p. 7 *et seq.*

43 Supplementary report of 7 May 2002 on behalf of the Committee on Foreign Relations and national defence, to the bill amending the Law of 5 August 1991, *Parl. Doc.* Senate, no. 851/7, pp. 3-4. *"Nonetheless, the bill, in all probability entirely involuntarily, has consequences for the possession of arms, as, indeed, the proposed article 15 states that no one shall be allowed to have arms in his possession, or transact, export, or deliver arms to or in a foreign country without a preliminary licence to that effect from the Minister of Justice. This licence can only be issued to legally accredited arms traders. In other words, only arms traders shall be permitted possession of arms. Such is most likely not the intention of the legislator. Rather, his intention is probably that no one shall be allowed to transact, export, or deliver arms to or in a foreign country, or to have arms stockpiled for the purpose of dealing in them, or for their export to or delivery in a foreign country without having received to that end a prior licence from the Minister of Justice. Amendment no 16 by Mr. Colla tries to express this intention in clearer terms."*

44 *But also other 'weapons', as evidenced from the list of prohibited weapons (art. 3 §1), where, among other items, throwing knives and star knives are mentioned.*

On the list of prohibited weapons in article 3 §1, article 27 §3 exempts two categories of arms that may be manufactured, repaired, sold, imported, stockpiled, and transported by accredited arms manufacturers, holders of a licence for those weapons, with the exclusion of the brokers. The exception to the prohibition therefore does not apply to brokers.
It pertains to (author's translation):

> Article 3, §1, 3°: Weapons designed for exclusive military use, such as automatic weapons, launchers, artillery pieces, rockets, weapons employing forms of radiating energy other than those meant under point 1° (anti-personnel mines and similar items), ammunition specifically designed for such weapons, bombs, torpedoes and grenades; (…)
> Article 3, §1, 15°: Firearms equipped with the following parts and accessories, as well as the following parts and accessories separately:
> Silencers;
> Magazine loaders of greater capacity than normal as determined by the Minister of Justice for a given model of firearm;
> Guidance equipment for firearms directing a particle beam on the target or infra-red night-vision devices
> Mechanisms for transforming a standard firearm into an automatic weapon;

The weapons requiring a licence includes all firearms that are not prohibited weapons and not freely available. By RD, other weapons (other than firearms) may be added to the list.[45]

The accreditations are issued for an indefinite duration, unless the application was submitted for only a limited time or the governor has imposed a limited duration by reasoned decision, on the grounds of safeguarding public order (art. 32, para. 1).

Every five years, the governor takes the initiative to ascertain that all holders of accreditations and licences are in compliance with the law and continue to meet the conditions necessary for accreditation.

Conditions for the admissibility of applications for accreditation

Not every application for accreditation as arms trader or broker is admissible. A number of categories of persons are not eligible to receive this accreditation (art. 5, §4 Weapons Act):

- persons with a criminal conviction or who are interned under regulations bearing on or for reasons of their abnormal habits, habitual criminality, or sexual delinquency;

45 Art. 3, §3 of the Weapons Act: "§3. Weapons requiring a licence are considered to include: 1° all other firearms; 2° other weapons that (following advice from the Advisory Council as meant in article 37) are included in this category by the King's decision."

- persons convicted as perpetrators of, or accomplices in, crimes as defined in the Weapons Act of 1933 and its implementing decisions, for reason of being guilty of certain categories of crime on the grounds of:
  - the Criminal Code;
  - the Military Criminal Code;
  - the Disciplinary and Penal Code of Navigation and Salt Water Fisheries;
  - the Law banning private militias (1934);
  - the regulation with respect to explosive and deflagration-sensitive substances and mixtures and devices loaded therewith (1956);
  - the IE&T Law of 1962;
  - the Law on private and special security (1990);
  - the Law on private detectives (1991);
  - the Law of 5 August 1991 on the IE&T of military materials and the combating of the illegal arms trade;
  - the regulation on hunting and recreational shooting;
- legal entities that have been convicted for the listed offences (the entities themselves or their directors);
- persons who are interned abroad or have been convicted as perpetrators of, or accomplices in, the listed crimes;
- minors and persons of extended minority status;
- nationals of states that are not members of the EU and persons whose principal residence is not in an EU member state.

The governor's accreditation may be limited to certain types of weapon and ammunition (art. 7, §1).

The governor may also suspend the accreditation for a period of 1–6 months, or it may be revoked, limited to only certain activities or to certain weapon or ammunition types, or restricted to a given duration, if the holder of the accreditation (art. 7, §2):

- belongs to the class of people whose application is deemed inadmissible (see *above*);
- fails to abide by the Weapons Act and its implementing decisions ;
- has received accreditation on the basis of incorrect information;
- has, for a period of one year, failed to conduct the activities to which the accreditation refers;
- has been conducting activities that, in combination with the accredited activities, might or could disrupt the public order.

The modalities for the above cases are established by RD.[46]

46 Art. 3 of the RD of 20 September 1991 implementing the Weapons Act, *BOJ* 21 September 1991, as amended by art. 5 of the RD of 16 October 2008 in amendment of diverse implementing decisions in the Weapons Act, *BOJ* 20 October 2008

None of the other provisions in the Weapons Act applies to foreign trade, including the brokering in military materials. Article 27, §1 explicitly excludes them from the scope of application of the Weapons Act. Only the provisions with respect to the accreditation of traders and brokers apply to military materials, as the Law of 5 August 1991 itself refers to them in Article 10. Through this reference, the accreditation procedure for brokers who are active in an intra-Belgian context is normative for the brokers who are working in an international context. The article states (author's translation):

> Article 27. §1. The provisions of this Law are not of application to the orders of weapons or of ammunition by the State or by public administrations and museums operating under administrative law, to the import, export, and transit of arms, ammunition, and to materials specifically intended for military use or for law enforcement purposes and associated dual-use technology.

Control of compliance

In the competence of the police, article 29 of the Weapons Act allows them to investigate and detect breaches against the regulation. To that end, the police may (1) at any and all times effect entry to all locations where the accredited persons conduct their activities, and (2) demand the submission of all documents, books, registers, accounting records, and objects that are present on the location or pertain to their activities. Given that the competence pertains to the control of "accredited persons", this applies to accredited traders *as well as* accredited brokers, which, in fact, was the legislators' intent.[47]

Sanctions

Article 23 of the Weapons Act provides for criminal sanctions in case of non-compliance with the prescriptions of the law and its implementing decisions. Violations may be punishable by a term of imprisonment from one month to five years and/or a fine of €100–25,000. As is the case for the Law of 1991, the general provisions in Book I of the Criminal Code are also valid.

47 Explanatory Memorandum to the Weapons Act, *op. cit.*, p. 16

1.2.2.3 Legal regulations relating to the accreditation and licensing procedure

a) The accreditation procedure for brokers, based on the Weapons Act

Acquiring accreditation as broker involves the following:
No one may on Belgian territory conduct activities as an arms trader or a broker in the context of the Weapons Act, or make himself known in that capacity without having obtained prior accreditation to that effect from the competent governor, e.g., the governor at the location of establishment (art. 5, §1).

If the applicant has already been accredited in another EU member state as an arms trader, the governor shall in his assessment of the application for accreditation in Belgium take due account of the guarantees that have been offered in the other EU member state.

It shall be incumbent on the applicant to demonstrate the following (art. 5, §2):
- proof of professional competency to exercise the activity applied for: this entails knowledge of the regulation that requires compliance, the professional deontological principles, and the techniques pertaining to and the use of weapons;
- the origin of the financial resources employed in the exercise of his activities (e.g., by means of bank documents or financial agreements[48]).

The competent governor shall inform the Public Prosecutor's Office of evidence of violations of the above requirements (art. 5, §2, para 2).

The governor shall render his decision within 4 months of receipt of the application (art. 31, 1°) and after receipt of the reasoned advice from (art. 5, §3):
- the Public Prosecutor's Office;
- the mayor with jurisdiction in the applicant's place of establishment or residence location (in case the residence location differs from the establishment location, the advice from the mayors of the two places will be requested).

The accreditation may be denied only for reasons that pertain to the maintenance of public order. In case of denial, the governor shall submit the reasons and justification for the decision (art. 5, §3, 2nd para.).
Article 30 provides for the possibility of appeal to the Minister of Justice against the governor's decision.
Article 50 of the Weapons Act determines the application fees.

48 In accordance with the implementing provisions specified in art. 2 of the Royal Decree of 20 September 1991, as amended by art. 4, 2° of the Royal Decree of 16 October 2008.

Proof of professional competency

In order to establish proof of professional competency, the Federal Arms Department, together with the Ministry of Justice, is charged with the organisation of an examination of the subject. The Federal Arms Department is a new office in the Ministry of Justice, created in accordance with Article 36 of the Weapons Act.

The RD of 16 October 2008 bearing on the status of arms traders[49] regulates the modalities of the examination with respect to the professional competency and the professional deontological principles, and describes the professional obligations and responsibilities of the arms traders.

In none of the provisions, however, is there mention of brokers.

b) The licensing procedure for brokers, on the basis of the Law of 1991

The RD of 16 May 2003[50] describes the procedure to be followed for the issuance of a licence for traders and brokers, according to Article 10 of the Law of 1991.

The licence is to be applied for via a registered letter addressed to the Minister of Justice (art. 1, para. 1). The applicant needs to indicate clearly if the application pertains to a licence of indefinite duration or to only one specific operation (art. 1, para. 2).

The applicant needs to add the following documentation to the application (art. 3, para. 3):
- a copy of the certificate of the accreditation in accordance with the Weapons Act, if he falls within that purview,
- a certificate of good conduct, issued no more than one month previously,[51]
- documents that enable identification of the applicant and his activities.

The Minister of Justice shall render the decision within 4 months of receipt of the application and of all required documentation (art. 2, para. 1).

Prior to rendering the decision, the Minister shall address a request for a reasoned advice to the following individuals or departments (art. 2, para. 2):
- the Public Prosecutor's Office of the district where the applicant is established;
- the governor who issued the possible previous accreditation as arms trader;
- the National Security Service;

49 *BOJ*, 20 October 2008.

50 RD of 16 May 2003 concerning the licence meant in article 10 of the Law of 5 August 1991, *BOJ*, 7 July 2003.

51 When it pertains to a legal entity, a certificate of good conduct shall be required from each of the directors, managers, or supervisory directors, and from each of the empowered competent mandataries appointed by the legal entity (art. 1, para. 4 of the RD of 16 May 2003).

- the Federal Police;
- the licensing department of the FPS–Economy (since 2003 this is not the department that is responsible in this matter; rather, the regionally competent departments (Arms Trade Monitoring Unit for Flanders) are currently involved in this procedure.

If the Minister decides to issue the licence, he requests the applicant to deposit the guarantee (see section 1.2.2.1) and pay the corresponding fee (art. 2, para. 3): €1000 for a licence of indefinite duration and €60 for a licence for one specific operation (art. 4).

The licence shall be completed in accordance with the sample model in the attachment to the RD of 16 May 2003 (art. 5, para. 1) and shall be sent to the party involved by registered letter, against receipt. The party involved needs to be able at all times to submit the document to the inspecting services and must mention the licence number on all correspondence with the authorities (art. 5, para. 3).

All departments offering advisories shall receive a copy of the issued licence (art. 5, para. 2).

When there are facts in evidence that could or might give cause for suspension, restriction, or revocation of the licence, the authorities offering advisories must immediately inform the Minister of Justice accordingly (art. 6, para. 2). When the Minister decides to proceed to any of the aforementioned measures, he shall inform the holder of the licence of his decision by registered letter, against receipt (art. 6, para. 1). The departments offering advisories shall in their turn be notified of the decision (art. 6, para. 2). As a result of the decision, it shall be incumbent on the holder to return the licence within eight days. The Minister may order the police to retrieve the licence from the individual (art. 6, para. 3).

1.2.3 The legal framework for control of the trade in dual-use goods

Dual-use items are goods that can be used in both civilian and military applications. Since 1994, they are subjects of an EU Regulation, the provisions of which are directly applicable to Belgium. Regulation (EC) No. 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology has been in effect since 2000, but as of 27 August 2009 a new Regulation 428/2009 setting up a Community regime for the control of exports, *transfer, brokering and transit* of dual-use items entered into force.

A significant number of the existing prescriptions concerning export (primarily Community export) have in the new Regulation been expanded to include brokering.

Trade in dual-use items has since the Special Law of 2003 was passed become subject to regional competence. Also in this instance, Flanders has not yet worked out its own regulation. Awaiting such a development, the relevant provisions in Belgium (aside from those in the EC Regulation) were incorporated in two laws.

Among the dual-use items under this law are both nuclear and non-nuclear goods.
The legal basis for the implementation of the Dual-use Regulations is the general IE&T Law of 1962 and its implementing decisions. Its licensing system applies to all dual-use items, both nuclear and all other goods.

The trade in (i.e. export of) nuclear materials is also subjected to a preliminary authorisation. This is regulated in the Law of 9 February 1981 bearing on the conditions for export of nuclear materials and nuclear equipment,[52] as well as technological data, and the RD of 12 May 1989 concerning the transfer to non-nuclear states of nuclear materials, nuclear equipment, technological nuclear data, and their derivatives.[53] This law was adopted "*with the view to the implementation of the international agreements regarding the non-proliferation of nuclear weapons*".[54]

Neither law contains provisions on brokering in dual-use goods. Moreover, the licences for brokers issued by the Minister of Justice on the basis of the Law of 1991 do not pertain to dual-use goods since the scope of application of the Law of 1991 is restricted to military materials. This means that, until recently, no form of control was exercised in Belgium on the brokering in dual-use items. As of 27 August 2009, however, this situation has changed because the new Regulation is directly applicable in Belgium. This Regulation is discussed in detail in the report "*The International Framework for Control of Brokering in Military and Dual-use Items*".[55]

The sections below summarise all the provisions with respect to brokering in dual-use items that have been in force in Belgium as of 27 August 2009.

52 *BOJ* of 10 March 1981.

53 *BOJ* of 15 June 1989.

54 Art. 1 of the Law of 9 February 1981.

55 K. VAN HEUVERSWYN, *The International Framework for Control of Brokering in Military and Dual-use Items*, op. cit.

Article 2, 5 of Regulation 428/2009 defines brokering services as follows:

> Brokering services:
>
> "the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country; or the selling or buying of dual-use items that are located in third countries for their transfer to another third country"

Article 2, 6 defines brokers as:

> Broker:
>
> "any natural or legal person or partnership resident or established in a Member State of the Community that carries out services defined under point 5 from the Community on the territory of a third country"

Scope of application

The description of "dual-use items" is the same as the definition in the previous Regulation,[56] and all dual-use items to which Regulation 428/2009 applies are listed in Annex 1.[57]

Licensing obligation

Regulation 428/2009 does not impose a systematic licensing obligation for brokering. A licence is required for brokering services if the broker has been informed by the competent authorities in the country where he is resident or where he is established that the goods may be destined for WMD (cf. art. 4, 1[58]). When the broker is aware of this, it shall be incumbent on him to notify the competent authorities accordingly so as to enable them to decide whether a licence is required.

56 Art. 2, of. Regulation 428/2009: "items, including software and technology, which can be used for both civil and military purposes, including all goods that can be used for both non-explosive uses and assist in any way in the manufacture or nuclear weapons or other nuclear explosive devices".

57 The list is based on the lists of the *Wassenaar Arrangement*, the *Missile Technology Control Regime*, the Nuclear Suppliers Group, the Australia Group, and the Chemical Weapons Convention. Any updating of these lists in turn requires the updating of the dual-use items list in Annex I so as to bring it in line with the most current changes (art. 15, 1.).

58 "(…) that the items in question are, or may be, intended, in their entirety or in part, for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological, or nuclear weapons or other nuclear explosive devices, or the development, production, maintenance or storage of missiles capable of delivering such weapons."

The member states themselves decide whether to extend this Regulation to goods that are not listed in Annex I, in the event the goods may be intended for WMD (cf. art. 4, 1[60]) for military items on national lists, destined for countries under embargo (art. 4, 2[59]) or exported in defiance of the national licensing procedure (art. 4, 3). Member states may also extend the licensing requirement to transactions where there is a suspicion that the products to be traded are destined for use in WMD (art. 4, 5, the so-called 'suspicion clause').

Extra-Community perspective

These provisions are valid only for brokering services with reference to third countries from a Community perspective: in other words, to the EC third countries, not to third countries from a national point of view of the member states, and when the broker is an EC national or is based on EC territory. The Regulation does not regulate intra-Community (between EC member states) brokering. Dual-use items that are transacted by an "EC broker" from the territory of another EC country to an EC third country hence are not regulated by this document. From a Community perspective, this in fact represents export.[60]

With respect to dual-use items, Regulation 428/2009, in contrast to the Common Position (CP) on arms brokering, does not provide in the possibility for the member states to extend the rules for extra-Community brokering to national laws on brokering.

Furthermore, the Regulation does not apply to services or technology transferred by the physical movement of persons from within to outside the EC area (art. 7).

Licensing modalities

Article 10 pertains to the authorisations for brokering services (art. 10, 1):

- such authorisations shall be granted by the competent authorities of the member state where the broker is resident or established;
- they shall be granted for a set quantity of specific items moving between two or more third countries;
- the location of the items in the originating third country, the end-user and the exact location where the latter resides must be clearly identified;
- the authorisations shall be valid throughout the Community.

59 "For the purposes of this paragraph, 'military end-use' shall mean: a) incorporation into military items listed on the military list of member states; b) use of production, test or analytical equipment and components therefor, for the development, production or maintenance of military items in the above-mentioned list; c) use of any unfinished products in a plant for the manufacturing of military items listed on the above-mentioned list."

60 See also M. QUENTIN, *The European Union Export Control Regime: Comment on the Legislation: article-by-article*, May 2009, p. 32, http://iv.vlaanderen.be/nlapps/data/docattachments/Quentin.pdf.

Brokers shall provide the competent authorities with all relevant information required for assessing the validity of the request for authorisation (art. 10, 2):

- details of the location of the dual-use items in the originating third country;
- a clear description of the items and the quantity involved;
- the identity of third parties involved in the transaction;
- the third country of destination;
- the end-user in that country and its exact location.

Requests for authorisations shall be processed within the period of time as determined by national law or practice (art. 10, 3).

Evaluation criteria

In deciding whether to grant authorisation, for both export and brokering services, the member states shall take into account all relevant considerations, including (art. 12):

> *"a) the obligations and commitments they have each accepted as members of the relevant international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties;*
>
> *b) their obligations under sanctions imposed by a common position or a joint action adopted by the Council or by a decision of the OSCE or by a binding resolution of the Security Council of the United Nations;*
>
> *c) considerations of national foreign and security policy, including those covered by Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment;*
>
> *d) considerations about intended end use and the risk of diversion."*

The same evaluation criteria therefore apply to export authorisations and to authorisations for brokering services. The list comprises a number of objective conditions (which may, or may not, have been satisfied, as in a) and a number of subjective criteria.
The list is non-limitative.[61]

61 See also M. QUENTIN, *op. cit.*, p. 67.

No undercut

Article 13, paras 1 and 2, prescribe that member states may refuse to grant authorisation for brokering services (as for export) and may annul, suspend, or revoke granted authorisations. Refusals shall be re-examined after a period of 3 years, after which the decision will be confirmed or modified. In every case, the other EC member states and the European Commission shall be notified accordingly. This information exchange is important in the context of the so-called no-undercut principle, described in article 13, para. 5: it obliges the member states, prior to granting authorisation, to take due account of previous denials by other member states for an 'essentially identical transaction'.

In case of such denials, there shall first be consultation between the competent authority that is considering the application and the competent authority(ies) of the member state(s) that previously refused to grant authorisation. In the event the authorisation is nonetheless granted, the other member states and the Commission shall be notified accordingly, and all relevant information shall be provided to explain and justify the decision.

The purpose of this provision is to prevent, as far as possible, a member state from granting authorisation for activities that were previously (recently) denied by other member states. Since a number of the criteria require a subjective assessment, this risk is not unrealistic. This provision is intended to prevent countries using a flexible interpretation from undermining stricter policies in force in other states.

Other conditions

The Regulation does, however, state that the member states in which those parties are resident or established are responsible for providing guidance to brokers (and to exporters) (art. 19, 5).

Authorisations for brokering services must be submitted either in writing or electronically (as in the case of individual and global export authorisations, art. 14). Annex III contains the model sample form for brokering services. The national forms must contain all the elements of – and in the same sequence - as in the model sample.

Control measures

The Regulation also contains a number of control measures.

Brokers in dual-use items (like exporters) must keep detailed registers or records of their activities that are subject to authorisation, in accordance with the national legislation or practice in force in their country (art. 20, 1). On request, brokers must be able to provide a

description of the dual-use items, of the period during which such products were the subject of their services, and of the destinations and countries where those services were rendered (art. 20, 2). e registers or records and documents need to be kept for at least 3 years (following the end of the calendar year in which the brokering services took place). They need to be submitted on request to the competent authority of the member state where the broker is resident or established (art. 20, 3).

Sanctions

Finally, EU member states must guarantee that the competent authorities can check that control measures (art. 21) are correctly applied and ensure compliance by imposing sanctions on violations against the Regulation and its operative provisions. These sanctions need to be effective, proportionate, and deterrent (art. 24).

Information to the Commission

The EU member states shall supply the Commission with a list of the authorities empowered to grant authorisations for the provision of brokering services. The Commission shall publish the list in the C series of the *Official Journal of the European Union* (art. 10, 4).

Each member state must keep the Commission informed about the legal and administrative measures that are being taken in implementation of the Regulation. The Commission shall forward the information to the other member states (art. 25).

Direct effect of the Regulation

Even though a Regulation has direct effect within the internal legal system of a member state and need not be (and even may not be) incorporated in national law, this shall not prevent any state from establishing additional implementing measures (comparable to a national law).[62]

This is also the case with Regulation 428/2009 concerning a number of concrete provisions such as the licensing procedure, the manner in which the trader provides the competent authority with the required information, the terms under which licences must be processed, the manner in which the authorities provide information to brokers, possibly also the use of their own national forms for issuing the licence, and the manner in which brokers need to keep registers or records on file.

62 R. BARENTS and L.J. BRINKHORST, *Grondlijnen van het Europees Recht*, Kluwer Deventer 2006, p. 185.

Moreover, effective, proportionate, and deterrent sanctions need to be determined by decree[63] and, eventually, the scope of application as it pertains to goods may be extended.

1.2.4 Interdepartmental consultation

In 1999, with a view to introducing coordination in the combat against illegal arms trade in Belgium, the Interdepartmental Coordinating Committee for Combating Illegal Arms Transfers (ICIW) was created.[64]

The ministers with competence to grant export and transit licences assumed the co-chairmanship of the ICIW (art. 2). The Committee was composed of the National Magistrate and representatives from:

- The Ministry of Foreign Affairs, Foreign Trade, and Development Cooperation;
- The Ministry of Justice;
- The Ministry of Economic Affairs;
- The Ministry of the Interior;
- The Ministry of Finance;
- The Ministry of National Defence;
- The Federal Police;
- The Proof House in Liège.

Experts in the field of illegal arms transfers could be invited as technical advisors to participate in the meetings of the ICIW. Its task is to establish better coordination and information exchange among all the relevant departments, with the aim of enhancing the exercise of their assigned competences with respect to combating the illegal arms trade (art. 3). The RD did not impose any periodicity for the meetings, and the Committee has not held any meetings since 2001.[65]

63 By decree, since dual-use items have since 2003 been under regional competences. Similarly, criminal sanctions may be established by decree since, according to art. 14 of the Constitution and art. 11, para. 1 of the Special Law on institutional reform (1980), the sanctioning competence follows the other competences (this is a so-called parallel competence). See also Advice no. 36.631/1 of 16 March 2004, in attachment to Advice no. 44.666 /1 of 1 July 2008 of the legislative department of the Council of State concerning the decree proposal of 10 July 2008 on the import, export, and transit of and against the illegal trade of arms, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology, *Parl. Doc.* Flemish Parliament, 2007-2008, no. 1555-2, p. 20.

64 RD of 9 February 1999 concerning the creation of the Interdepartmental Coordination Committee for combating illegal arms transfers, *BOJ* 26 May 1999.

65 See: *Acts*. Fl. Parl. 2004-2005, 30 June 2005, pp. 9-10.

1.3 Control of brokering in practice

In order to present a complete picture of the organisation of Belgium's control of brokering, it is relevant to determine if, in addition to the legal regime, certain processes have been developed in the practice. The following aspects are worth noting: the licensing procedure, the updating of the list with goods to which the control regime is of application, and the consultation among the offices involved.

1.3.1 Licensing and accreditation procedure

1.3.1.1 The advice procedure within the licensing procedure in the Law of 1991

Our inquiries with the departments involved indicated that there are no practices that *complement* the legally prescribed procedures. In fact, rather the opposite; in practice, the procedures are not at all followed.

From contacts with the provincial services that treat the accreditation applications on the basis of the Weapons Act, it appears that they are not involved in the advice procedure prescribed in the RD of 16 May 2003. Article 2, para. 2, of the said RD determines that the Minister of Justice, on assessment of the applications for a preliminary licence, needs to request the reasoned advice from a number of persons and departments (see also section 1.2.2.3.b). None of the five provincial services had knowledge of any request for advice in the context of the licensing procedure for a broker previously accredited by them.

The Federal Arms Department[66] confirmed that the provinces were not approached for advice for the reason "that the provinces themselves issue the preliminary accreditations". The Department also said that the Regions are not asked for advice either, "given that the granted licences are precisely meant to be subsequently passed on to the Regions".

66 The Federal Arms Department was created in the new Weapons Act (art. 36) and is a service of the Ministry of Justice. This department also issues the preliminary licence for an arms trader (the Law of 1991).

Although both arguments sound logical enough, they are, strictly speaking, contrary to the intention of Article 2, para. 2, of the 16 May 2003 RD. Furthermore, the argument advanced that the preliminary licences for the Regions is only relevant to arms *traders* whose IE&T activities are to be assessed later by the Regions. For brokers, the licensing procedure with the Ministry of Justice is the only procedure possible since there is currently no control of individual transactions.

In practice, the procedure is conducted rather in a chronologically reverse order than that laid out in the RD. Generally, traders - in practice exclusively arms traders and exporters of military materials – do notautomatically request a preliminary licence from the Ministry of Justice. This obligation appears not to be well known; it is mostly the Customs Services and Regional Services that, on the basis of the records they are handed for processing, become aware that a trader does not possess a preliminary licence, and they consequently refer the applicant to the Ministry of Justice.

1.3.1.2 The 'success' of the accreditation and licensing procedure for brokers

All provincial services consider the accreditation as broker (in keeping with the Weapons Act) to be a highly exceptional procedure. Some services have not received a single accreditation application (West Flanders) since 2003 and others have had only one or just a few.

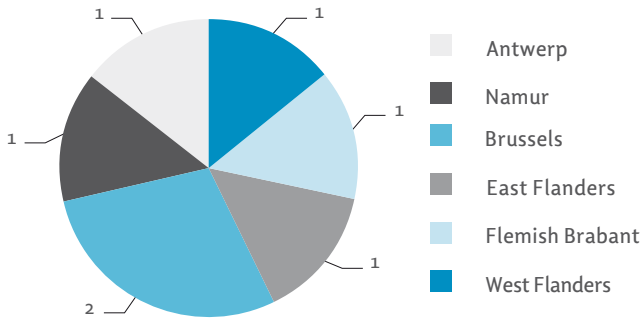
The fact that only a very few accreditation applications have been submitted for brokers and that only a few applications for accreditation as arms trader are submitted on the basis of the Weapons Act confirms the picture presented in the Federal Arms Department's report of activities for 2006-2008. The data do not show the type of trader who applies for the accreditation.

Overview of the applications for accreditation as trader on the basis of the Weapons Act
Source: Federal Arms Department, Report of Activities 2006-2008, p. 10.[67]

	Submitted	Granted	Denied	Inadmissable/withdrawn/returned
2006	1	0	1	0
2007	3	0	2	1
2008	3	0	2	0
Total	7	0	5	1

67 See http://www.just.fgov.be/img_justice/publications/pdf/264.pdf.

Number of accreditation applications submitted per province



In the same Federal Arms Department report, there are no data on the number of licences granted by the Ministry of Justice on the basis of the Law of 1991, although this department issues the licences on the basis of Article 10 of this Law.[68]

From the presentation of the Federal Arms Department team members, it appears that there are two administrative collaborators that, among their other duties, process applications for 'preliminary' licences (p. 28). 'Preliminary licence' (or international licence) is the term used by the Federal Arms Department for those licences based on Article 10 of the Law 1991 in order to distinguish them from the transaction licences for import, export, and transit granted by the Regions. Inquiries with the Federal Arms Department confirm that, since 2003, no procedure has been started to issue such a preliminary licence to a broker.

1.3.1.3 Knowledge of the procedures for brokers

The lack of adequate knowledge among arms traders about their obligation, as individuals, to have a preliminary licence (Law of 1991) is in practice compensated by the fact that other services, the Customs or Regional Arms Services, 'suspend' their granting of permissions or their licensing until the individual has been issued a licence by the Ministry of Justice. In the case of brokers, this alternative is not available. The fact is that the current provisions in Belgian regulations impose control on brokers only as *persons*, not on their *activities*. Brokers can thus can continue their activities unhindered and uninterrupted. No department or agency or office can detect what brokers are doing or investigate whether they are acting under a preliminary licence from the Ministry.

68 See, among others, a circular form letter dated 17 July 2003 in which the Federal Arms Department presents explanatory notes for the new licensing requirement in art. 10 of the Law of 1991, available at http://www.just.fgov.be/index_nl.htm (Via Ministry of Justice from A to Z – Arms – Licence for the export and transit of arms – document: Information (PDF)).

The fact that not a single application for a preliminary licence as broker has been submitted to the Ministry of Justice since 2003 may indicate that, in Belgium, no brokers are any longer, or (since 2003) have been, active or, conversely, that they are not willing to voluntarily report their activities. Since in the case of brokers (in contrast to arms traders) there are no direct consequences (only criminal sanctions) attached to not having a preliminary licence, one may assume that nothing would induce them to submit an application and thus make themselves known to the competent departments.

It is not only the arms traders and brokers who have little or no knowledge of the provisions that in 2003 were added to the Law of 1991: the Federal Arms Department, like the provincial services, appears to take only slight account of the fact that, aside from arms traders, brokers also need accreditation and/or a licence. This is evident, for instance, from the FAQ that the Federal Department publishes on the website of the Ministry of Justice which lists a question only about a licence for arms traders.[69] Nowhere is it stated that the information is also applicable to brokers.

Furthermore, the little attention to brokers is also evidenced in the wording of the RD of 16 October 2008 with respect to the status of arms traders in the context of the Weapons Act, which describes the modalities for examination to determine the level of professional competency, the professional deontological principles, and the duties and responsibilities of an arms trader. Notwithstanding the fact that Article 10 of the Law 1991 makes the issuance of a licence dependent on these conditions for both traders and brokers, the RD makes no mention of the latter.

In sum, it needs to be noted that the accreditation procedure on the basis of the Weapons Act has come into practice only very recently as legally prescribed, among others reasons because it was only in March 2009 that the first professional competency examinations were organized. Until then, the legal conditions were taken as mere theory, in the case of not only brokers but also arms traders. Indeed, brokers participated in the examinations in 2009 in the sense intended in the Weapons Act. In order to take into account the specificity of their activities, the Federal Arms Department provided a set of separate questions.

69 Available at *http://www.just.fgov.be/index_nl.htm*
(Via the Ministry of Justice from A to Z – Arms – Licence for export and transit of arms FAQ).

1.3.2 Updating the list of goods

Three lists of goods show the material scope of application in the valid legislation: the Common EU List of conventional arms, the list of military materials in an attachment to the RD of 1993 (implementing decision with the Law of 1991) that determines the scope for the preliminary licence issued by the Ministry of Justice, and the list of arms to which the Weapons Act of 2006 applies and which determines the scope for the accreditation by the governor.

The list in the attachment to the 1993 RD was most recently amended and adapted to the Common EU List in the RD of 2 April 2003. This list determines the material scope of application of not only the preliminary licence by the Ministry of Justice, but also the IE&T licences that the Regions issue.

As evidenced by the Annual Reports,[70] Flanders, which is still bound by the Law of 1991 and its implementing decisions, has since 2003 taken into account the adaptations to the EU List while awaiting the adoption of its own regulation.[71] Flanders bases its practice on the updated EU List and in its reporting follows the classification into the 22 main categories and the corresponding sub-categories used in the EU List. Moreover, Flanders reports goods in four extra categories, two of which relate to goods that are not on the EU List but are in Belgium subject to a licensing requirement in keeping with the attachment to the RD of 1993 (ML 23 and ML 26[72]). The other two categories comprise goods that have been added to the EU List by way of the catch-all clause in the Annex, 2nd Category, Section 1, point A.19[73] of the 1993 RD (ML 24 and ML 25[74]).[75] This is an *ad hoc* approach, whereby the Minister can, on a case-by-case basis decide to make goods that are not on the existing

70 See the heading 'Methodology' in the Annual Reports on the website of the Flemish Arms Trade Monitoring Unit at *http://iv.vlaanderen.be/nlapps/data/docattachments/Quentin.pdf.*

71 Fifth Annual Report and Eleventh Semi-annual Report of the Flemish Government to the Flemish Parliament on the granted and denied licences for arms, ammunition, materials specifically intended for military use or for law enforcement purposes and associated technology, period 1 January 2008 to 31 December 2008, p. 3 (referred to as Fifth Annual Report), available on the website of the Flemish Arms Trade Monitoring Unit at *http://iv.vlaanderen.be/nlapps/docs/default.asp?id=35.*

72 ML 23: Rifles and ammunition, as not provided for in ML1, ML 2 and ML 3. ML 26:ML 26: Law enforcement equipment.

73 The so-called "catch-all clause" holds that "*other equipment and other materials, destined to support military actions*" fall within the purview of the licensing regime of the Belgian legislation in casu; see also the explanatory notes in the Fifth Annual Report, *op. cit.*, p. 13; for data on the application of the *catch-all* provision, see *Hand.* Fl. Parl. 2005-2006, 23 February 2006, pp. 1-5.

74 ML 24 (catch-all): 5) visualisation screens.
ML 25 (catch-all): a) airport lighting, b) gear boxes, c) telecommunication, d) masks and parts of masks, e) software, f) cut and thrust weapons, g) parts and accessories for vessels, transport trucks, and airplaines, h) construction materials, i) elektronics.

75 See: Decree proposal of 6 March 2008 amending the Law of 5 August 1991 on the import, export, and transit of and against the illegal trade of arms, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology, where the reporting to the Flemish Parliament is concerned, *Parl. Doc.* Fl. Parliament, 2007-2009, no. 1591-1, p. 4.

lists (EU, RD) subject to licensing if they lend themselves to use for military purposes.[76] This practice involves the risk that the Ministry of Justice will not grant a preliminary licence (since the goods are not on the list in the attachment to the 1993 RD) and the Flemish Department would therefore also have to withhold an IE&T licence, even though the goods are included in the list used by Flanders for the purpose. These types of impasse could be dealt with by the practice described above whereby traders, in keeping with the chronological order, first should – but do not – apply for a preliminary licence from the Ministry of Justice but are rather referred to the Ministry by the Customs or Regional Services following an IE&T or a licensing application. Hence, it is the *de facto* lists of goods used by the Regions that determine who needs a preliminary licence from the Ministry of Justice.[77]

1.3.3 Consultation among the services involved

The description of the legal framework for brokering in Belgium mentions the role of the ICIW, the Interdepartmental Coordination Committee for Combating Illegal Arms Transfers (see section 1.2.4). Although the RD, which created the ICIW, has not been cancelled or replaced, the Committee has not met since the regionalisation of competences in 2003.

Judging from our inquiries with the services involved, it appears that further consultation is conducted in an informal manner with the same objective in mind as advanced in the RD, namely, ensuring mutual information exchange among the various services that pursue the same goal –combating illegal arms trade – so as to enable each individual service to better deploy the full scope of its own specific competences.

The number of services that are involved in these processes is smaller than the number of members of the former ICIW. It is especially the regional and provincial services competent for the control of arms trade and the Federal Arms Department that meet regularly or exchange information. Informal consultations are also carried on with Foreign Affairs, Customs, and Internal Security.

76 It may be noted here that this practice is not wholly transparent; not a single official document could be found that explains how – on what legal grounds – Flanders keeps account of the regular updates of the EU List, or in what way Flanders makes use of the *catch-all* provision in the 1993 RD. The information entered in our study about this is based on (verbal) explanations by the competent officials of the Flemish Arms Trade Monitoring Unit.

77 In the Walloon Region, the *catch-all* provision in the RD forms the legal basis for catching all goods that are present on the (updated) EU List but absent from the attachment to the RD of 1993.

1.4 Summary overview of the Belgian framework de lege and de facto

Control of brokering in military goods in Belgium

Binding character
The control of brokers is regulated by law; the procedures are not fully complied with in practice.

Measures and evaluation criteria for military materials
Belgium has opted for the imposition of a licence, issued by the Ministry of Justice, for brokers engaged in negotiation of the trade of military materials. Brokering activities are not subjected to a licensing requirement.

Anyone acting as a broker in the (foreign) trade in firearms must – in principle – also satisfy conditions in order to be accredited by the provincial governor (in principle only because, as the analysis shows, the application of these conditions is subject to interpretation).

The assessment in the context of the licence applications is meant as a screening of the 'trustworthiness' of the broker.

Description of brokers and their activities
For the accreditation procedure and the licensing procedure for military materials, there exist separate definitions for 'broker', respectively in the Weapons Act and in the Law of 1991 on the combating of the illegal arms trade.

Scope of application
Fulfilment of the conditions for accreditation as a broker is required for the goods that fall within the purview of the Weapons Act; the preliminary licence is required for the goods on the list of military materials that is established in the attachment to the RD of 1993. Controls on the 22 categories of military goods on the EU List are being adopted and expanded for Flanders by 4 additional categories (ML 23–ML 26).

Control of brokering in dual-use items in Belgium

Binding character

The control of brokering is at the European level subject to EC Regulation 428/2009, directly applicable in the Belgian legal system. Since 27 August 2009, the provisions of this Regulation apply.

Measures and evaluation criteria for dual-use items

In cases where the goods to which the EC brokering services relate can be used for weapons of mass destruction, a licence shall be required.
The Regulation imposes the same evaluation criteria on licences for brokering (4 types) as for export.
The application of the no undercut principle is being expanded to include brokering.
Brokers themselves need to keep registers or records for at least three years.
Violations must be penalized appropriately.

Description of brokers and their activities

Regulation 428/2009 defines both brokers and brokering services; that is, EC brokering among EC third countries.

Scope of application

The list of the dual-use products to which the control regime is of application is etermined in Annex I to Regulation 428/2009.

Overview of Belgian legislation

Belgium	
BE	Special Law of 12 August 2003 amending the Special Law of 8 August 1980 on institutional reform (art. 2)
BE	Law of 5 August 1991[78] on the import, export, and transit of and on the combatting of the illegal trade of arms, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology (Title III, art. 10–13)
BE	Royal Decree of 8 March 1993 regulating the import, export, and transit of arms, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology
BE	Royal Decree of 16 May 2003 on licensing, as referred to in article 10 of the Law of 5 August 1991 on the import, export, and transit of and against the illegal trade of arms, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology
BE	Law of 8 June 2006 regulating the economic and individual activities involving arms
BE	Royal Decree of 16 October 2008 regulating the status of the arms trader

Summary overview of the types of provisions with respect to brokering in Belgian legislation

Source	Measures	Assessment criteria	Definition brokering	Definition brokers	Types of weapon
BE Law of 1991, Title III	Yes	Yes	No	Yes	Military equipment, Attachment Royal Decree 1993
BE Weapons Act	Yes	Yes	No	Yes	Firearms (according to the Weapons Act)

78 As amended by the Laws of 25 and 26 March 2003.

2

Analysis of the Belgian regime for the control of brokering

2.1 Introduction

On the basis of chapter 1's description of Belgium's legislative framework and administrative practice, this chapter analyses Belgian legislation pertaining to the control of brokering in military and dual-use goods.

Our analysis looks for answers to two complementary questions:

- To what degree is the Belgian regime in compliance with supranational legal, political, and moral obligations? In what areas does Belgium meet the conditions, where is Belgium failing, or where does Belgium possibly exceed the requirements imposed by the supranational instruments?
- How effectively, that is, conclusively, is the control of brokering regulated in Belgium?

The analysis sought answers by posing three sub-questions:

- Who in Belgium holds competence for the control of brokering? Is brokering part of the designations 'import, export, and transit of military materials', or does it fall under the general description of 'the combating of the illegal arms trade'? In other words, is the control of brokering a regional, a federal, or possibly a mixed competence? Is this assignment of competences applicable to military and dual-use goods?
- To what extent is the current Belgian regulation internally coherent (in the light of the assignment of relevant competences): in what degree is effort made to ensuring harmonisation of the control measures and prescribed procedures?
- To what extent is the current control regime effective, that is, how far is the control of compliance assured and are the prescribed measures successful in realizing the legislators' objectives?

All these questions pertain to the control of brokering in military and dual-use goods.

2.2 Analysis of compliance with supranational obligations

2.2.1 Overview of the supranational obligations by weapon type

This section presents summary overview of all the measures and their legal effect as background to investigating whether Belgium is meeting its supranational obligations regarding brokering; a fuller account is presented in Annex 2. Here a distinction is made between conventional arms with SALW as a subcategory and dual-use items that can be employed in WMD.

The overview examines the following aspects for each type of goods:

- **The measures:** the table shows, per type of goods, which measures are prescribed in supranational documents;
- **The source:** the table shows, per type of measure, which documents prescribe the measure;
- **Description:** for every source there is a brief explanation of how the measure is described, that is, precisely what the measure entails and how imperative its character is assessed to be (e.g., if it should be considered or is mandatory, whether it must be incorporated in Belgium's national legislation or policy, etc.). Descriptions that contain an obligation are indicated in bold typface; provisions that only suggest consideration of a given measure are shown in *italics*.
- **Binding character of the document:** the overview categorises measures according to the source, e.g., whether they are politically or legally binding or *soft law* instruments.[79]

79 As a result of the increasing diversification of instruments at the international level over recent decades, a form of *soft law* has evolved. *Soft law* refers to a heterogeneous set of documents and provisions that may or may not be grounded in law, but still cannot be categorised as full-fledged legislation or *hard law*. The typology and distinguishing criteria are discussed in K. VAN HEUVERSWYN, *The International Framework for Control of Brokering in Military and Dual-use Items*, *op. cit.*, p. 16

Conventional arms, including SALW			
Types of measure	**According to source**	**Description (requirement = bold) or (to be considered = *italics*)**	**Binding character**
Legislative framework for control of arms brokering	WA Statement Brokering	**Ongoing efforts to further work out the legislation**	Politically
	WA Elements Brokering	**Control through adoption and implementation of adequate legislation and regulations**	Politically
	EU CP 2008/944/ CFSP	**Obligation to adapt the national policy to the prescriptions of the CP**	Soft law
	EU CP 2003/468/ CFSP Brokering	**Creation of a clear judicial framework for legal EU brokering and taking all necessary measures to keep supervision on EU brokering conducted on one's own territory**	Soft law
		Eventually to be expanded (see with the licences)	
Penalizing illicit brokering and violations	WA Statement Brokering	**Having consultations about measures to enforce compliance with the controls**	Politically
	WA Elements Brokering	**Adequate sanctions and administrative measures, including criminal sanctions, in order to effectively enforce the controls**	Politically
	EU CP 2003/468/ CFSP Brokering	**Every member state provides for appropriate penalties, including criminal sanctions**	Soft law
Registration of brokers	WA Statement Brokering	*To be considered (no precise ruling with respect to the territory)*	Politically
Licensing/authorisation of brokers	WA Statement Brokering	*Considering a restriction of the number of licensed brokers*	Politically
	WA Elements Brokering	*Considering a restriction of the number of licensed brokers*	Politically
	EU CP 2003/468/ CFSP Brokering	*Possibly considering the imposition of a written authorisation on the persons or the entities themselves to act as brokers (in addition to, and not in replacement of the licence for the activities)*	Soft law

Types of measure	According to source	Description (requirement = bold) or (to be considered = *italics*)	Binding character
Licensing/ authorisation of brokering activities	WA Statement Brokering	*To be considered*	Politically
	WA Elements Brokering	**At least a licence or written authorisation for brokering between third countries, issued by the competent authority of the territory where the activities are being conducted, irrespective of the broker's nationality or his place of residence**	Politically
		Possibly also a licence irrespective of the location where the brokering activities are being conducted or expansion to cases where the export is being organized from out of one's own territory	
	EU CP 2008/944/ CFSP	**Obligation to subject extra-community brokering to a licence**	Soft law
	EU CP 2003/468/ CFSP Brokering	**At least a licence or written authorisation issued by the national authorities at the location where the brokering activities are taking place**	Soft law
		Possibly expanded towards brokering under national laws; towards brokering whereby the goods are being exported from out of one's own territory, or towards activities outside of the territory carried out by own nationals that are residents or are based there	
Assessment criteria: licit versus illicit activities	WA Elements Brokering	**Testing of applications against the principles and objectives as presented in the official WA Documents**	Politically
	EU CP 2008/944/ CFSP	**The same 8 evaluation criteria (with respect to security and human rights) for applications for activities of EC brokering and EC export. Authorisations may only be granted on the basis of reliable, prior knowledge about the end use.**	Soft law
	EU CP 2003/468/ CFSP Brokering	**The applications shall be assessed on the basis of the EU Code of Conduct (now CP 2008/944/CFSP)**	Soft law
		Possibly taking into account the applicant's past involvement in illegal activities	

Types of measure	According to source	Description (requirement = bold) or (to be considered = *italics*)	Binding character
Keeping of registers on brokers (by the competent authority)	WA Elements Brokering	**Keeping of lists (records) about individuals and companies that have been granted a legitimate licence**	Politically
		Possibly a register about brokers	
	EU CP 2003/468/ CFSP Brokering	**The member states shall for a period of ten years keep records of persons and entities that have obtained a licence**	Soft law
		Possibly the introduction of a register of brokers	
Mutual information exchange (between "member states"[80])	WA Statement Brokering	*Considering disclosure of information about the names and locations of brokers*	Politically
	WA Elements Brokering	**The promotion of mutual cooperation and transparency among the states through exchanging information on activities**	Politically
	EU CP 2008/944/ CFSP	**Justifying contrary decisions on licences denied by other member states, plus consultation on denials issued during the past 3 years (no undercut principle)**	Soft law
		The member states aim for better cooperation and convergence of their policies; for instance, by means of annual reports, national reports, and joint evaluations of end users	
	EU CP 2003/468/ CFSP Brokering	**About brokering, among others, with respect to: legislation; poss. registered brokers; data about brokers; poss. denials of applications for registration and for licences.**	Soft law
International cooperation	EU CP 2008/944/ CFSP	**Exchanging experiences with non-EU countries**	Soft law
	EU CP 2003/468/ CFSP Brokering	*Possibly exchanges with third countries*	Soft law

80 Differs depending on the organisation that prescribes such measures

SALW, incl. firearms			
Types of measures	**According to source:**	**Description (requirement = bold) or (to be considered = *italics*)**	**Binding character**
Subjecting brokers and their activities to regulations	UN Firearms Protocol	**Legal or other measures**	Legally
	UN Programme of Action	**Taking adequate national measures: legal or administrative**	Politically
	WA Best Practices Guidelines	**Providing for adequate legislation or administrative procedures**	Politically
	OSCE Document SALW	*To be considered*	Politically
	OSCE Principles Brokering	**All necessary measures, including working out a legal framework for legal brokering**	Politically
	Directive 91/477/ EEC (amend. 2008/51)	*Giving consideration to introducing a system for regulating brokers' activities*	Legally
Penalizing illicit brokering by legislation	UN Firearms Protocol	**Mandatory**	Legally
	UN Programme of Action	**Making illegal brokering activities sanctionable on the member state's territory**	Politically
	WA Best Practices Guidelines	**Providing in appropriate sanctions**	Politically
	OSCE Principles Brokering	**Providing for appropriate penalties, including criminal sanctions**	Politically
Competent authorities	UN Programme of Action	**The same authorities are to be made competent for arms trade and brokering**	Politically
Registration of brokers	UN Firearms Protocol	*To be considered for brokers that are active on the territory of the regulating state (the member state with the jurisdiction)*	Legally
	UN Programme of Action	*One of the possible measures*	Politically
	OSCE Document SALW	*To be considered (ditto as Firearms Protocol)*	Politically
	Directive 91/477/ EEC (amend. 2008/51)	*Consider registration of brokers*	Legally
Imposing a licence on brokers	WA Elements MANPADS	**No brokering in MANPADS without licence or permission**	Politically
	OSCE Principles Brokering	*Possibly in addition to the permission for activities(imperative), the imposition of a written permission for brokers*	Politically

Types of measures	According to source:	Description (requirement = bold) or (to be considered = *italics*)	Binding character
Imposing a licence or authorisation on brokering activities	UN Firearms Protocol	*To be considered*	Legally
	UN Programme of Action	*One of the possible measures*	Politically
	OSCE Document SALW	*To be considered* *(ditto as Firearms Protocol)*	Politically
	OSCE Principles Brokering	**At the least, licences or written permissions for every separate transaction, to be issued by the authorities of the territory where the activities are being conducted**	Politically
		Possibly expanded to: - *brokering with export from one's own territory* - *the activities of brokers that are based on the territory or are resident there* *Possible exemption for transfers among participating states.*	Politically
	EU JA 2002/589 SALW	**Only deliveries to governments are allowed, either directly by the authorities or by appropriately empowered departments**	Politically
	Directive 91/477 (amend. 2008/51)	*Considering the mandatory imposition of a licence or authorisation for intra-community brokering activities*	Legally
Assessment criteria for licensing of brokering activities	UN Firearms Protocol	**To be determined in the national legislation (general obligation, including brokering)**	Legally
	OSCE Principles Brokering	**Licences for transactions need to be subject to the same (3 categories of) evaluation criteria as those for export.**	Politically
		Possibly taking into account the applicant's past involvement in illegal activities	
Keeping registers on licensed activities	OSCE Principles Brokering	**Registers on all granted licences and written permissions during the past decade**	Politically
Keeping registers on brokers	UN Firearms Protocol	*Member states are encouraged to keep a register on brokers for 10 years*	Legally
	OSCE Principles Brokering	*Possibly keeping registers about licensed brokers*	Politically
	Directive 91/477 (amend. 2008/51)	*To be considered for 'brokers' active on the member state's territory*	Legally

Types of measures	According to source:	Description (requirement = bold) or (to be considered = *italics*)	Binding character
Mutual (between "member states"[81]) exchange of information	UN Firearms Protocol	*Considering disclosure of information about brokers, e.g., names and locations*	Legally
		Member states are encouraged to exchange information about brokers	Legally
	OSCE Document SALW	**About international arms brokers and about control of international brokering**	Politically
	OSCE Principles Brokering	*To be considered: legislation, registered brokers and broker registers (case pertaining), denied registration and licence applications (Section V., 2.).*	Politically
International cooperation	UN Programme of Action	**Continuing efforts towards achieving common understanding**	Politically

Dual-use items			
Types of measure	**According to source**	**Description (requirement = bold) or (to be considered = *italics*)**	**Binding character**
Control of brokering through legislation	UN Resolution 1540	**Organizing interior, border, and export controls and imposing their compliance by way of legislation**	Legally binding
	Dual-use Regulation 2009	**Provisions directly of application within the member states. The national legislation needs to provide in a number of additional (control) measures: registers, control of compliance, and sanctions.**	Directly applicable
Sanction for non-compliance	UN Resolution 1540	**Civil and criminal sanctions for non-compliance with regulations regarding export control, of which also brokering activities are a part**	Legally binding
	Dual-use Regulation 2009	**Appropriate sanctions that are effective, proportionate, and deterrent**	Directly applicable

81 Differs depending on the organisation that prescribes such measures.

Types of measure	According to source	Description (requirement = bold) or (to be considered = italics)	Binding character
Licensing of brokering activities	Dual-use Regulation 2009	**Required for brokering services if the broker has been or is informed that the items may be intended for weapons of mass destruction**	Directly applicable
		A catch- all provision and a suspicion clause allow for possible expansions by the member states	
		Licences for brokering for a determined volume of specific products moved between two or among several third countries to be issued by the competent authority of the member state where the broker is resident or based; the licences are valid throughout the entire Community	
Assessment criteria	UN Resolution 1540	**As determined in the national legislation, which needs to be in accordance with the international law in casu**	Legally binding
	Dual-use Regulation 2009	**The location of the items in the originating third country, the end user, and the exact location where the latter resides must be clearly identified;** **The applications shall be evaluated in the light of international commitments with respect to non-proliferation; of EU, of OSCE, of UN sanctions; of the CP 2008/944, and considerations pertaining to end use and the risk of diversion. The same criteria as for export**	Directly applicable
Providing information	Dual-use Regulation 2009	**Brokers are to inform the authorities when aware that the goods are destined for use in weapons of mass destruction.** **Brokers to provide the authorities with the required information to enable assessment of their applications** **The authorities shall provide the brokers with advice**	Directly applicable
Records/registers on activities	Dual-use Regulation 2009	**Brokers themselves need to maintain a 3-year record or register of the activities that are subject to a licence**	Directly applicable
Mutual (between member states) exchange of information	Dual-use Regulation 2009	**Information exchange and consultation among member states about denied licences (no undercut)**	Directly applicable

2.2.2 Analysis instrument for testing supranational measures for the control of brokering

This section describes the instruments with which we can analyse whether and if so to what extent Belgium complies with its supranational obligations.

2.2.2.1 Relationship between the supranational measures

General provisions

In general, all the instruments emphasize the importance of a legal framework or administrative practices for the control of brokering, including the need to provide for appropriate sanctions. In fact, most such documents make this a fundamental and explicit requirement.[82]

All such instruments consider the control of brokering to be one of the measures of a holistic approach to combating of illegal arms trade in all its aspects. Most documents' provisions on brokering have been entered into a whole series of prescriptions dealing with the control of arms transfers, with respect to import, export, and transit controls, marking of the arms, and the like. In the EU Regulation, this all-encompassing approach is evidenced by the fact that the regime for the control of IE&T of military and dual-use items was recently expanded to include brokering.[83] The instruments that specifically target the problem of brokering also emphasize that these provisions are part of the effort to combat the illegal arms trade and additional to measures such as the control of IE&T, and they serve the same purpose: to create a framework for legal transfers and to prevent the circumvention of embargoes and prevent arms from falling into the wrong (e.g., unauthorized) hands, and the like.[84]

82 The UN Firearms Protocol suggests in art. 15 merely consideration of a regulation on brokering, but mandates in art. 5. 2.a that typical unauthorized brokering activities be made sanctionable by means of legislation. The OSCE Document on SALW of 2000 prescribes consideration of a regulation on brokering, although in later documents the OSCE does explicitly impose the obligation to adopt legislation.

83 Common Position 2008/944/CFSP for military goods (the new EU 'Code of Conduct') and Regulation no 428/2009 bearing on dual-use goods, respectively.

84 See the introduction to the WA Elements for effective legislation on arms brokering, the introduction containing the OSCE Principles about the control of arms brokering in SALW (which states explicitly in art. 1, 1. *"determined to improve the control of arms-brokering in order … to reinforce the export control of SALW")* and Common Position 2003/468/CFSP on the control of arms brokering.

In terms of the concrete measures (licences, registers, etc.) to control brokering, the overview indicates that for military as well as for dual-use goods, the EU Regulation has broader and more strictly worded provisions than the prescriptions of the UN, the WA, and the OSCE. Furthermore, the provisions of the EU instruments are of a legally more imperative nature than other international and regional prescriptions in terms of the control measures, evaluation criteria, definitions, description of materials, and territorial scope of application. The latter concern, respectively, the types of goods and the territory where the control measures are of application.

Each aspect of the supranational measures is briefly explained below.

Control measures

The EU Regulation prescribes a greater number of obligations, whereas the other supranational instruments usually merely urge the organisation's member states to consider concrete measures.

All the documents emphasise the control of brokering activities by means of transaction licences and the obligation to keep registers of brokered transactions, rather than the control of brokers, which is mostly expressed as an optional measure.

Only the UN Programme of Action on the Illicit Trade in SALW imposes an extra (political) obligation, namely, that the competence for arms trade and brokering be placed under the same authority.

Evaluation criteria

The EU regulations establish for all types of goods clearly described criteria to be used in the evaluation of applications for licences. The same criteria apply to export and brokering activities. Only the WA Elements (arms) and the OSCE Principles (SALW) impose assessment criteria. Only the OSCE applies identical criteria to both export and brokering.

Definitions

Only the EU provides definitions for brokering activities (CP 2003/468/CFSP) *and* for brokers (Dual-use Regulation 428/2009) or arms brokers (Directive 91/477). These definitions of brokering are as broadly delineated as the other two internally defined definitions, e.g., those of the WA Elements (arms) and the OSCE Principles (SALW).[85]

85 For an overview of all definitions of 'brokering activities' and 'broker' see K. VAN HEUVERSWYN, *op. cit.*, Annex 1.

Material scope of application

The EU List of goods to which the measures apply overlaps with the other EU lists. On the Common EU List of military goods, SALW appear in the categories ML1, ML2 and, in part, in ML3. e Dual-use Regulation presents as the sole instrument a list of dual-use items that can be used in WMD.[86]

Territorial scope of application

A common feature of all these instruments is that they prescribe that control be exercised by the competent authority of the country where the activities are being conducted. As a rule, this concerns activities relating to transfers between third countries. Two instruments - the OSCE Principles SALW and CP 2003/468/CFSP - provide two possible expansions that might or could be *considered*: the control of export from one's own territory or on activities conducted elsewhere by brokers (whether or not by nationals of one's own country) who are resident or based on the territory.

In the case of a territorial scope of application, it is important to note that the EU Regulation applies only to extra-Community (brokering) trade, in other words, to transfers between EU third countries. Only Directive 91/477 with respect to arms applies to intra-Community brokering, but the Directive does not impose mandatory control.

2.2.2.2 Analysis instrument

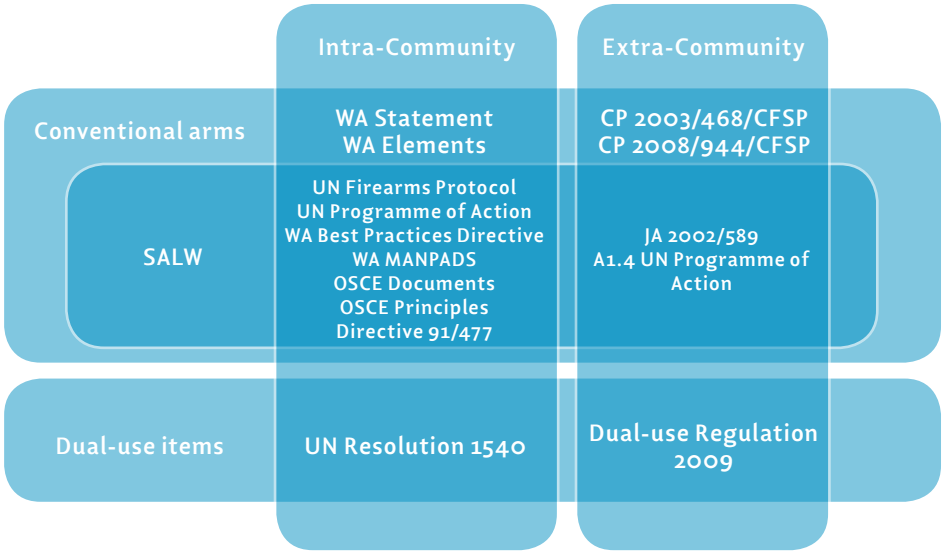
Concerning extra-Community arms brokering (including SALW), Belgium must comply with the requirements of the EU Regulation as well as an extra provision of the UN Programme of Action, namely, that the same authorities should be made competent for the control of both brokering and arms trade.

As to the 'intra-Community' control of arms brokering, the provisions of the other supranational instruments are valid. Directive 91/477 (SALW) merely prescribes consideration of possible regulation, just as the Common Position allows the EU member states to expand the extra-Community regime to include brokering from another member state's territory (art. 2. 3, Active section)

86 The dual-use list of the Regulation is based on the lists of the *Wassenaar Arrangement*, the *Missile Technology Control Regime*, the Nuclear Suppliers Group, the Australia Group, and the Chemical Weapons Convention.

In the case of dual-use items, for extra-Community brokering the provisions in Regulation 428/2009 apply. This Regulation provides a possibility for extension fo intra-Community trade; in consequence, only the provisions of UN Security Council (UNSC) Resolution 1540 are valid.

This offers the following summary of the obligations that Belgium needs to meet:



Overview of the supranational regulations on brokering to which Belgium is bound

Note: 'intra-Community' in this diagram does not pertain to the validity or force of the documents listed, but rather to the obligations that Belgium needs to satisfy with regard to brokering activities taking place in Belgium and related to transfers between EU member states (intra-Community trade) or between an EU member state and an EU third country (Community export). Both situations fall outside the territorial scope of application of the (imperative) European legislation, which is valid for extra-Community brokering.

This overview serves as an instrument that facilitates the following testing of Belgian regulations for compliance with the country's supranational obligations. The sections below treat some general observations (2.2.3), the compliance analysis of the prescriptions with respect to arms, including SALW (2.2.4), and with respect to dual-use items (2.2.5).

2.2.3 General observations with respect to the compliance analysis

Relationship between brokering and IE&T in combating illegal arms trade in Belgium

When Belgium regionalised competences for IE&T to the exclusion of the provisions with respect to the combat of the illegal arms trade, it created a distinction that no other supranational organisation has made. At the supranational level, combating the illegal arms trade involves a wide range of measures, *such as* control of the import, export, and transit of military materials (including dual-use items on the basis of the EU legislation), the marking of arms, information exchange, etc. *in addition to measures to control brokering.*

In this respect, Belgium does not act in line with the supranational vision.

Control of brokers or brokering activities

Belgium has opted to 'combat the illegal arms trade' by subjecting individuals active in arms trade and brokering activities to a licence requirement. The authorities' assessment of the application is intended to ascertain the reliability and the trustworthiness of the applicants. In 2003 Belgium took an approach that, at the time, has been evaluated was a ground-breaking[87] initiative (sincefew countries had introduced any legal provisions in that respect); however, since it does notcontrol brokering activities, this approach can no longer be considered as conforming with the supranational prescribed approach.

That this Belgian step was in essence not all that ground-breaking an initiative in 2003 is, amongst others, evidenced from the German legislation that already in 1978 had introduced control of brokering *activities*[88].

87 Especially the Belgian politicians themselves were convinced of this fact. The Law of 26 March 2003 "*was during the First evaluation conference on light weapons in New York from 7 through 11 July 2003 proudly introduced by members of Parliament as a model law* "; see Report on behalf of the Commission for institutional affairs of 25 July 2003 with the draft of the Special Law amending the Special Law of 8 August 1980 concerning the reformation of the institutions, *Parl. St.* Senate, BZ 2003, no. 89/3, p. 8.

88 On Germany see FEDERAL OFFICE OF ECONOMICS AND EXPORT CONTROL (BAFA, Germany), *Information leaflet on trafficking and brokering*, 29 May 2006, 11 pp., http://www.bafa.de/bafa/en/export_control/publications/export_control_information_leaflet_trafficking_brokering.pdf. On other countries see SAFERWORLD, *Weapons under Scrutiny, Implementing arms export controls and combating small arms proliferation in Bulgaria*, Center for the Study of Democracy, 2004, 10 pp., http://www.smallarmssurvey.org/files/portal/issueareas/transfers/transfers_pdf/2004_CSD_Saferworld.pdf; and H. ANDERS, 'Controlling arms brokering, Next steps for EU member states', GRIP, January 2004, p. 21 et seq., http://www.iansa.org/issues/documents/controlling%20_arms_brokering.pdf.

Moreover, the Belgian approach did not for long remain a prominent measure as, three months later, it was overtaken by the EU's Common Position 2003/468 on the control of arms brokering (June 2003).[89] This CP had been on the European agenda for some time;[90] in other words, parallel to preparation of the Belgian legislation, European legislation was also being drafted, which Belgian legislators did not take into account at the time.[91]

With its assessment of the reliability of brokers, Belgium still exceeds the requirements prescribed by the supranational instruments, since the latter include this element as only an optional measure for consideration. A minimal control, however, needs in the first place to impose controls on brokering *activities*, and it is in that respect that Belgium falls well short of the mark.

Distinction according to the type of arms

Belgium distinguishes between military and dual-use goods by analogy with EU legislation. At the international and regional levels, initiatives are taken rather with reference to SALW (a subcategory of military goods) and dual-use items that can be used in WMD (UNSC Resolution 1540), although often without clarifying which types of goods are to be considered in the category dual-use items (i.e., there is no definition in the text itself or no list of goods appended to it). The European (EU) and Belgian provisions with respect to military and dual-use items thus have a broader and more precisely defined material application scope than most of the international and regional documents.

The territoriality of control

Belgium's regulations are also valid outside its territory; this is a more far-reaching control than the measures prescribed in most other instruments. Only the OSCE Principles (SALW) and the EU's CP 2003/468 on brokering provide the *possibility* to control activities outside the territory of the regulating state, although this provision is limited to brokers (whether[92] nationals or not[93]) who are based on its territory or resident there.

89 See also V. MOREAU, 'Pour un réel contrôle des courtiers en armes en Belgique' – Towards a real control of arms brokers in Belgium, Brussels, Groupe de Recherche et d'Information sur la Paix et la sécurité (GRIP), 31 August 2009, p. 2, http://www.grip.org.

90 See the reporting about progress in preparation in the fourth annual report on the EU Code of Conduct on Arms Exports of December 2002.

91 On the fact that, in Belgium, it is a structural problem not to have a policy anticipating on EU regulations, whereby the incorporation i, or adaptation of Belgian legislation is quasi-systematically too late, see K. VAN HEUVERSWYN., *Leven in de risicomaatschappij Deel 2, Kritische analyse van de Belgische wetgeving: welzijn op het werk, civiele veiligheid, Sevesorisico's – Living in the risk society Part 2, Critical analysis of the Belgian legislation: well-being at work, civil security, Seveso risks*, Antwerp, Garant, 2009, pp. 417 and 430.

92 EU CP 2003/468 brokering.

93 OSCE Principles SALW.

In spite of the progressive character of Belgium's extraterritoriality principle, a number of substantial points about its effectiveness in actual practice are presented in the sections below.

2.2.4 Specific observations with respect to military goods

2.2.4.1 Compliance with EU legislation: extra-Community brokering

General compliance

In this regard, Belgium has not incorporated a number of EU instruments or provisions into its national policy. For military goods, this applies to the new obligations in Common Position 2008/944/CFSP and the prescriptions of Common Position 2003/468/CFSP on the supervision of arms brokering. Both prescribe control of brokering *activities*.

Belgium satisfies only the option stated in Article 4 of the CP on brokering to demand that brokers present a written authorisation. Article 4 also states 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*".

According to the EU Treaty, the member states are obliged to adapt their national policy to the provisions of a Common Position.

In sum, Belgium partially satisfies (control of brokers) and partially fails to satisfy (control of brokering activities) the following imperative provisions:
- create a judicial framework for legal brokering and take all necessary measures to maintain supervision of EU brokering from Belgian territory (CP 2003/468);
- provide appropriate sanctions, including criminal sanctions (CP 2003/468).

Belgium completely misses the objectives of the following imperative provisions:
- a licence or written authorisation for EU brokering activities conducted on Belgium's territory (CP 2008/944 and CP 2003/468);
- an evaluation of the licensing applications (for brokering transactions) on the basis of the identical criteria as for export licences, namely the 8 criteria of CP 2008/944; as imposed by the CP 2003/468, licences may only be issued on the basis of reliable, prior knowledge about the end-use (CP 2008/944);

- a register to be kept for a 10-year period of brokers that have received a licence for brokering activities (CP 2003/468);
- information exchange with other member states about licences denied during the preceding 3 years, consultations, and justifications for the eventual non-conform decisions in that respect (according to the *no-undercut* principle of CP 2008/944);
- exchange of information with other member states, among others, about legislation, registered brokers (if of application), data about brokers, denials of applications for registration (if of application), and licensing applications (CP 2003/468);
- exchange of experiences with third countries (CP 2008/944).

Belgium partially follows (brokers) and partially fails to follow (brokering activities) the following optional measures in EU legislation:

- extension of controls to include brokering under national or 'intra-Community' laws (CP 2003/468);
- extension of controls to include brokering where goods from one's own territory are being exported (CP 2003/468)[94];
- extension to activities that are conducted outside one's own territory by own nationals who are resident or are based there (CP 2003/468)[95];
- evaluation of applications, taking into account any previous involvement of the applicant in illegal activities (CP 2003/468).[96]

One of the optional measures that are not followed by Belgium is:

- the introduction of a register of (licensed) brokers (CP 2003/468).

Finally, it should be noted that Belgium does not follow the broader international obligation prescribed by the UN Programme of Action, namely, export and brokering licences must be issued by the same authorities.

The scope of application with respect to arms

In the adaptation of Belgian legislation to the two Common Positions, Belgium will have to take the Common EU List as a point of reference. This list does not automatically apply in the EU member states, but must be the basis for national lists, as explicitly prescribed in Article 12 of CP 2008/944.

Belgium's list of military goods to which controls apply is currently laid down in the attachment to the RD of 8 March 1993. The list was most recently revised in the RD of 2 April

94 Here, Belgium fails to satisfy conditions concerning the control of activities, but does meet them for the control of persons, since the definition of broker is valid regardless of whether the goods are present on Belgian territory.

95 The same observation is also valid here: Belgium does not conduct extraterritorial control of brokering activities but does provide for limited extraterritorial control in art. 13 of the Law of 1991, across the scope of said extraterritoriality.

96 Again, Belgium carries out this practice in its control persons but not brokering activities.

2003, which introduced the extension of military materials with arms for the purpose of law enforcement and adaptations by analogy with the EU Common List of 13 June 2000. The Belgian list has not been revised since 2003, either by one of the Regions or by the federal state.

As stated in the description of the Belgian regime (see section 1.3.2) the Flemish authorities follow the most recent European list (which was extended to four additional categories). Nevertheless, the Council of State has repeatedly noted that the determination of the material scope of application cannot be delegated to the executive authority, nor on the basis of an administrative practice.[97] The Council of State bases its position on general legal principles: the legality principle that determines the relationship between the executive and legislative authorities.[98] In addition, the general principle of legal certainty,[99] is unquestionably an important reason for working out a judicial base for the updated EU List and for finding a flexible solution for regularly updating the list in the Belgian legislation.

2.2.4.2 Compliance with international legislation: 'intra-Community ' brokering

Because the EU Regulation applies only to extra-Community transfers, and even if Belgium satisfied the above-described EU Regulation with respect to arms (as well as for dual-use goods, see infra, section 2.2.5), there is still a vacuum concerning brokering activities in import and export transactions among the EU member states and from one EU member state to a third country.

Even though the control of arms transfers within the EU and exports from the EU is strictly regulated, illegal 'intra-Community' transfers with the intervention of brokers who are EU nationals, are resident or based within the EU, cannot entirely be excluded.

97 The Council of State opined in an advice note that "*the determination of the scope of application of the regulation, albeit by means of the adaptation of a European List* "of, *in casu*, military goods, cannot simply be left to the Flemish Government without breaching the principles that govern the relationship between the legislative and the executive authorities. In accordance with those principles, it is the decreer himself that shall lay down the basic rules or the essence thereof. See: Advice 44.6651 of the legislative department of the Council of State of 1 July 2008 concerning the draft decree on the import, export, and transit of and against the illegal trade of arms, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology, *Parl. Doc.*, Fl. Parliament, 2005-2006, no. 834-2, p. 7; see also Advice no. 36.628/1 Council of State, *op. cit.* pp. 6-7 and p 9 and Advice no. 36.629/1 Council of State, *op. cit.* pp. 8 and 11.

98 The legality principle holds, on the one hand, that the authorities can only act when they have legal grounds for doing so and, on the other, that the authorities themselves must act in accordance to the law. See inter alia P. POPELIER, *De wet juridisch bekeken – The law seen from a legal viewpoint*, Tijdschrift voor Wetgeving, Bruges, Die Keure, 2004, p. 53 *et seq.*

99 According to the Constitutional Court, the principle of legal certainty demands inter alia that laws must be foreseeable and accessible. See P. POPELIER, *op. cit.*, p. 48, see also M. VANDAMME and A. WIRTGEN, 'Het rechtszekerheids- en vertrouwensbeginsel' – The legal certainty principle and the principle of legitimate expectations, in I. OPDEBEEK and M. VAN DAMME (eds), *Beginselen van behoorlijk bestuur – Principles of good governance*, Die Keure, Administrative Legal Library, General series no. 1, 2006, p. 315 *et seq.*

Furthermore, there must be a specific legal ground in order to prosecute and convict illegal brokers (if not restricted to crimes against common law such as falsification of documents, bribery, etc.). For the sake of completeness, it should be noted that all the EU member states except Luxembourg need to have this relevant legal ground, since Belgium forms with Luxembourg a unified Customs Union, the so-called BLEU.[100] As a result, Luxembourg is not considered as a third country in the context of Belgian foreign trade. Concerning IE&T, the individual territories of both states are considered as a single territory.[101] And n the context of the Benelux customs union,[102] Belgium is required (as a minimum obligation) to consult with the Netherlands in order to safeguard a harmonized policy.[103]

In order to somewhat fill this 'intra-Community'[104] vacuum, Belgium has two options. First, it can make use of the possibility offered by the CP on brokering (art. 2.3, para. 2) and Directive 91/477 (art. 4) to extend the control to or adopt it for, respectively, 'intra-Community 'brokering. This would introduce a uniform regime for 'intra-' and extra-Community brokering.

If Belgium does not choose one of these alternatives, in principle it still needs to satisfy its international obligations. Because quite a number of instruments prescribe only consideration of concrete measures, the only provisions that are binding on Belgium are the following[105]:

- organizing the control of brokering by means of adequate legislation or administrative practices (i.a., WA Elements on brokering);
- providing adequate sanctions, including criminal sanctions, in order to effectively enforce the controls (i.a., WA Elements Brokering);
- demanding at least a licence or written permission for brokering between or among third countries for the activities that are being conducted on one's own territory, irrespective of the nationality or residence of the broker (i.a., WA Elements, brokering);
- assessing the applications on the basis of the principles and objectives stated in the official documents of the WA Arrangement (i.a., WA Elements, brokering);
- assessing the applications on the basis of the same criteria that are in force for export licences (OSCE Principles SALW);

100 The Belgian-Luxembourg Economic Union.

101 See G. CASTRYCK, S. DEPAUW and N. DUQUET, *op. cit.*, p. 58 *et seq.*; see also FLEMISH PEACE INSTITUTE, Advice of 16 January 2009 to the decree proposal of 10 July 2008 on the import, export, and transit and the combating of illegal arms trade, trade in ammunition, and materials specifically intended for military use or for law enforcement purposes and associated technology, *Parl. St.* Fl. Parliament, 2007-2008, no. 1555-3, p. 7.

102 Customs Union between Belgium, the Netherlands and Luxembourg.

103 See also FLEMISH PEACE INSTITUTE, Advice note of 16 January 2009, *op. cit.*, p. 7.

104 For the purposes of this study, 'intra-Community' is not to be understood in its common meaning (within the EC borders); rather, the term refers to brokering activities that do not come under the EU Regulation (EC brokering), that is, brokering among EU member states (purely intra-Community brokering) and between one EU member state and a third country (actually Community export).

105 There may be several instruments prescribing this; in this respect, see the overview on p. 38. In brackets, only one instrument is mentioned each time, by way of example. As a rule, the reference is invariably to one of the most imperative instruments.

- keeping records of individuals and companies that have been granted a legitimate licence (i.a. WA Elements, brokering);
- mutual information exchange among the participating states on international or regional organisations;
- promoting a common understanding of brokering in SALW (UN Programme of Action);
- the same authorities that are in charge of export licences ought also to have the competence to decide on licences for brokering (UN Programme of Action).

2.2.5 Specific observations with respect to dual-use goods

2.2.5.1 Compliance with EU legislation (extra-Community brokering)

The directly applicable Regulation 428/2009 on the control of the brokering in dual-use items entered into force on 27 August 2009. In spite of the Regulation's direct effect, Belgium, as all other EU member states, still needs to establish a number of operative provisions at the national level in order to make the new measure fully effective. This mainly concerns a number of concrete measures such as the licensing procedure itself, the manner in which the broker provides the competent authority with the required information, the period in which the licences need to be processed, the manner in which the authority then provides information to brokers, possibly the drafting of specific national forms for issuing the licence, and the manner in which brokers need to keep registers or records.

In addition, the national regulation needs to contain effective, proportionate, and deterrent sanctions, while a possible expansion of the scope of application for goods may be contemplated.

At the time of writing (November 2009), Belgium had not yet introduced the necesssary operative provisions, but it is not entirely clear whether this competence was assigned to the Regions or the federal authorities. At the time of the regionalisation, in 2003, the IE&T of military materials and dual-use goods was, in effect, transferred to the Regions while stopping the illegal arms trade remained a federal responsibility. Although brokering activities differ from IE&T, they are nonetheless an aspect of the arms trade, so in the context of controlling illegal trade it would belogical to understand this as a responsibility of the federal authority. Whether this is actually in with the spirit of the legislation is discussed in depth in the second part of the analysis (see *section* 2.3).

2.2.5.2 Compliance with international legislation: 'intra-Community' brokering

The same observation as regards military materials also applies to control of 'intra-Community' brokering in dual-use goods: the Regulation is not applicable to this control. Nor does the Regulation – in contrast to the two CPs on military materials – explicitly provide in the possibility to expand the prescribed provisions towards brokering under national law. As such, there are no EU prescriptions with respect to the control of brokering transactions between an EU member state and a third country and between and among EU member states themselves.

The Regulation does not explicitly exclude such an expansion. In case a member state opts for this, it must, by analogy with the provisions regarding licences for intra-Community 'transfers' (export among EU member states), take account of the imperative demands of the free movement of goods within the Community (cf. art. 22 – e.g., controls may not be instituted at the internal frontiers and the requirements must not be stricter for EU transfers than for transfers between third countries).

If Belgium does not decide to extent the Regulation to include intra-Community brokering, the only international prescriptions that bind Belgium are the provisions of UNSC Resolution 1540, which only suggest that states:

- organize and enforce compliance with (internal)[106] frontier and export controls through regulation;
- provide for sanctions in the event of non-compliance with the regulation;
- establish criteria in the national legislation for legal brokering; these criteria need to be conform to international law.

2.2.6 Conclusion: the compliance analysis

Our compliance analysis demonstrates a fundamental shortcoming in the Belgian legislation. In order to comply with the supranational obligations regarding the control of brokering in military *and* dual-use items, Belgium needs urgently to take steps towards setting up a regime for the control of brokering activities.

106 By analogy with the provisions of the Dual-use Regulation for IE&T, in the choice of the control regime for intra-Community brokering account must also be taken of the imperative requirements of the free movement of goods within the EC.

With respect to extra-Community brokering in arms, Belgium needs to adapt its regulation to the prescriptions of Common Position 2003/468 regarding brokering and the new obligations of the EU Code of Conduct on Arms Exports, as determined in Common Position 2008/944.

In the case of 'intra-Community' brokering, Belgium may choose between a uniform regime by expanding the prescriptions for extra-Community brokering and implementing the minimal provisions imposed by international and regional documents.

For extra-Community brokering in dual-use items, the provisions of Regulation 428/2009 have, as of 27 August 2009, applied directly. Belgium simply needs to adopt a number of implementing measures,[107] although the Regulation still applies (because of its direct applicability.[108]

Concerning 'intra-Community' brokering in dual-use items, Belgium has the same options as for military materials: it can expand the extra-Community regime or implement the (few international) obligations of UNSC Resolution 1540.

Concerning 'intra-Community' brokering, in transactions involving both military and dual-use items, Belgium must adhere to the imperative prescriptions on the free movement of goods within the European Community.

107 An EU Regulation - in contrast to e.g. a Directive – does not need to be incorporated in national law. In fact, even if national legislation does not contain the same control measure the provisions of the EC Regulation still apply within the national legal system. However, EU states may decide not to regulate certain aspects of the Regulation, in this case e.g. the procedural aspects, while in other cases they have no competence at all, e.g. to independently determine the type and extent of a sanction (the penal competence is a national issue). For such aspects, the member states themselves still need to adopt additional measures.

108 It does, however, significantly weaken the effectiveness of the provisions in the Regulation for several reasons. First, because of the lack of clarity on the procedures to be followed in order to satisfy the requirements of the Regulation, but also, and especially, since in the absence of sanctions there is no possibility to start prosecution proceedings and resort to penalties or criminal sanctions against those who do not comply with the Regulation.

2.3 Analysis of the effectiveness of the Belgian regime for the control of brokering

The second part of the present analysis concerns the actual effectiveness of Belgian regulations and administrative practice relating to the control of brokering.
The sections below address three questions:

- Who in Belgium has the competence for the control of brokering?
- How effective is the current regulation?
- How coherent is the present control regime?

2.3.1 Aspects of the competences regarding the control of brokering

2.3.1.1 General competence aspects

As mentioned above, in March 2003 Belgium introduced an artificial difference between, on the one hand, the import, export, and transit of military and dual-use goods and, on the other, the illegal arms trade.[109] This gives the impression that the control of IE&T for comabating the illegal arms trade is the responsibility of two different competence units, each pursuing a separate objective. Reinforcing that perception is the fact that the control of IE&T was regionalized a few months later, while control of illegal arms trade remained under federal jurisdiction. As is emphasized above, this does not conform to the international community's general view of the problem of illegal arms trade, which, for the purpose of combating it in every possible aspect, is looking towards a set of measures *among which* export controls, marking of the arms, information exchange, control of brokering and/or brokers, and the like.

109 Other aspects that have not been regionalised are: imports and exports to serve the armed forces and the police, the domestic arms trade, the possession of arms, the bearing of arms, and the manufacturing of arms. Within the context of this study, especially important are the relationship between the import, export, and transit of military materials and the combating of the illegal arms trade as two supplementary sections in the legislation on the foreign trade, regulated prior to the regionalisation within the wording of one act – the Law of 1991.

This artificial split makes it impossible to establish unequivocally whether the control of brokering in military and dual-use items falls under regional or the federal competence in Belgium. It depends largely on what is understood by IE&T and by the combat of the illegal arms trade. It could conceivably be argued that only IE&T matters have been explicitly transferred to the Regions and that all other aspects of the combat against the illegal arms trade, including the control of brokering activities (which differ from those of IE&T), remain under the federal jurisdiction.[110] The then Minister of Foreign Affairs, Louis Michel, described IE&T in 2003 as follows: "*By import, export, and transit, the draft means the cross-border movement of goods and technologies from and to the Kingdom's territory*"[111].

It can also be argued that the control of brokering is a complementary measure that serves to make the control of IE&T terminally conclusive, for instance, by ensuring that legal export (from whatever nation) effected through the activities of brokers active within Belgium be not diverted elsewhere, e.g., outside 'Belgian territory, to unauthorized destinations. In that sense, the control of brokering activities is inextricably linked to the control of IE&T and may be seen as a competence of the Regions on the basis of the theory of the 'implied powers'.[112] Article 10 of the Special Law of 8 August 1980 on the reformation of the institutions does, in fact, explicitly provide for the possibility that "*decrees (may) contain legal provisions and instruments in matters for which the Councils have not been issued with the competence, in so far as such provisions are deemed necessary for the exercise of their functions and competences*".[113]

110 See i.a. Advice no. 36.630/1 of the legislative department of the Council of State of 26 March 2004 on the Draft Decree amending the Law of 5 August 1991 on the import, export, and transit of and on the combatting of the illegal trade of arms, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology, *Parl. Doc.*, Fl. Parliament, 2003-2004, no. 1979-2, p. 6, which holds that the Special Law of 8 August 1980 "*transfers only the mentioned aspects, and not the totality of the international arms trade issue to the Regions*".

111 Report on behalf of the Commission for the institutional matters of 25 July 2003, *op. cit.*, p. 2.

112 The Council of State has issued a reminder that the Court of Arbitrage has already on several occasions stressed that the proportionality principle needs to be taken into consideration in the exercise of the assigned competences, thus to ensure that another legislator not be burdened with exaggerated or impossible impediments in the exercise of his competences; see Advice no 44.666/1 Council of State, *op. cit.*, p. 13 and Advice no 36.629/1 Council of State, *op. cit.*, p. 7.

113 Article 10 of the Special Law of 8 August 1980 towards the Reformation of the Institutions, *BOJ* 15 August 1980, which concerns additional-implicit competences, see: J. DUJARDIN and J. VANDE LANOTTE, *Inleiding tot het publiek recht, Deel I Basisbegrippen – Introduction to public law, Part I Basic Concepts*, Bruges, Die Keure, 1994, p. 141 and p. 223; M. UYTTENDAELE, *Précis de droit constitutionnel belge: regards sur un système institutionnel paradoxal – Summary of Belgian Constitutional Law – opinion on a paradoxical institutional system*, Brussels, Bruylant, 2001, p. 782 and p. 813 *et seq.*; F. DELPÉRÉE and S. DEPRÉ, *Le système constitutionnel de la Belgique – The Belgian Constitutional System*, Bruxelles, Larcier, 1998, pp. 294-295. In addition, there exist also inherent-implicit competences whose existence is recognized without their having an explicit legal basis, see: R. SENELLE, *Teksten en Documenten, Verzameling "Ideeën en Studies" nr 326, De Staatshervorming in België, Deel III, De regionale structuren in de wetten van 8 en 9 augustus 1980- Texts and Documents, Collection "Ideas and Studies" no 326, The State Reformation in Belgium, Part III, The regional structures in the Laws of 8 and 9 August 1980*, Ministry of Foreign Affairs, Brussels, 1980, p. 133 *et seq.*

Neither of these arguments offers a conclusive answer to the question of the assignment of competences, and neither the advisories from the Council of State[114] and the Parliamentary preparations of the Special Law of 2003, nor those pertaining to the Laws of 25 and 26 March 2003, nor those with the new Weapons Act of 2006, clarify these points.[115] On the contrary, they all perpetuate the same inaccuracies and contradictions, primarily by confusing or equating the control of various categories of persons involved in the arms trade with control of the arms trade by ignoring the fact that there exiarest various categories of activity.

Notwithstanding the legislators' good intentions in adopting in 2003 provisions with respect to the control of brokers, the manner in which the existing legal framework has been adapted has, inadvertently, created a problem of interpretation with respect to the assignment of competences between Belgium's federal departments and Regions,[116] Since those provisions pertain only to military materials, the sections below deal with this issue and then scrutinise the implications for the control of *dual-use goods*.

2.3.1.2 Competence for the control of military materials

The distinction in Belgian legislation between IE&T and the combating of illegal arms trade pertains only to the trade in military materials, since it is the Law of 1991 (concerning the IE&T of arms, ammunition, and materials specifically intended for military use and associated technology) that, in its title, breaks down the foreign trade on those goods.

114 See i.a. Advice no. 44.666/1 Council of State, *op. cit.*, pp. 11-12, where the Council of State explicitly states that the provisions with respect to the illegal arms trade have remained a federal issue. The advice was proffered with a decree proposal that was intended to replace the provisions in the Law of 1991 by a Flemish decree. The proposal literally takes over the provisions in Title III of the Law of 1991 (art. 10 through 13), and encompasses, as such, only the control of arms traders and brokers. The position of the Council of State cannot therefore lead us to discover whether a control of *brokering activities is a* federal competence (as being part of the combat of the illegal arms trade) or a regional competence (as being part of the control of import, export, and transit). The Council of State likewise considers the fact that the illegal arms trade exceeds the territorial competence of the Regions as an additional argument for the federal competence.

115 Draft of the Special Law amending the Special Law of 8 August 1980 towards the reformation of the institutions, *Parl. St.* Senate, BZ 2003, no 89/1.

116 Even had IE&T not been regionalized, the split between IE&T and the combating of the illegal arms trade in the title of the Law of 1991 would have led to problems in interpretation and brought about a lack of criteria to uniformly and unequivocally assign all aspects other than the control of IE&T and the control of persons involved in the trade in military materials (combating of the illegal arms trade) as a competence. Without regionalisation, the discussion would no doubt have been carried on between two federal departments: the FPS–Economy and the FPS–Justice. See also the discussion below.

A elucidation on this distinction is given in the initial legislative proposal of 9 February 2000, which was meant to add 'the combating of the illegal arms trade' to the Law of 5 August 1991, albeit one needs to read between the lines of this statement.[117]

The only provisions currently in Belgian regulations with respect to the control of brokering – the obligatory licence issued by the Ministry of Justice for brokers (art. 10), the prohibition to violate embargoes (art. 11), the specific criminal sanctions in case of non-compliance (art. 12), and the extraterritorial competence of the Belgian courts (art. 13) – were adopted after a number of reports noted that Belgium is *"being used all too frequently as a starting base for illegal arms trade"*.[118]

The problem was brought to light by citing the example of a shipping firm with its registered seat in Ostend that collected arms in Ukraine and from there delivered them to their final destination. Since the goods never entered Belgian territory, there was no question of export and, on the basis of the Law of 5 August 1991 that regulates the IE&T of arms, no prior control of such activities was possible, nor was there any question of prosecution or sanctioning in case of a suspicion or evidence of demonstrable illegal activities.[119]
In other words, before 2003, there was no legal basis on which to act *ex ante* or *ex post* versus activities in cases where goods did not enter Belgian territory.

Principally in order to prevent arms embargoes from being circumvented though this kind of activity, the legislative proposal advocated that " *every activity in the sector of arms trade be subjected to a preliminary licence. The Minister of Justice shall lay down the conditions that persons wishing to obtain such a licence must satisfy* ".[120] This passage does, however, point to an immediate contradiction: there is to be a control of every *activity* … by imposing additional prior conditions upon *persons* who conduct such activities. Ultimately, no licence was imposed on brokering activities, only on the persons, whereby the 'prior' character of the licence affected only the arms traders that had need of an IE&T licence.
The motivation for choosing to license persons can largely be explained by the diversity and specificity of unauthorized activities. As stated in the explanation: *"It does of course not suffice to combat illegal trade towards those regions that have been placed under an embargo. It is important that anybody who is operating in the grey area between legal and illegal arms trade be subjected to control: the brokers, the transporters, the lobbyists"*.
In fact, this passage shows up a second contradiction: illegal trade encompasses more than transfers to regions under an embargo, yetno other evaluation criterion was intro-

117 It is not so much the explanations with the legislative proposal *per se* that offer clarification, but rather the explanation as put in a chronological perspective of the successive amendments to the Belgian legislation *and* as seen in the context of the characteristics of the problem of illegal arms trade and brokering, as they are primarily evidenced in international documents and regulations.

118 Legislative proposal of 9 February 2000 towards the amendment of the Law of 5 August 1991 concerning the import, export, and transit of arms, ammunition, and materials specifically intended for military use and associated technology and supplementary to the prior title of the Criminal Code, *Parl. St.* House 1999-2000, no 431/1, p. 1 and p. 3 (further referred to as legislative proposal of 9 February 2000), See also V. MOREAU, *loc.cit.*, pp. 6-7.

119 Legislative proposal of 9 February 2000, *op. cit.*, p. 3.

120 Legislative proposal of 9 February 2000, *op. cit.*, p. 4.

duced. A few lines down, one reads the following: "*Furthermore, every firm or every person that violates the arms embargoes faces a definitive and irrevocable rescission of the licence*".[124] This once again illustrates both contradictions: the intent is to remove illegal traders and for that purpose a procedure is provided to check the 'reliability or the trustworthiness' of the individuals involved, but without controlling their activities (brokers); and the licence would only be revoked in the case of a violation against an embargo (which does rather prove untrustworthy *conduct*, but is, in the first instance, an illegal *activity*).

The Belgian authorities tried to resolve the difficulty in regulating illegal IE&T that is not carried out onBelgian territory by imposing control on the 'reliability' of the persons who engage in such activities. And, because it does not pertain to import, export, or transit, these provisions have been added under another label to the Law of 1991, namely, 'combating the illegal arms trade'.

But in 2003 this was not a true control for the following reasons:

- Title III 'combating the illegal arms trade' in reality encompasses only a few *specific aspects of such an effort:* the control of the reliability of arms traders and brokers, a prohibition to engage in the activities of arms trader and broker with violation of an arms embargo, the extraterritorial competence of the Belgian courts in well-defined cases (for more detail see below).
- The control of the regular IE&T *also* forms part of the combating of the illegal arms trade.
- Other measures, such as the marking of arms, arms stock control, information exchange, (criminal) sanctions, etc., are also part of the effort against the illegal arms trade.

If the name of Title III is reduced to – or interpreted in the sense of – the meaning that is compatible with the objective and the scope of the provisions within its purview, namely '*some specific aspects of the combating of the illegal arms trade*' or '*the control of persons involved in the trade in military materials*', this would be a workable basis for judging the distribution of competences between the Regions and the federal authorities.

This leads us to the crucial observation that Belgium in reality is not promoting a global policy to combat the illegal arms trade *in all its aspects* the control of brokering activities, strictly speaking, falls neither under the description of IE&D nor under Title III with respect to the specific aspects of what constitutes the combating of illegal arms trade. The reason is that Belgium has taken only *ad hoc* account of the changing circumstances in, and insights into, international arms trade, and at no time has re-examined the problem from a global perspective.[121]

121 About the structural absence of an encompassing overarching measure...for all aspects of a problem to be regulated, see: K. VAN HEUVERSWYN *Leven in de Risicomaatschappij Deel 3: Aanbevelingen voor doeltreffend risicoreguleringsmanagement – Living in the Risk Society Part 3: Recommendations for effective risk regulatory management* -, Antwerp, Garant, 2009, pp. 69-88 (an explanation for the absence of a vision), and p. 125 *et.seq.* (recommendations to reinstate oversight)

Among other factors, the *ad hoc* approach is evident from the following chronological account of events:

> Until 2003, the arms trade was exclusively regulated at the federal level in the Law of 1991 on foreign trade, and in the Law of 1933 on internal arms trade. The Law of 1991 had deleted military materials from the general (federal) IE&T Law for reason of their specificity.
>
> When, as of the 1990s, it gradually became apparent that there does indeed exist a different form of arms trade that is not either external or internal trade, but nonetheless traverses the objectives of legal arms trade, namely brokering, and when, as of 1997, reports have exposed Belgium's role therein, the Law of 1991 was adapted in March 2003, under the voluntaristic but unfortunate name of 'combating the illegal arms trade'.
>
> A few months later, in August 2003, IE&T was (officially) regionalized because of the coherence between 'economic interests, aspects of employment, and aspects of the sales and export policy'.[122] The evaluation in the context of licensing based on the 'trustworthiness' of persons as regards both internal and foreign trade was centralized within the purview of the (federal) Minister of Justice because of the cohesive aspects of the arms trade.[123]

The fact that there is also coherence between the control of internal trade and control of external trade, on the one hand, and coherence between the evaluation of persons and the evaluation of activities, on the other, is noted only by the Council of State and a few professors of international criminal law. Prior to the regionalisation, Professor Eric David argued in an advisory note to a proposal for amendment of the Law of 1991 the desirability for "*the legislator to consider joining those two texts* (e.g., the Law of 1991 and the Law of 1993), *or having them coordinated, in order to turn this instrument into one single coherent whole unit*".[124]

122 Explanatory Memorandum with the draft of the Special Law of 22 July 2003 towards the amendment of the Special Law of 8 August 1980 towards the reformation of the institutions, *Parl. St.* Senate, BZ 2003, no 89/1, p. 2

123 Explanatory Memorandum with the bill of 7 February 2006 concerning regulating economic and individual activities involving arms, *Parl. St.* House, 2005-2006, no. 51-2263/01, p. 7, "*The first objective of this bill (the new Weapons Act) is to centralize the entire arms problem in Belgium, with the exception of the problem of licensing for import and export, within the purview of the Minister of Justice, this with a view to its coherence*" (further referred to as the Explanatory Memorandum to the Weapons Act).

124 Advisories by experts to the legislative proposal of 28 May 2001 towards the amendment of the Law of 5 August 1991 concerning the import, export, and transit of arms, ammunition, and materials specifically intended for military use and associated technology, and complementary to the prior title of the Criminal Code, *Parl. St.* House, 2000-2001, no. 431/9, p. 17.

Following the regionalisation, the Council of State has several times cautioned against the possibility of conflicts and offered the advice to conclude a Cooperation Agreement.[125] The Council of State pointed out two instances where the scope of application of both the said Laws can overlap: first, with respect to the list of prohibited arms, and, second, with reference to the authorisations based on the Law of 1933 (the former Weapons Act) and the import licences based on the Law of 1991.[126]

At the time of writing these recommendations are still relevant – actually, more than before - because the supranational provisions, which impose controls on brokering activities through regulation or administrative practice, oblige Belgium to examine the combating of the illegal arms trade *in all its aspects* and to evaluate who, i.e. at which administrative level, has the competence for each specific aspect. Moreover, the UN Programme of Action requires that brokering and arms trade be controlled by the same services.

2.3.1.3 Competence aspects with respect to the control of dual-use goods

For dual-use items, there is only the provision in the Special Law of 2003 that regionalizes the control of IE&T. There are no comparable provisions with respect to the illegal trade in dual-use items, nor is there Belgian legislation dealing with the persons who transact deals in dual-use items or facilitate the trade in such goods. Nonetheless, because these goods can be used in WMD, the control of the (brokering of) trade in dual-use items is a real aspect of the problem presented by the illegal arms trade. Also for these goods, the question who has the competence to implement the new provisions of Regulation 428/2009 with respect to brokering is still unanswered.

With a view to the implementation of the prescriptions concerning brokering in dual-use goods, in the course of 2009 the relevant Belgian departments held consultations on the question of which office should assume responsibility in the matter. The FPS–Foreign

125 Advice no. 38.231/VR/4 of the Council of State of 21 April 2005 to the legislative proposal of 7 February 2006 concerning a regulation on economic and individual activities involving arms (the new Weapons Act), *Parl. St.* House, 2005-2006, no. 2263/01, p. 72; see also Advice no 36.360/01 of the Council of State of 26 March 2004 to a decree proposal concerning the amendment of the Law of 5 August 1991, *Parl. St.* Fl. G., 2003-2004, no. 1979-1, p. 9. Also because the federal authorities retain competence for the import, export, and transit licences to the armed forces and the police, a cooperation agreement is advisable; see Advice no. 44.666/1 Council of State, *op. cit.*, p. 14.

126 See footnote 12 to the Advice no 38.231/VR/4 of the Council of State *op. cit.*, p. 72, and footnote 6 with Advice no. 36.360/1 of the Council of State *op. cit.*, p. 9 and footnote 4 with Advice no. 36.629/1 of the Legislative Department of the Council of State of 26 March 2004, to the decree proposal concerning the import, export, and transit of arms, ammunition, and materials specifically intended for military use or for law enforcement purposes and associated technology, *Parl. St.* Fl. Parl., 2003-2004, no. 1824-2, p. 8. Also because of the inter-relationship with the Customs Legislation and the fact that the federal authorities also retain competence for other import, export, and transit licences (armed forces and the police), the Council of State recommends a cooperation agreement.

Affairs, the Customs Administration, and the three Regional control services, by mutual consultation decided to entrust this implementation duty to the Regions. For their legal grounds, they resorted to the territoriality criterion: the definition in the Dual-use Regulation describes a broker as a natural or legal person who *resides* or is *based* on the territory of the regulating member state with jurisdiction. In itself, this reasoning is correct, on condition that, in the same manner, the federal competence in the combating of the illegal arms trade be interpreted in a narrow sense (see the explanation with the competence concerning military materials above).

2.3.2 Effectiveness of Belgian regulations

Aside from the question of who in Belgium has the competence to control brokering activities, and also aside from the need to regulate them, the analysis examines whether aspects that are currently regulated by law are effective. This involves the question whether the authorities are in a position, by means of the current prescriptions, to realize the legislators' objectives, namely, the combating of the illegal arms trade and, in particular, the control of brokers.

In the sections below the four articles of Title III of the Law of 1991 are tested for their effectiveness.

2.3.2.1 Effectiveness of the preliminary licensing system (art. 10)

In the description of the Belgian regime it was stated that the provinces only seldom receive an application for broker accreditation in the sense of the Weapons Act, and no data on brokers was entered in the 2006-2008 report by the Federal Arms Department. The Federal Arms Department of the Ministry of Justice confirms that, since 2003, it has not issued a preliminary licence to any broker in the sense of article 10 of the Law of 1991.[127]

In consequence, it is not clear whether brokers accredited by the provincial governors are transacting only arms in Belgium that fall within the purview of the Weapons Act, or if these brokers have neglected to apply for a licence from the Ministry of Justice. Nor is it clear if the fact that the Ministry does not receive applications means that brokers in military materials are not (no longer) active in Belgium.

127 See also V. MOREAU, *loc.cit.*, p. 11.

As stated in the description of the Belgian control regime, arms traders do not generally know that they must have a preliminary licenceamong. As a result, exporters of military materials do not apply for such a licence with the Ministry of Justice, as prescribed by the regulation, but have to be referred to the Ministry by the Customs or Regional Services. Since Belgium does not control the activities of brokers, there is no office to ascertain and ensure that such persons have received a preliminary licence by the Ministry.

The fact that brokers do not voluntarily submit applications to the Ministry of Justice may well mean that this requirement is also unknown to them, or it may be that they simply do not apply. In both cases, it may be assumed that the current system is not working properly since it does not make any provisions for 'catching' brokers or for implementation of the preliminary licence procedure.

2.3.2.2 Effectiveness of the sanctions (art. 11-12)

Title III of the Law of 1991, in its article 12, provides for sanctions in case of non-compliance with the provisions in article 10 (preliminary licence requirement) and article 11 (obligation to abide by embargoes). Because of the limited possibility for preventative control of brokers (since there is no mechanism to 'catch' or to urge them to apply for the preliminary licence), the criminal sanctions in article 12 offer the only means to act against malafide brokers and their illegal activities. These sanctions are, however, only a small measure to try to punish illegal transactions.

Article 12, in combination with article 10, makes prosecution and sentencing possible for the conduct of brokering activities without a preliminary licence. Given that it pertains to an official requirement, the burden of proof for this is not likely to prove problematic. If brokers can only be prosecuted for the lack of a licence, this would constitute only a very weak sanctioning measure that could hardly be expected to have a deterrent effect. This problem is addressed in article 12, in combination with article 11, by providing for the possibility to punish brokers for the illegality of their activities –violation of an embargo. However, compliance with this provision is, in practice, very difficult to check without an evaluation of the activities carried out; and such an evauation is not part of the screening process to establish the 'trustworthiness' or the 'reliability' of the traders involved.

Moreover, there remains the question whether this provision does in fact belong under Title III '*combating the illegal arms trade*'. Concerning the activities of arms traders, the Regions are, on the basis of the licensing procedure for IE&T, the only authorities empowered to make such a judgement. For brokering activities, for which there is still no procedure for assessing individual transactions, the question may be asked who is actually in a position to pass judgement on conformity with article 11 and to pass on such information to the Ministry of Justice, which, in turn, should take this into account in issuing licences to

brokers, or to the Prosecutor's Office, with a view to taking legal steps on the grounds of article 11.

In other words, the effective gain to be derived from the sanctions in article 12 is, in practice, limited to one element, the licensing of persons, while the ultimate objective, the combating of illegal brokering, cannot be prosecuted because of the lack of control of brokering activities.

2.3.2.3 Effectiveness of extraterritoriality (art. 13)

Article 13 of the Law of 1991 prescribes the following (autor's translation): "*The Belgian courts are competent to entertain the offences stated under this title that have been committed outside of the Belgian territory, when the suspect has been apprehended inside Belgium, even in cases where the Belgian authorities have not received from the foreign authorities any complaint or official communication, and this even when the activity in casu is not liable for prosecution and penalisation within the country where it was committed.*"

By the placement of Article 13 (at the end of Title III), and by its wording, the extraterritorial validity of this provision is much less significant than would appear at first glance: as it stands it is, in fact, only valid for the 'offences stated under this title' or, in other words, for the transacting of military materials without being in possession, as trader or broker, of a licence, and for acting – as a licensed person – in violation of an arms embargo to which Belgium is bound. Strictly speaking, these are the only two offences for which the extraterritoriality principle is valid.[128] In effect, it is the "*persons meant in Article 10*" that Article 11 prohibits from violating embargoes while, for instance, for a violation of human rights or contributing to terrorist activities, or for violations of one of the other criteria of the EU Code of Conduct on Arms Exports, there is no extraterritorial validity.

According to the initial legislative proposal of February 2000, the extraterritorial validity appears to have in any event been the legislators' intent: "*there must be extraterritorial legislation adopted to curb violations of arms embargoes*".[129]

128 The extraterritoriality of art. 13 is, in fact, often misinterpreted and misrepresented in the literature on the topic. There is praise for 'the extraterritorial validity of the Belgian legislation', without clarifying what this legislation entails in concreto: see e.g. H. ANDERS, 'Controlling arms brokering', l.c., p. 10; H. ANDERS, 'European Union standards on the control of arms brokering', GRIP/ IANSA,presentation at UN Workshops on illegal brokering in SALW, May-June 2005, p. 7 http://disarmament.un.org/CAB/brokering/Presentation%20UN%20brokering%20workshop%20-%20HA%2028.06.pdf; S. CATTANEO en S. PARKER, *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, 2008, p. 79 and p. 70; X, 'Best practice in the regulation of arms brokering', Saferworld paper directed to the Group of Governmental Experts on Brokering, March 2007, p. 4, http://www.saferworld.org.uk/publications.

129 Legislative proposal of 9 February 2000, *op. cit.*, p. 3.

The analysis asks whether this extraterritorial validity is not formulated too restrictively in the light of the objective in Title III, the combating of the illegal arms trade, which encompasses more than just abidance by arms embargoes.[130]

2.3.3 Internal coherence of Belgian regulations

As a final aspect, the analysis examines whether the Belgian control regime is internally coherent: whether the various procedures are in harmony with one another. For the sake of completeness, it needs to be kept in mind that the prior licensing procedure applies only to military materials, not to dual-use goods.

Given the observation that, since 2003, brokers have not submitted any applications according to the Law of 1991, this part of the analysis is a purely theoretical mental exercise. Nevertheless, it is relevant to assess the internal coherence among existing procedures, starting from the question whether these procedures have been logically developed and attuned to one another in order to ensure effective control, *assuming one would find a solution to actually 'catch' brokers'*.

Below, we offer reflections on the existence of various definitions, the degree to which the current procedures account (or fail to account) for the differences between the activities of arms traders and brokers, the varied forms of the material scope of application, and the process followed in practice for the advice procedure with applications for a licence.

2.3.3.1 Harmonisation of the definitions of 'broker'

As stated in the discussion of the description of the Belgian control regime, Belgium has adopted a (preliminary) licensing procedure for brokers (based on the Law of 1991) and an accreditation procedure for brokers (based on the Weapons Act). Both laws define brokers. The definitions both state "*irrespective of whether or not the goods are to be present on the Belgian territory*", which can result in confusion regarding internal and external trade. From the perspective of the Weapons Act, it is surprising that brokering could per-

130 See also E. CLEGG, op. cit., p. 12, who argues that arms embargoes are only imposed as a sanction "after the situation in a particular country or sub-region has deteriorated to the extent that the international community feels compelled to act". In other words, with respect to international security and stability, the embargoes exert absolutely no preventative effect.

tain to goods that will not be present on Belgian territory, given that the Weapons Act regulates the internal trade. What is most likely meant is: without the brokers being themselves in possession of the goods that they are transacting. Within the context of the Law of 1991, one could ask whether a transaction in which the goods are physically on Belgian soil does not fall under the customs qualification and designation of import, export, or transit. Indeed, such transactions on Belgian soil fall under the control regime for IE&T (arms trade) and, strictly speaking, do not pertain to brokering (trade between third countries).[131]

A second aspect concerns the difference between both definitions of broker[132] with reference to the description of the brokering activities. The definition in the Weapons Act offers a broader description (more activities) than that in the Law of 1991, which may be explained by the different finality of both these Laws, respectively the control of internal *versus* control of the external trade. Nevertheless, the use of the identical terminology but with a different connotation may, depending on the wording of the Act in which it occurs, be confusing.

2.3.3.2 Procedures for arms traders

In the introduction of the provisions with respect to the combating of the illegal arms trade, for the sake of simplicitythe legislators chose to expand an existing procedure, e.g., the accreditation based on the Weapons Act. In this process, they failed to be consistent in dealing with two different categories of persons, e.g., arms traders and brokers, who are conducting two entirely different types of activity.

The general obligation to make application for a licence from the Ministry of Justice, in accordance with art. 10, para. 1 of the Law of 1991, bears on both arms traders and brokers. Article 10, para. 2, defines "*a broker*". By the 3rd paragraph, brokers seem to have been forgotten: the conditions are established that a person needs to meet in order to receive a licence, and these are described only for "*the arms traders accredited in conformity with the law*". According to a strict interpretation, no further modalities and conditions for brokers have been established (no need for accreditation, no morality conditions, no guarantee, etc.).

131 See also V. MOREAU, *loc.cit.*, p. 8.

132 Art. 10, 2nd sub-paragraph Law of 1991 (author's translation): "any person who, either against payment of, or without, a fee, creates the conditions leading to the conclusion of an agreement for the purpose of transacting, trading, exporting, or delivering to a foreign country, or for that purpose holds in his possession, arms, ammunition, or materials specifically intended for military use and associated technology, irrespective of the origins and the destinations of the goods and irrespective of their possible presence on the Belgian territory"
Art. 2, 2° Weapons Act: "any person who, in return for the payment of, or without, a fee, creates the conditions leading to the conclusion of an agreement that has for its subjects the manufacturing, the repair, the modification, the offering, the acquisition, the transfer of firearms, or any other method of making firearms available, plus parts and components or ammunition thereof, irrespective of their origins or destinations and irrespective of the possible presence of the goods on the Belgian territory, or who concludes such an agreement when the transport is executed by a third party."

If it was the legislators' intent to have the conditions of Article 10, para. 3 apply to both brokers and arms traders, the question is how brokers can satisfy the imposed conditions. Article 10, para. 3.1 states that "*all legal conditions must be satisfied in order to be accredited at the time of application as arms trader*". The accreditation is regulated in the Weapons Act. Both arms traders and brokers need, on the basis of Article 5, §1 of the Weapons Act, an accreditation for trade in the arms that fall within the scope of application of the Weapons Act. Article 5, §2 determines that the "*applicant*" - both arms traders and brokers - needs to be able to prove professional competency in the field. The modalities of the professional competency examination are regulated in the RD of 16 October 2008. However, this RD regulates only the status of the arms trader. No provision mentions brokers. Strictly speaking, these prescriptions do not apply to brokers. All other provisions of the RD of 16 October 2008 with respect to the professional deontological principles, duties and responsibilities are clearly directed towards the activities of an arms trader, so it is difficult to accept that brokers *implicitly* fall within the scope of application of this RD.

It is therefore not at all clear how a broker can satisfy Article 5, §2 in order to prove professional competency in the field and receive accreditation as broker on the basis of the Weapons Act. Nor is it clear how a broker could satisfy the conditions for receiving accreditation if one interprets Article 10, 3rd paragraph in the sense that no official accreditation is required.

2.3.3.3 Variances in the material scope of application

Problems of interpretation similar to those described above follow from the difference in the material scope of application in the Weapons Act vis-à-vis that in the Law of 1991. Whoever as arms trader or as broker in the sense of the Law of 1991 submits an application for a licence to the Ministry of Justice needs to present "*a copy of his certification of accreditation pertaining to arms and ammunition*" (cf. the Weapons Act) "*in cases where he exercises activities as meant in the afore-mentioned law*"[133] (the Weapons Act). The material scope of application is, however, more restrictive when it pertains to military materials than it is in the Law of 1991. This implies that there are certain categories of arms for which brokers and arms traders need a licence from the Ministry of Justice on the grounds of the Law of 1991, whereas the scope of application of the Weapons Act does not prescribe such accreditation.

Also in this instance, it is unclear whether this means that for those arms (that are listed on the list in attachment to the RD of 1993 and that do not fall under the Weapons Act) all legal conditions must be met in order for the applicant to receive accreditation, without there being official need of such an accreditation. The implementing RD of 16 May 2003 appears to confirm this: a copy of the certification of accreditation is demanded "*if appli-*

133 Art. 1., 1° Royal Decree of 16 May 2003.

cable to him" (art. 3, para. 3). This leaves us with the question what is to happen when it is not applicable to him: is there to be still another testing (without official accreditation) or is there to be a total absence of any testing?

2.3.3.4 The advice procedure

According to the procedure prescribed in the RD of 16 May 2003, it is incumbent on the Federal Arms Department to request with any licence application the reasoned advice from: the Public Prosecutor's Office of the district where the applicant is located; the governor who has issued the accreditation as arms trader, case pertaining; the Belgian Security Service, the Federal Police, and the licensing service of the FPS–Economy. Since 2003, it is no longer the FPS–Economy, but rather the regional competent services (the Arms Trade Monitoring Unit for Flanders) that have become engaged in the procedure.

It appears from the description of the administrative practices that the procedure imposed in the RD is, at least in part, not adhered to and that, in reality, the chronological order in which the steps in the process ought to be performed is being reversed. Arms traders do not first approach the Ministry of Justice and then, after receiving a preliminary licence, apply for an IE&T licence. In practice, it is the Customs or the Regional Services that refer arms traders to the relevant Ministry. With respect to brokering, there is not a single service to control brokers' activities. As a consequence, there is no one to refer them to the Ministry. Since the prescribed procedure is not followed because it is not deemed workable in practice, there is cause to question the reason for its existence and to re-evaluate it in the light of the experience gained since 2003.

2.3.4 Conclusions with respect to the effectiveness of the Belgian regime for the control of brokering

In order to check the effectiveness of Belgium's control of brokers, we examined three aspects: the allocation of relevant competences, the effectiveness, and the internal coherence. Because of the inaccurate formulations in the provisions of Title III '*combating the illegal arms trade*', which were intended primarily to control brokering, the Law of 1991 as amended in 2003, in spite of all good intentions, falls short of its aims.

In the first place, the name of both the Law and Title III that introduces it - 'combating the illegal arms trade' - is inadequte. Only certain specific aspects are regulated. As a result of the broad description in proportion to the scope of the provisions, confusion has been created about the competence to control brokering activities. Strictly speaking, they do not fall under regional competence for IE&T since the activities are different, nor do they fall under Title III, which has remained a federal competence.

Likewise, the confusing formulation of the conditions needed to receive a licence according to Article 10, the fact that brokers are sometimes mentioned in the operative provisions and sometimes not, the lack of clarity about the implications of the differences in material scope of application of the Weapons Act and the Law of 1991, the limited formulation of the extraterritorial validity of article 13, and the doubts about the feasibility to control the obligation to comply with embargoes (art. 11) all demonstrate that the current provisions do not constitute a coherent entity and are not of a nature to enable the execution of effective control. It appears as if no further thought was given to brokers in formulating the operative provisions.

Moreover, because of the absence of a mechanism to 'catch' brokers with respect to their possession of the preliminary licence, and the lack of a procedure to control brokering activities, criminal sanctions have no preventative value and only very limited repressive value. It should come as no surprise then that, since 2003, no broker has received a preliminary licence.

This observation alone would have been enough to question the effectiveness of the present control regime.

2.4 Conclusion of the analysis

In the light of all the above observations, we summarize the findings of the analysis of Belgian regulations and administrative practice with respect to the control of brokering in military and dual-use materials in the following sections.

2.4.1 Summary overview of the findings of the analysis

With respect to the compliance with supranational obligations

Belgium barely meets the obligatory standards and those only for consideration that are prescribed by supranational instruments. The principal lacuna is the absence of control of brokering activities, with the result that a large number of other related provisions have not been regulated either. Since August 2009, this pertains only to military materials, since EC Regulation 428/2009 introduced a directly applicable control regime with respect to dual-use items.

The effectiveness of the Belgian control regime

Three observations are noteworthy. Except for the competence aspect, they pertain exclusively to the control of brokering in military materials, since there is no specific Belgian legislation on dual-use items.

First, the present provisions for the assignment of competences do not give an unequivocal determination on whether brokering belongs to the regionalized domain of IE&T or has remained a federal competence under the title 'the combating of the illegal arms trade'.

The analysis of the effectiveness of the current Belgian control regime clearly demonstrates that the provisions that were added in 2003 entirely fail to control brokers. Since 2003, there has not been a single instance where the procedure was used. The reason for this lies in the absence of a mechanism that allows brokers to be 'caught' or that encourages them to voluntarily apply for a preliminary licence. The sanctions provided under the law on the non-possession of such a licence are the only aspect of some merit, enabling repressive action against brokers and leading to penalisation. On the other hand, the added value of the sanctions is limited since, in practice, it is difficult to prosecute a broker for violating an embargo without a mechanism that permits control of brokering activities and follow-up.

In sum, the analysis shows that Belgian legislation takes minimal account of:
- the specificity of brokering activities; and
- the difference in the problem of control between internal (domestic) and external (foreign) brokering.

2.4.2 Evaluation of the findings on coherence

All our findings, both those on compliance and those with regard to effectiveness, lead to the conclusion that Belgium has failed to gain adequate insight into the specific problem of brokering in the arms trade and, in addition, has failed to develop a global or holistic vision[134] of how to combat of the illegal arms trade in all its aspects. This shortcoming encompasses, on the one hand, the foreign arms trade by way of import, export, and transit, plus other activities such as brokering; on the other hand, there is also internal trade. Among the crucial aspects needing regulation are: definitions of activities and of the individuals carrying them out, control measures (including evaluation criteria and a correct procedure), and appropriate sanctions. All these elements should be regulated as one whole, coherent entity.

134 On the need for a *holistic* vision as the fundamental first step towards the determination of an effective policy, see K. VAN HEUVERSWYN, *Leven in de risicomaatschappij Deel 1, Negen basisvereisten voor doeltreffend risicomanagement – Living in the risk society Part 1, Nine basic requirements for effective risk management*, Antwerp, Garant, 2009, p. 330 *et seq.*; on the absence of a holistic vision in Belgium, see: K. VAN HEUVERSWYN, *Leven in de risicomaatschappij Deel 2 - Living in the risk society Part 2*, *op. cit.*, pp. 441 and 469 *et seq.*; see also recommendations with respect to a holistic vision: K. VAN HEUVERSWYN, *Leven in de risicomaatschappij Deel 3 - Living in the risk society Part 3*, *op. cit.*, pp. 21, 30, 69 and 127.

3
Recommendations for the control of brokering in Belgium

Chapter 3 presents a synthesis of the previous two chapters, starting from the findings of the analysis of the Belgian regime, the measures that impose binding supranational instruments, complemented by the insights and guidelines taken from good practices and international recommendations.[135]

First, we present a summary of the strengths and weaknesses of the current control regime in Belgium. Next, concrete recommendations are suggested to optimize the legal framework for the control of brokering in Belgium. They pertain to:

- the need for clarity concerning the allocation of competences;
- the importance of insights into the problem, as a starting point to devise a conclusive legal framework for control of brokering;
- the importance of an unequivocal scope of application: definitions, types of goods, (extra)territoriality;
- the choice between obligatory and optional control measures;
- possible mechanisms for ensuring compliance with, and control of, such measures;
- the need for internal *and* international cooperation and information exchange;
- the need for consultation in order to safeguard coherence and ensure harmonisation between the varying aspects.

135 For an exhaustive overview of the international initiatives and good practices regarding control of brokering, see K. VAN HEUVERSWYN, *Op. cit.*, Flemish Peace Institute, 2010.

3.1 Summary of the strengths and weaknesses of the Belgian control regime

3.1.1 Strengths

(1) Belgium has since 2003 adopted a legal framework for the control of brokering in military materials and, as such, belongs to a small leading group of some 40 countries worldwide.
(2) The Belgian legislation provides a legal basis for assessing the reliability of brokers in military materials.
(3) The Belgian legislation provides for sanctions for failing to abide by the legal obligations (licence for brokering in military materials) and for non-compliance with embargoes.
(4) The Belgian legislation has extraterritorial validity by enabling prosecution of any person guilty of illegal arms trade, irrespective of nationality, location of residence or establishment.
(5) The competent authorities at the federal and regional levels regularly consult with each other on the implementation of the policy on arms trade in Belgium.

3.1.2 Weaknesses

(1) Belgium does not carry out controls on brokering activities in military materials. As such, it does not meet the requirements of supranational instruments, some of which emphasize that the control of brokers is rather a complementary measure that can in no way replace the control of brokering activities.
(2) In practice, the Belgian regime fails to achieve its objectives. It was introduced after international reports had revealed that brokers could with impunity conduct illegal activities using Belgium as a transit area for their operations. Since 2003, not one single broker has followed the prescribed procedure. The legal regulation has thus been

unsuccessful in controlling brokers, primarily because of the absence of measures to 'catch' them.

(3) The effect of the prescribed criminal sanctions is very limited given the lack of control of brokering activities. In Belgium, active brokers may be penalized if they fail to comply with a formal obligation, for instance, if they do not have a preliminary licence. However, it is not at all clear how compliance with an embargo can be enforced without control of brokering activities. In addition, illegal arms trade encompasses more than non-compliance with embargoes.

(4) he additional merit of extraterritoriality is more limited than would appear at first glance. It is only valid where it pertains to non-abidance by a formal obligation, namely the licence, and non-compliance with embargoes. Here, we meet the same practical problems as in the case of the implementation of criminal sanctions.

(5) A theoretical evaluation (because of the absence of examples of practical applications) of the current licensing procedure for military materials does demonstrate the lack of harmony between the definitions in the Law of 1991 and those in the Weapons Act. Second, it appears that the legally established modalities of the procedure take no account of the specificity of brokering activities and that, in the operative provisions, brokers are not considered. Third, the updates of the material scope of application are based on an administrative practice that offers neither legal certainty nor assurances for a harmonized policy between the three Regions and the federal authorities. Fourth, the advice procedure for preliminary licences (currently only applied to arms traders) is not followed since it does not fit the practice.

(6) In spite of the legislators' good intentions when in 2003 they adoptedprovisions on the control of brokers, because of the way the legal framework has been adapted an involuntary problem of interpretation with respect to the assignment of competences between the federal authorities and the Regions has arisen, since the Special Law of 2003 fails to make it clear whether brokering belongs to import, export, and transit activities, which were regionalized, or to the 'combating of the illegal arms trade', which has remained under federal jurisdiction. For dual-use items, the same question arises since only import, export, and transit were transferred to the Regions.

(7) In conclusion, with respect to dual-use items, it is a valid observation that Belgium is too late in introducing operative provisions for the full implementation of Regulation 428/2009. Even though this does not suspend the directly applicable character of the Regulation, it is especially the absence of criminal sanctions that renders it toothless.

3.2 Recommendations

Given the welter of weak points in the list, there is obvious room for recommendations for substantial improvements.

The following recommendations are based primarily on the obligations and optional measures that prescribe supranational instruments, complemented with non-imperative guidelines from international reports and recommendations.

For one aspect, namely the pro-active assurance of compliance with the legal prescriptions, for which not enough information was garnered from the relevant literature, recommendations were formulated by the present author.

3.2.1 Common recommendations on the competence concerning brokering in military and dual-use goods

Belgium needs to develop a comprehensive vision of the (il)legal arms trade 'in all its aspects'. This happens to be a fundamental condition for achieving a qualitative legislative policy.[136] Furthermore, Belgium must bring clarity in the allocation of competences between the Regions and the federal departments.

On the basis of the present descriptions, arguments can be adduced for considering the control of brokering as an implicit regional competence - as an activity that is complementary to arms trade by way of import, export, and transit – as well as a federal competence – being part of the residual competence of the combat of the illegal arms trade.
The current impasse could be resolved by:

- replacing the designation 'combating the illegal arms trade' in the title of the Law of 1991 and as the name of Title III by 'control of brokers and arms traders'; this fits in more neatly with the objective and the scope of the provisions that fall within its purview;

136 See K. VAN HEUVERSWYN, *Leven in de risicomaatschappij Deel 3*, *op. cit.*, pp. 21, 30, 69 and 127.

- in parallel, making a political choice concerning *all* aspects of the combating of the illegal arms trade and unambiguously describing all of such aspects in the Special Law. This would entail:

    - arms trade and trade in dual-use items by way of import, export, and transit;
    - supportive and related activities of such trade, e.g., technical services, financial services, insurance, training, etc.
    - trade in arms and dual-use goods between third countries, 'organised' out of Belgium, e.g., brokering;
    - supportive and related activities of brokering.

On allocation of the competences, the following considerations should be taken into account:

- The UN Programme of Action and non-imperative recommendations prescribe that the control of arms trade and on brokering (because of their inter-connectivity) be assigned to the same offices;
- Because of the complexity of the problem of illegal brokering, and its ties with sundry other illegal activities, there are several ministerial departments that have only passing or partial relevant knowledge of the issues. The appointment of only one licensing department is insufficient to ensure comprehensive control if provision is not made for cooperation with other competent authorities. This implies that the department possessessing the best knowledge of on the arms trade can be designated as the main competent authority, or an administrative office that will exercise a mainly coordinating function and centralize the competence of other offices. But, irrespective of the choices made, consultation and cooperation are indispensable and necessary adjuncts.

3.2.2 Recommendations on the control of brokering in military goods

3.2.2.1 Recommendations on a conclusive legal framework

In conformity with Common Position 2003/468 CFSP with respect to brokering, Belgium is required to create a clear legal framework for legal brokering and for control of brokering activities that are conducted on its soil.

In order to work out a strong legal basis for the control of brokering, Belgium needs to:

- take into account the legally and politically binding supranational prescriptions;
- maintain a clear focus on the objective, e.g. the creation of a legal framework for brokering, while avoiding that, by way of the brokering, military materials fall into the wrong (unauthorized) hands. 'Wrong' hands are persons, groups, or countries that constitute a threat to international security and respect for human rights;
- take into account the link between brokering and arms trade: the problem of illegal brokering cannot be seen separatey from arms trade through import, export, and transit. Malafide brokers do, in fact, take advantage of the absence of, or less stringent, controls on import, export, and transit in certain countries to deliver their goods to their 'unauthorized' destinations;
- take into account the fact that the activities of malafide brokers are generally not limited to illegal trade in arms, but that these individuals are frequently also involved in cross-border criminal activities;
- take into account the specific characteristics of brokering: by definition, brokers operate as intermediary negotiators or middlemen out of a certain country, acting between a producer, a buyer, or a vendor. They themselves do not acquire physical possession of the goods or are their legal owners, while the movements of the goods happen in countries other than at the locations where the brokering activities are taking place or where the broker resides or is based;
- take into account the types of brokers and their activities on Belgian soil: on this point, the services competent for arms trade and brokering currently have no relevant information.

A legal framework for the control of brokering is therefore best integrated into a legal regime that encompasses all aspects of the illegal arms trade and limits them to additional provisions with particular reference to the problem that is specifically related to brokering.

3.2.2.2 Recommendations with respect to the scope of application for military materials

The legality principle in criminal cases requires that sanctions be linked to clear legal prescriptions. The persons under scrutiny must be able to determine unambiguously if the prescribed provisions apply to them. This requires clear definitions and a clearly described material and territorial scope of application.

Given the international dimension of brokering, those three aspects need to be in line with the provisions of other states. As long as this is not the case, brokers will continue to use the differences in national legislation to their advantage to slip through the cracks in the net while carrying on their 'unauthorized' activities in a legal way or, at least, with impunity. Hence the importance of adapting national legislation that takes into account supranational obligations.

3.2.2.2.1 Definitions

In order to avoid confusing with other activities such as import, export, and transit, the definitions of broker and brokering activities are best limited to their essential characteristics: 'intermediary' negotiating activities pertaining to the arms trade, actual transactions that take place between third countries. These essential characteristics can be found in the definition of brokering in CP 2003/468/CFSP, to which Belgium is bound.

Furthermore, in order to avoid confusion between brokering in the sense of foreign trade and domestic trade, it is preferable to use two different terms. The point is that internal brokering has no relation to trade in third countries, the difference with te actual arms trade being here the fact that the broker does not himself possess the goods or is the legally entitled owner of them and does not himself physically handle them.

A definition of broker *and* brokering activities is not an indispensable requirement; either will suffice to identify both the targeted persons and their activities.
Belgium needs to review the existing definitions in the Law of 1991 and in the Weapons Act.

3.2.2.2.2 Material scope of application

For the delineation of the material scope of application, e.g. the types of military goods to which the control measures apply, Belgium is bound by CP 2008/944/CFSP, which mandates that Belgium must use the Common EU List of military materials as the reference for its national list.

The 2003 version of this list was entered into the attachment to the RD of 8 March 1993, which, in addition, also contains materials for law enforcement. The most recent adaptation of the RD was in 2003. Since then, the Regions have taken into consideration the updates to the EU List, without formal adaptations to the official list. This is done on the basis of an administrative practice that differs from Region to Region. Although, thus far, this has resulted in a quasi-identical list, it does not exclude differences within Belgium, depending on the respective Regions.

In order to promote legal certainty, a better legal basis needs to be found, e.g., one that enables flexible adaptations to the regular updates of the European list. In addition, there is a need for a mechanism, for instance, by formal cooperation or consultation, in order to ensure a uniform scope of application in Belgium.[137]

137 Taking into account the BLEU and BENELUX (see above).

3.2.2.2.3 Territorial scope of application

The territorial contact point for the control of brokering is the location where the brokering activities are conducted, as mandated by CP 2003/468/CFSP. This CP provides for two possible extensions of its provisions: towards brokering, when goods are being exported from the territory of the regulating states with the jurisdiction, and towards brokering activities that are conducted abroad by nationals residing or based on their territory.

In contrast to the CP and other documents that propose an extension of '*from the territory*' as an option, with a view to ensuring the greatest possible scope for the control regime, this should not simply be accepted without some serious reflection for two main reasons. First, the chance of concurrent jurisdiction with other nations increases; and second, brokering the export of goods from the same territory where the activities are taking place falls within the purview of the customs qualification of export and is being controlled under the arms trade control regime. Taking one of the recommendations – to limit the legal regulation of the control of brokering to the specific aspects that are not already regulated elsewhere – makes such an expansion of no added consequence.

The control regime that CP 2003/468/CFSP imposes on Belgium applies only to EC brokering, that is, between EC third countries. In order to enable control of brokers who are operating, residing, or based on Belgian territory, when the goods are traded from one EC member state or between EC member states, extending the scope of application to include brokering as subject to national legislation is desirable. The CP does, in fact, provide for this possibility. If Belgium does not choose that route, it must, for 'intra-Community' brokering, at least implement the (less stringent) prescriptions of instruments under international law.

3.2.2.3 Recommendations on control measures for military materials

A control regime may consist of a graduated system of three successive controls: (1) registration or preliminary licensing of brokers, (2) licensing of every individual transaction, and (3) the control ex post on the end use. Not all types of controls are considered of equal imperative or necessary import for a conclusive control.

Imperative, however, is a clear description of the prescribed measures and the modalities governing the procedures (see also *infra*). Seeing that sanctions are coupled to non-compliance with the requirements, in this case also it is necessary, in keeping with the legality principle, that the legal provisions be sufficiently clear and predictable.

3.2.2.3.1 Control of brokers

In CP 2003/468/CFSP the written authorisation for persons or entities to act as brokers is considered an optional measure that can never replace the licence for individual transactions. Similarly, in international instruments this is not considered an imperative condition. With the preliminary licence imposed by the Law of 1991, Belgium has chosen an optional measure as its sole control mechanism. To achieve a control regime that is as complete as possible, it is best to retain this measure, even if Belgium at some time in the future chooses also to subject brokering activities to control.

In order to optimize the current regulation, it is advisable to consider whether a separate procedure for brokers is not the preferable route to take. In case an expansion of the existing procedures is opted for, it will be necessary to at least ensure that definitions, the conditions, the modalities, and the territorial and material scope of application are all harmonised.

3.2.2.3.2 Control of brokering activities

What is mandatory and to be considered a core control measure is the written licence for individual transactions. This requirement is imposed by both CP 2003/468/CFSP and CP 2008/944/CFSP.

Applications for such licences must be assessed on the basis of the same eight evaluation criteria imposed by CP 2008/944/CFSP for the export of military materials and pertaining to international security and human rights. Furthermore, licences may be granted only on the basis of reliable, prior knowledge about the end-use of the items. In the wording of CP 2008/944, which imposes this condition, there is a question of *ex ante* control with the evaluation of the application, not of an *ex post* control, e.g., after completion of the transaction.

It is especially this lacuna, the licence for brokering activities, that Belgium needs to address within the current regime.

3.2.2.3.3 The keeping of registers

The EU's CP 2003/468/CFSP requires the competent authorities to keep, for a period of 10 years, a register of all licensed persons and entities. Eventually, a second general register of brokers may be started as a kind of 'institutional memory'.[138]

138 See S. CATTANEO, 'National systems of licensing and registration', Chapter 2 in Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons – Scope and Implications, United Nations Institute for Disarmament Research (UNIDIR), 2007, p. 87.

3.2.2.3.4 Optional control measures

The following are some of the measures that are being recommended but are not considered obligatory in supranational instruments:

- the keeping of registers by brokers themselves;
- mandatory annual reporting by brokers to the competent authorities;
- the reporting obligation for persons already in possession of a licence as arms trader and who, in addition, wish to conduct activities as brokers;
- a time limitation on the validity of the registration and of the licence;
- the obligation on brokers to voluntarily report changes during the term in which the registration or licence if valid;
- the assignment to every registered broker of a registration number that must be noted on all official documents;
- the explicit mention in the regulation that licences are personal and non-transferable;
- the possibility to grant exemptions for certain destinations, the so-called white lists, or for certain categories of brokers, e.g., public administrations.

3.2.2.4 Recommendations on compliance

3.2.2.4.1 Recommendations to ensure implementation

Supranational obligations, recommendations, and directives focus on the development of a legal framework and the provision of criminal sanctions in order to enforce compliance. Our analysis of the Belgian control regime shows that the existence of a legal regulation, even including sanctions, does not ensure the practice of control. Hence, there is a particular need for a mechanism to search out and detect brokers, to catch them, or to urge them to comply with the prescribed control measures.

In the absence of attention to this in the documents we discuss here, the present author offers the following recommendations.

Since the activities of 'Belgian brokers'[139] are, by definition, difficult to detect and track because the activities are rather of the virtual kind and because their physical, traceable activities in the import, export, and transit of goods, where they act as middlemen and negotiators, are carried out in other countries, regional and international cooperation is crucial for searching out these brokers. Possible measures are:

139 Belgian brokers is not a reference to their nationality but rather to the fact that they fall under the scope of application of Belgian legislation.

- intensive cooperation and arrangements with foreign customs services and competent offices that issue import, export, and transit licences, and have them pass on information to the Belgian authorities whenever they have cognisance of the fact that a Belgian broker is involved in transfers on their territory;
- similar cooperation and arrangements and agreements with state security services (and via them with foreign security) for them to proactively pass on information to the licensing authorities about possible Belgian brokers;
- a proactive policy to detect brokers via police or inspection services.

A second option may be to make the sanctions on unlicensed brokering activities so severe that, at least for brokers who are acting in compliance with the established criteria, they are motivated to step forward and submit an application for registration or licensing. This might be linked to a reversal of the burden of proof[140]: anyone engaging in brokering without a licence or registration will be suspected of carrying out an illegal activity (i.e. fails to satisfy the evaluation criteria for the issuance of the licence), unless the broker himself can offer proof to the contrary, for instance, by means of certificates of final destination for import, export, and transit transactions in which he is involved as broker. In this way, the threat of severe repressive sanctions will work preventatively, while the reversal of the burden of proof on the basis of a suspicion of illegality will moreover facilitate the proof of 'guilt' in case of prosecution.

Given that a suspicion of illegality can only be considered as a measure of exception that can be justified on the grounds of international security, it will require that all possible assurances are given by the competent authorities to allow legitimate brokers to satisfy the conditions. In practice, this means that, by using all possible resources, awareness of the existence of an obligation for brokers to apply for a licence will be created, as well as an awareness of the procedure to be followed and the conditions and the modalities for receiving a licence. In any event, such outreach activities in the control policy for trade in strategically important goods are, as a matter of course, to be recommended.

3.2.2.4.2 Penalisation

CP 2003/468/CFSP, like most other supranational instruments, imposes the provision of adequate sanctions, including those for criminal offences. The primary objective of this obligation is to counter impunity in the case of illegal brokering activities. As described above, sanctions may also fill a preventative function.

140 By analogy with the precautionary principle for i.a. environmental and health risks, see: COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication from the Commission on the precautionary principle*, COM(2000)1 final., Brussels, 2 February 2000, pp. 22-23.

Given the complexity of attempting to control brokering in practice, and to enable a dual, repressive as well as preventative function, a mix of sanctions could be provided for the following:

- non-compliance with the formal requirements, such as registration and licensing;
- irregularities in the processing of the procedure;
- non-compliance with embargoes and other illegal activities that threaten international security, cf. the evaluation criteria for the application.

Penalisation could consist of a combination of sanctions based on provisions in the Criminal Code for so-called offences under common law, e.g. falsification of documents and the like, either in combination with special sanctions as described in the Law on arms trade or not. Three categories of sanction could be envisaged:

- of a civil nature: e.g., the confiscation and forfeiture of goods;
- of an administrative nature: e.g., the revocation or suspension of the registration or licence;
- of a criminal nature: penalties and/or imprisonment.

3.2.2.5 Recommendations with respect to cooperation and information exchange

Cooperation and information exchange are indispensable elements, for both internal and external departments.

CP 2003/468/CFSP prescribes mutual information exchange among the member states with respect to legislation, registered brokers (if of application), data about brokers, and with reference to denials of applications for registration (if of application) and applications for licences. CP 2008/944/CFSP also imposes implementation of the no-undercut principle on brokering. This means that consultations are required with other member states about licence applications that were denied over the previous three years and decisions in departure of such denials need to be justified. This principle is meant to prevent member states from undermining each other's policy. In addition, CP 2008/944 requires the member states to strive to improve their cooperation and convergence in their policies, for instance, by issuing annual, national reports, and joint evaluations of end-users.

These prescriptions are intended to strengthen the capabilities of member states at the general regulating level, in the area of implementation of the legal framework, and with a view to more efficient prosecution and penalisation. As mentioned aabove, in order to catch brokers, there is also a need for better proactive cooperation among (member) states through the release of mutual information about EC brokers who are active on their

respective territories. Given the international dimension of brokering, such information exchange and cooperation should ideally take place at the international level.

At the internal level, cooperation and consultation between all Belgian departments with know-how were mentioned above: licensing authorities cannot on their own generate all the relevant knowledge.[141] Furthermore, in an internal context, cooperation is required among all the licensing authorities in order to be able to provide assurances of a coherent policy (see also below).

Internal consultation among all the departments involved is currently being conducted in an informal manner. Nevertheless, formally organized consultation is preferable. This can be achieved, for instance, by breathing new life into the Interdepartmental Coordination Committee, which was active until 2001. This could be done on the basis of a Cooperation Agreement between the federal authorities and the Regions, with a view to making appropriate arrangements and agreements designed to implement a holistic approach in the combat of the illegal arms trade in all its aspects.

3.2.2.6 Recommendations with respect to internal coherence and harmonisation

As long as several associated aspects of the arms trade are the responsibility of offices at various different administrative levels or of several departments within one and the same administrative stratum, there will be the risk of overlapping, inconsistent procedures, and the like. Under the current regime, there is a need for harmonisation between the definitions and procedures based on the Weapons Act and the Law of Foreign Arms Trade of 1991.

Prior to adapting any new legislation, we must carefully scrutinise the current dual procedure that is based on the Weapons Act and the Law of 1991, especially since specific modalities for brokers have been ignored in the implementing decisions. Also in this case, formal consultations are recommended, albeit not based on a Cooperation Agreement. In its advisories, the Council of State has in fact voiced the same opinion.

141 It was previously recommended as one of the measures to catch brokers proactively, by analogy with the suggestions of a British House of Commons research report to reinforce the cooperation and information exchange with security and intelligence services. Another British study has demonstrated that the British security and intelligence services do not, however, serve only the interests of the 'foreign security policy' of the UK, but that their information "*has helped facilitate the sale of UK-developed and manufactured arms to third countries, often via commercial agents, and has helped in protecting those markets from the manufacturers of rival exporting countries through covert action*". That kind of risk of intertwining interests can be seen as an extra argument for the competent service that assesses the licences not to be dependent on just one single office and, preferably, to seek input from several departments or from an interdepartmental committee. On the workings of the security and intelligence services in the UK, see R. DOVER, 'For Queen and Company: The Role of Intelligence in the UK's Arms Trade', in *Political Studies*, vol. 55, 2007, pp. 683-708.

3.2.3 Recommendations for control of brokering in dual-use goods

In the absence of international recommendations and research reports adducing additional directives for dual-use goods, the only references for recommendations are the EU's Dual-use Regulation 428/2009 and a few provisions of UNSC Resolution 1540. The provisions of the EC Regulation have since 27 August 2009 had direct effect in the Belgian judicial system and therefore do not require transposition into national law. The UN Resolution does not impose any additional requirements.

3.2.3.1 Specific recommendations on dual-use compliance

It suffices as recommendation to point out that Belgium still needs to adopt some implementing decisions in order to fully enable EC Regulation 428/2009. This primarily concerns a number of concrete modalities such as the licensing procedure, the manner in which the broker provides the competent authority with the required information, the delay with which licences are processed, the manner in which the authorities provide brokers with advice, and, eventually, specific forms designed for issuing a licence and the manner in which brokers are expected to keep registers or records. In addition, effective, proportionate, and deterrent sanctions need to be determined in national regulation and, possibly, the scope of application for goods may be expanded.

3.2.3.2 Recommendations by analogy with military materials

A number of the recommendations for military materials, *mutatis mutandis*, also apply to dual-use goods, for instance:

- The territorial validity of the Dual-use Regulation that describes brokering as EC brokering between third EC countries. Although the Regulation does not explicitly provide in this possibility, it does not expressly exclude extending it to that effect by making brokering subject to national law. This entails brokering from an EC member state to an EC third country or between or among EC member states reciprocally. In this respect, account needs to be taken of imperative provisions concerning the free movement of goods within the European Union.
- The need for attention to the practical implementation of the Regulation, and specifically the need for a mechanism to urge brokers to follow the prescribed procedure, is also valid for dual-use goods. In contrast to the European regulation with respect to military materials, the Dual-use Regulation does not prescribe a systematic, but rather a conditional, licensing requirement, based on knowledge of the possible use of the

goods in WMD. In this respect, the Regulation does in fact explicitly make mention of the obligation of the competent authorities to provide brokers with the necessary advice.
- Also for dual-use items, cooperation with diverse internal and foreign services is a necessity.

3.3 Conclusions with respect to the recommendations

The common thread running through the observations based on the recommendations may, both for compliance with supranational provisions and effectiveness (competence, effectiveness, and coherence), be summarized as follows:

- The Belgian regime for the control of brokering in military materials is not in line with the prescriptions stated in the supranational documents, not even with the minimal obligations on which there is consensus at the international, regional, and European levels;
- Belgium does not possess sufficient insight into the characteristics of illegal arms trading in general, and the competent departments wholly lack insight into the (current) extent of the specific problem posed by brokering in Belgium;
- In consequence, Belgium has so far operated with only a partial policy in place with respect to the fight against illegal arms trade; Belgian legislators lack a globally encompassing outlook on the problem in all its aspects;
- The Belgian policy on the control of brokering is primarily a symbolic policy; by adopting legislation it has been feasible to move the problem off the political agenda while, in practice, the legislation could not realize its objective - to exercise control over brokers and introduce criminal sanctions for the practice of illegal brokering.

These observations on structural problems and remedies may serve as departure points in the search for well-founded and reasoned choices towards optimizing the current regime.

CONCLUSION

This research report analyses the Belgian regime for the control of brokering in military materials and dual-use goods from a multi-facetted perspective. Following a description of the legal provisions and the administrative practice, the report examines the degree to which the Belgian legislation meets the provisions of relevant supranational obligations. Next, the report analyses whether the Belgian legislation and complementary administrative practices are effective in three aspects: (1) is the assignment of competences conclusive? (2) is the legislation successful in realizing its objective of subjecting brokering to control measures? (3) to what extent are the internal coherence and the harmonisation with other legally regulated aspects of the arms trade assured?

Brokering in military and dual-use items forms a separate category of, and within, the entire chain of the arms trade. Brokering is distinctive from foreign arms trade in the strictest sense (e.g., import, export, and transit of goods) since transfers of goods take place in countries other than those where brokers are conducting their practices. Brokers are mediators acting between a producer, buyer, or vendor, without themselves physically posssessing the goods or being their legally titled possessors. Military items include SALW as well as other conventional weapons. To the class of dual-use items belong goods that can have both a civil and military use. Both categories of goods are treated separately in national and international control regimes.

In the 1990s, the international community became aware of the problem of illicit brokering in arms after a number of reports revealed the role of brokers in violations of arms embargoes. These reports explained that, in the transfer of goods, brokers selected countries that either impose no, or less stringent, export controls, as a result of which they can carry out their trade activities and shipments, unimpeded and with impunity (within the bounds of the laws validly in force), to unauthorized destinations and proscribed recipients. Unauthorized destinations or proscribed recipients are placed under an arms embargo when may constitute a threat to regional or international security or may be in contravention of human rights. Following such observations, initiatives were undertaken at the international, regional, and European levels to combat illicit brokering. The United

Nations, the Wassenaar Arrangement, the Organization for the Security and Co-operation in Europe, and the European Union have each adopted legally or politically binding documents. Internationally, there is consensus about the need for national legislation to subject brokers to a control within the territory where they are conducting their activities. This also allows the creation of a legal framework for licit brokering. Likewise, there is consensus about the need for sanctions to ensure that malafide brokers do not walk away with impunity. As a control measure, preference is given to licensing brokers' activities rather than licensing the individuals.

In 2003, Belgium amended the Law of 5 August 1991 on foreign trade in military materials, following a number of reports that exposed the role of Belgium as the pivotal point in brokering activities. A Title III called 'combating the illegal arms trade' was added to the Law of 1991, with four articles that (1) subject brokers and arms traders to the procedure of preliminary licensing (2) impose a prohibition on violating arms embargoes (3) determine criminal sanctions for non-compliance with the provisions in Title IIII, and (4) provide for an extraterritorial validity. Belgium has opted to subject persons involved in brokering (and arms trade) to controls rather than to control the brokering activities. The preliminary licence applies only to brokers in military materials, not to persons who facilitate the trade in dual-use items. This latter category has (since 27 August 2009) come under the directly applicable provisions of EC Regulation 428/2009. Belgium has not yet adopted operative measures, nor has it provided for sanctions, but this should not impede its implementation of the Regulation.

Since 2003, the Belgian control regime has been considered to be a prominent and ground-breaking measure. This is actually an overstatement since, barely three months after its enactment the Belgian legislation was already overtaken by Common Position 2003/468/CFSP, which imposes the condition of a licence on subjects brokering *activities* and emphasizes that a licence for *persons* can never replace one issued for the person's *activities*. In adition, since 2008, CP 2008/944 has mandated that the evaluation of import, export, and transit of military materials be conducted on the basis of eight criteria, which extend to brokering activities. This is in line with the international vision: the control of brokering forms a kind of second-line measure to close the loopholes in the control net on import, export, and transit transactions. Preferably, such controls should be conducted by the same authorities as control brokers. Also in this respect, Belgium does not fall in line with the international vision. The control of import, export, and transit of military and dual-use items was regionalized a few months after the legislation was amended, while the control of brokers (and arms traders) has remained a federal jurisdiction. Since that time, it has been unclear whether the control of brokering *activities is a regional, a federal, or a mixed competence*. Each these interpretations could be supported by legal arguments.

This absence of clarity – one might call it an impasse – demands that the entire problem of combating the illegal arms trade be reviewed at the political level in all its aspects, and that judicial choices be made with respect to the control of all part-aspects of the issue,

including brokering, keeping account of the specific characteristics, on the one hand, and the contextual coherence of some of these aspects, on the other. This was not done in 2003, as further evidenced by the fact that, ever since the legislative amendment was made, not a single broker has completed the statutory procedure necessary to be issued a preliminary licence. The competent department at the Ministry of Justice has not processed a single application. In other words, the Law of 2003 is imbued with only a symbolic value and, in actual practice, has not succeeded in subjecting brokers to control. Moreover, it is unclear whether this means that brokers have not been active in Belgium since 2003 or that they simply have ignored the requirement to submit an application. Even if applications had been received, the question remains according to which procedure the brokers could effectively have been checked. In 2003, it was decided to introduce a measure to link the licensing procedure to the accreditation process, based on the Weapons Act, but the manner in which the accreditation and the licensing procedure combine and complement one another, the concrete conditions that brokers need to satisfy, the harmonisation between the definitions, and the areas of scope of application, etc. all create ambiguity and confusion. They cannot ensure effective control, not even on paper.

The conclusion we have to draw from this is that the Belgian regime for the control of brokering in military and dual-use items does not work: there is no compliance, no implementation of the legislation in actual practice, and not even any procedure that would allow testing the effectiveness of its conclusive character. In other words, the Belgian regime for the control of brokering leaves room for substantial improvements. The present report puts forth recommendations drawn from a general global vision on the combating of the illegal arms trade and from insights into the specific characteristics of brokering in particular.

Annex 1: Overview of the supranational instruments binding on Belgium

For an exhaustive overview of the international initiatives and good practices with respect to control of brokering, see annex 2 and the report *The International Framework for Control of Brokering in Military and Dual-use Items.*[142]

Org.	Name of instrument	Belgian legislation
UN	Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, Protocol to the Convention against transnational organized crime (May 2001)	Signed on 12 December 2000 and ratified on 11 August 2004[143]
	Programme of Action on Small Arms and Light Weapons (July 2001)	As a member of the United Nations
	Security Council Resolution 1540 dealing with weapons of mass destruction and non-state actors (April 2004)	
WA	Best Practices Guidelines for export of SALW (December 2002)	As a participating state of the Wassenaar Arrangement
	WA Statement of Understanding on arms brokerage (Dec. 2002)	
	WA Elements for Export Controls on Man-Portable Air Defence Systems (MANPADS) (Dec. 2003)	
	WA Elements for Effective Legislation on Arms Brokering (Dec. 2003)	
OSCE	Document on small arms and light weapons (November 2000)	As a participating state of the OSCE
	Principles on the control of brokering in SALW (November 2004)	
EU	Joint Action 2002/589/CFSP with a view to a European Union contribution to combating the destabilising accumulation and proliferation of Small Arms and Light Weapons (July 2002)	Art. 14 EU Treaty: Joint Actions shall commit the member states to the positions they adopt and to the conduct of their activity.
	Common Position 2003/468/CFSP on the control of arms brokering (June 2003)	Art. 15 EU Treaty: As a member state, Belgium must ensure that its national policy conforms to the common position.
	Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (December 2008)	
EC	Directive 2008/51/EC amending Directive 91/477/EEC on control of the acquisition and possession of weapons (May 2008)	Art. 249 EC Treaty: Belgium must transpose a Directive into national legislation, the result of which is binding; the national authorities can freely choose the form and methods. A Regulation shall be binding on Belgium in its entirety and directly applicable in Belgian rule of law.
	Regulation no. 428/2009 setting up a Community regime for the control of export, transfer, brokering, and transit of dual-use items (May 2009)	

142 K. VAN HEUVERSWYN, Op. cit., Flemish Peace Institute, 2010.

143 See *http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en.*

Annex 2: Overview of international initiatives and good practices concerning control of brokering

Chronological overview, by source

United Nations	
UN	Protocol against the illicit manufacturing of, and trafficking in, firearms, their parts and components and ammunition, Protocol to the Convention against transnational organized crime (May 2001)
UN	Programme of Action on small arms and light weapons (July 2001)
UN	Security Council Resolution 1540 dealing with weapons of mass destruction and non-state actors (April 2004)

Wassenaar Arrangement	
WA	Best practices guidelines for export of SALW (December 2002)
WA	Statement of understanding on arms brokerage (December 2002)
WA	Elements for export controls on Man-Portable Air Defence systems (December 2003)
WA	Elements for effective legislation on arms brokering (December 2003)

Organisation for Security and Cooperation in Europe	
OSCE	Document on small arms and light weapons (November 2000)
OSCE	Principles on the control of brokering in SALW (November 2004)

European Union	
EU	Joint Action 2002/589/CFSP with a view to a European Union contribution to combating the destabilising accumulation and proliferation of Small Arms and Light Weapons (July 2002)
EU	Common Position 2003/468/CFSP concerning control of arms brokering (June 2003)
EU	Directive 2008/51/EC amending Directive 91/477/EEC on control of the acquisition and possession of arms (May 2008)
EU	Common Position2008/944/CFSP defining common rules governing control of exports of military technology and equipment (December 2008)
EU	Regulation no 428/2009 setting up a Community regime for the control of exports, transfer, brokering, and transit of dual-use items (May 2009)

Overview of the types of provision, by document

Source:	Legal force	Measures	Assessment Criteria	Definition brokering	Definition brokers	Types of weapons
UN Firearms Protocol	Legally binding	Yes	No	No	No	Firearms (definition)
UN Programme of Action	Politically binding	Yes	No	No	No	SALW5 (no definition)
UN Resolution 1540	Legally binding	Yes	Yes	No	No	NBC6 and dual-use for WMD7 (no definition)
WA Directives SALW export	Politically binding	Yes	No	No	No	SALW (no definition)
WA Statement brokering	Politically binding	Yes	No	No	No	Conventional arms, Control List
WA Elements MANPADS	Politically binding	Yes	No	No	No	MANPADS8, Control List
WA Elements brokering	Politically binding	Yes	Yes	Yes	No	Conventional arms, Control List
OSCE Document SALW (2000)	Politically binding	Yes	No	No	No	SALW (instrumental definition)
OSCE Principles brokering	Politically binding	Yes	Yes	Yes	Yes	SALW (instrumental definition)
EU CP 2003 brokering	Soft law	Yes	Yes	Yes	No	Conventional arms – EU list
EU JA 2002 SALW	Politically binding	Yes	No	No	No	SALW (instrumental definition)
EU Directive 91/477 (2008/51)	Legally binding	Yes	No	No	Yes	SALW cf. definitions UN Protocol
EU CP 2008 'Code of Conduct'	Soft law	Yes	Yes	Implicit	No	Conventional arms – EU list
EU Dual-use Regulation 2009	Directly applicable	Yes	Yes	Yes	Yes	Dual-use items in Annex I

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