

European and international developments in arms brokering controls

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I. Introduction

It is often acknowledged that poor controls on those who mediate and arrange arms transfers and their financing and transport contribute to the illicit trade in conventional weapons and especially in small arms and light weapons (SALW). Undesirable activities include the brokering, financing, or transfer of arms in violation of UN or other arms embargoes and/or in violation of the national laws of the states of origin, transit, or destination. Only few states have the national legislation in place that controls arms brokering activities and criminalises the brokering of arms transfers that violate international and/or national law. Moreover, there often remain loopholes in the legislation of the few states that control arms brokering. The lack of – and weaknesses – in existing, controls perpetuate a situation in which brokers, financiers, and transporters can arrange and facilitate illicit arms transfers with impunity.

This paper reviews recent developments in arms brokering controls at the European and international levels. The following section reviews the implementation of the 2003 European Union Common Position on the Control of Arms Brokering and the remaining weaknesses in European controls. The paper then looks at the international situation on brokering controls and the recent UN report on further steps to combat illicit SALW brokering. The paper recommends that European governments seriously consider:

- the introduction of controls on brokering-related activities;
- the comprehensive prohibition of brokering and brokering-related activities in relation to violations of arms embargoes;
- the establishment of greater transparency on granted brokering licenses; and
- the promotion of brokering controls at extra-regional levels.

II. Implementation of the EU Common Position on arms brokering

In the last four years, EU member states made some progress in the implementation of the 2003 Common Position on the control of arms brokering.¹ In September 2007, 19 of the 27 EU members were reported to have in place controls that fulfil the common position's requirements. The states that still need to adopt relevant controls are Cyprus, France, Greece, Ireland, Italy, Latvia, Luxembourg, and Portugal.² Most states ensured the conformity of their national controls with the common position by amending existing legislation or adopting new laws.

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

2. Council of the European Union. 2007. *Ninth Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports*. EU Council Document 12919/1/07, Rev. 1. Brussels: Council of the EU, 25 September, Table C, p. 327-8. Available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/c_253/c_25320071026en00010332.pdf

The principal control element is a licensing requirement for the mediation of arms transfers between non-EU states (third country transfers) and the dealing in arms that involves transfers between third countries. 'Mediation' covers negotiating or arranging third country transfers. 'Dealing' covers buying, selling, or arranging transfers of arms that are in the ownership of the broker. The licensing requirement for arms brokering activities applies to entities and individuals who operate within the territory of the state and to all goods on the EU Common List of Military Equipment.

Licensing decisions are made on a case-by-case basis and against the criteria of the 1998 EU Code of Conduct on Arms Exports. National legislation that is in conformity with the common position includes criminal sanctions on violations of national brokering controls. Arms brokering to embargoed destinations is sometimes covered by separate legislation that implements UN, EU, or national embargoes. There are few recent examples of successful prosecutions of illicit brokering activities in Europe and elsewhere, but they demonstrate the viability of legal sanctions.³

EU members also agreed to use the information sharing mechanisms under the EU Code for the exchange of information on national legislation on brokering controls and denials of license applications. The information exchanges are, like the licensing requirement for the brokering of third country transfers and criminal sanctions on illicit activities, mandatory requirements under the common position. Several states operate complementary controls on brokering activities that are only encouraged or outside the scope of the common position.

II.1. National controls on arms brokering⁴

a) Licensing of arms brokering

The national legislation in several states restricts the right to apply for a brokering license, and, where relevant, a prior registration to act as a broker, to entities and nationals who are resident or established in the national territory. Several states impose a licensing requirement that also applies if only part of the brokering activities take place within the national territory. Licensable activities may include the exchange of information in a telephone call that was made or received within the national territory and that formed part of contract negotiations on a third country transfer. Some states also control mediation-related activities such as marketing and advertising and activities that are carried out for non-monetary gains.

Further differences in the scope of licensing exist in relation to the origins of brokered arms. Several states only require a licence for the brokering of transfers between states outside the EU. Other states also require a license for the brokering of transfers between EU member states. The licensing requirement for the brokering of arms exports from the national territory is operated in addition to the licensing requirement for the actual export and forms part of a two-stage licensing control system. States with legislation that adopted elements of these controls include Belgium, Bosnia and Herzegovina, Estonia, Finland, Hungary, Lithuania, Malta, Poland, Slovenia, Slovakia, Sweden, and the Ukraine.

b) Registration of arms brokers

Several states require entities and individuals to obtain a registration to engage in arms trade activities or, more specifically, in arms brokering activities. Registration applications may be refused if the applicant is known to have previously engaged in illicit arms trade activities. Only registered brokers may apply for individual brokering licenses. Registrations are regularly renewable and brokers who are convicted of violations of national regulations may be barred from the register. The common position stipulates that EU

3. United Nations Institute for Disarmament Research (UNIDIR). 2006. *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons*. UNIDIR/2006/23. Geneva: UNIDIR, p. 101-38.

4. The information contained in this section is based on Groupe de Recherche et d'Information sur la Paix et la Sécurité (GRIP). 2005. *Regulating Arms Brokering: Tacking Stock and Moving Forward the UN Process*. Brussels, GRIP. Available at https://www.grip-publications.eu/pub/rapports/rg05-hs_courtage.pdf; and GRIP. 2004. *Controlling Arms Brokering: Next Steps for EU Member States*. Brussels, GRIP. Available at https://www.grip-publications.eu/pub/rapports/rg04-1EN_brokering.pdf

member states that operate a registration requirement exchange information on registered brokers and registration denials.

States with a registration scheme for arms brokers include Belgium, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, and Spain. Estonia is an example of a state that introduced a brokering-specific registration requirement. Potential brokers must obtain a prior registration in the State Register of Brokers of Military Goods. The registration includes a specification of the categories of military equipment the broker is authorised to mediate or deal and is publicly accessible on the internet.⁵

c) Extraterritorial controls

The common position encourages member states to consider controlling nationals who are resident or established in the national territory but who broker arms transfers from abroad. The extraterritorial application of controls on arms brokering can be a crucial element in deterring the involvement of EU nationals, residents, and entities in arms transfers to embargoed destinations, regions of conflict, and zones of human rights crisis. It is also an important mechanism to ensure greater accountability in the arms trade. States that imposed a licensing requirement on residents and nationally established entities for brokering activities that are conducted abroad include the Czech Republic, Estonia, Finland, Hungary, Lithuania, Poland, Romania, and Sweden.

Other states restrict extraterritorial controls to the prohibition of the involvement in arms transfers, including their brokering, to destinations or actors who are under a mandatory UN, EU, or national arms embargo. The relevant controls are often stipulated in legislation on the national implementation of arms embargoes. The UK imposed a licensing requirement for extraterritorial activities only for certain military equipment. The current UK legislation covers the extraterritorial brokering of torture equipment, anti-personnel landmines, and long-range missiles, but not of other military goods.⁶ The government recently announced its willingness to extend the controls to cover the extraterritorial brokering of small arms and other equipment that is currently outside the scope of controls.⁷

d) Transparency

The common position does not contain provisions that encourage the exchange of information on granted brokering licenses between member states or the publication of this information. Nevertheless, a few states, including Finland and the UK, publish the information on brokering licenses in their domestic national export reports. The UK reports list the total numbers of brokering licenses that were issued, refused, or revoked, a summary of the brokered goods, and the countries of origin and destination of the goods. For the year 2005, the UK reported decisions on a total of 76 standard individual brokering licenses. This represents about 1 per cent of reported UK decisions on the more than 7000 standard individual export licenses during the same period.⁸

II.2. Remaining weaknesses in European controls

There remain important weaknesses in the controls on arms brokering controls in EU member states. Several states still have to initiate or conclude legislative processes that ensure the conformity of national controls with the existing obligations under the common position. States may also face challenges in the implementation of brokering controls. A legal challenge that was brought forward by arms producers and

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

6. *Trade in Goods (Control) Order*. UK: 31 October 2003.

7. Brown, Gordon. 2007. *Lord Mayor's Banquet Speech*, 12 November. Available at <http://www.number10.gov.uk/output/Page13736.asp>

8. *UK Strategic Export Controls Annual Report 2005*, July 2006, p. 18. The figure of 76 brokering licenses refers to Standard Individual Trade Control Export Licenses (SITCL) that were issued or refused in 2005.

dealers about aspects of the national brokering legislation that was adopted in Belgium in 2003⁹ has hindered the full implementation of the controls. Further, states may face challenges in promoting awareness about newly adopted brokering controls among the relevant authorities, including the judiciary, and the industry.

a) Inadequate controls on brokering-related activities

A key concern among control advocates is the lack of adequate controls on entities and individuals who engage in 'brokering-related' activities. Brokering-related activities include providing logistic, transportation, and freight forwarding as well as insurance and financial services that are associated with arms transfers. The activities can be undertaken by specialist companies and individuals who are not controlled by the national arms export legislation and, where existing, brokering legislation. There are also examples of courts that found that the scope of the national legislation on brokering did not cover the provision of fake or falsified end-user certificates that were used to facilitate unauthorised arms transfers between foreign states.¹⁰

The few states that control certain brokering-related activities include Bulgaria and Germany. Controls in Bulgaria include the obligation on nationally registered and established agents to obtain a prior license for transporting arms between two foreign countries even if the arms do not enter or cross the national territory.¹¹ Controls in Germany stipulate that entities and persons operating aircraft registered in Germany or ships that sail under the German flag must obtain a general trade authorisation for the transport of military equipment between foreign countries.¹²

b) Inadequate controls on extraterritorial activities

Another key concern among control advocates is the absence of adequate extraterritorial controls on arms brokering and brokering-related activities. The legislation in many states does not cover extraterritorial brokering and related activities by nationals and/or nationally established entities in relation to the prohibition of arms transfers to destinations or actors under mandatory UN, EU, or national arms embargoes. States also have to accept that brokers and other specialists may easily arrange undesirable transfers from abroad in the absence of a licensing requirement for extraterritorial brokering and brokering-related activities.

III. International developments on brokering controls

The regulation of arms brokering is promoted in a range of multilateral instruments on arms control. They include legally binding instruments on SALW control in eastern, southern, and western Africa as well as in the Americas.¹³ There are two relevant instruments at the global level. The 2001 UN Protocol on the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (UN Firearms Protocol) encourages member states to consider the adoption of brokering controls.¹⁴ The 2001 UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in SALW in All Its Aspects (UN Programme of Action) commits states to the adoption of brokering controls. States also committed to consider further steps to combat illicit SALW brokering.¹⁵

9. *Law of 25 March 2003 modifying the Law of 5 August 1991 on the Import, Export, Transit and Combat against Trafficking in Arms and Ammunition*. Belgium: 25 March 2003.

10. UNIDIR, op. cit., p. 106-7.

11. *Law on the Control of Foreign Trade Activity in Arms and in Dual-Use Goods and Technologies of 1995*. Bulgaria: 1995, as amended.

12. *War Weapons Control Act of 20 April 1961*. Germany: 1961, as amended.

13. UNIDIR, op. cit., p. 157-65.

14. *UN Firearms Protocol*, art. 15. Available at http://www.unodc.org/pdf/crime/a_res_55/255e.pdf

15. *UN Programme of Action*, section II, para. 14 and section IV, para. 1.d. Available at <http://disarmament.un.org/cab/poa.html>

The relevant multilateral instruments converge on the basic principles of brokering controls, but there are also differences in the scope and comprehensiveness of the promoted controls.¹⁶ This may lead to future situations in which brokers exploit differences in sub-regional and regional controls to evade the detection or prosecution of illicit brokering activities. More importantly in the short term though is that still only about 40 states operate controls on brokers or brokering activities. Many of them are EU member states. Other states include Bosnia and Herzegovina, Israel, Nicaragua, South Africa, Switzerland, the Ukraine, and the USA.¹⁷ As is the case with the control standards in multilateral instruments, there is a wide range in the scope and comprehensiveness of the existing national controls on arms brokering.¹⁸ The diversity of the existing controls may leave loopholes that are exploited for illicit brokering activities.

III.1. The UN Group of Governmental Experts on brokering

In December 2005, the UN General Assembly mandated the creation of a Group of Governmental Experts (GGE) to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in SALW. The GGE was established in 2006 and was composed of representatives of 25 states. The states included China, Pakistan, the Republic of Korea, the Russian Federation, and the USA as well as states from Europe, Latin America, the Middle East, and sub-Saharan Africa. The GGE met in three sessions of two weeks each in late 2006 / early 2007. It submitted its report to the UN General Assembly in August 2007.¹⁹

The consensus report highlights that illicit SALW brokering can have profoundly destabilizing effects and that it can contribute to violations of UN arms embargoes. It also highlights that the global nature of the arms trade, in which brokers arrange intricate transfers involving complex transportation and financing routes, requires a comprehensive control approach. One advance in the report is the first internationally agreed description of the activities that may constitute brokering and brokering-related activities. Another advance is the definition of illicit brokering as the brokering that violates national laws and regulations or a state's international obligations. The report further includes a review of the national control practices in states that already operate brokering controls.

The report's concluding recommendations include the encouragement that states without brokering controls adopt relevant controls; that states cooperate on sharing information on national measures to combat illicit brokering and in areas including the verification of export documentation and investigations of illicit brokering; that states in a position to do so seriously consider rendering assistance to support the development of national brokering controls; and that states periodically report on their brokering control systems. The report does not consider the feasibility of developing an international instrument on SALW brokering or otherwise recommend the development of such an instrument.

IV. Conclusions and recommendations

More can be done to promote the effective control of brokering and brokering-related activities in EU member states. Brokering controls in Europe will remain limited in their impact on illicit brokering if the states outside the region that do not control brokering adopt relevant controls. This does not remove, however, the need to effectively prevent the involvement of European brokers in illicit arms transfers. EU member states without legislation that is in conformity with the EU Common Position should be called

16. UNIDIR, op. cit., p. 157-65.

17. UNIDIR, op. cit., p.66; and GRIP, 2005, op. cit., p. 33-5.

18. UNIDIR, op. cit., p. 68-85.

19. United Nations. 2007. *Report of the Group of Governmental Experts to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons*, UN Document A/62/163. New York: United Nations, 30 August. Available at <http://disarmament.un.org/cab/brokering/GGE%20brokering/Sg%20Report/A62163E.pdf>

upon to implement their relevant commitments at the earliest possible opportunity. Member states should continue to follow-up the implementation of the common position and to expand the relevant information-sharing mechanisms. Other recommendations include:

Controls on brokering-related activities

EU member states should seriously consider the development of a common standard to control brokering-related activities. Controls should cover brokering-related services for third country transfers that are offered from within the territory of a member state. Controls should extend to nationally established entities and individuals who transport arms between foreign countries and to the use of ships and aircraft under the jurisdiction of a member state in third country transfers. A possible minimum requirement in this regard could be a regularly renewable general activity authorisation for brokering-related activities.

Extending prohibitions and extraterritorial controls

EU member states should develop a common minimum standard prohibiting the involvement of entities and persons under their jurisdiction in illicit arms transfers to destinations and end-users under a nationally implemented UN, EU, or other arms embargo. The prohibition should be comprehensive and cover brokering and brokering-related activities, including activities by nationally established entities and residents who operate abroad. EU member states without the relevant controls should be encouraged to adopt a licensing requirement for extraterritorial brokering and brokering-related activities by actors that are established in their territory.

Transparency and public scrutiny

EU member states should consider exchanging information on granted brokering licenses and to publish information on granted brokering licenses in their national arms export reports. Minimum information should identify the types of brokered goods or services under the licenses as well as the country of destination of the brokered goods or services. The publication of this information would allow for a minimum of public scrutiny of member states' decisions on brokering licenses.

Promotion of controls at multilateral levels

EU member states should continue their outreach activities to promote strengthened arms export controls among south-eastern and central European states and, where relevant, include the support for the development of brokering controls. States in a position to do so should consider providing assistance for further awareness raising activities on brokering controls in extra-European regions and sub-regions. EU member states should also consider possible steps to build support for the development of an international and preferably legally binding instrument on SALW brokering that would set common minimum standards for the national control of arms brokering activities.

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