

## CHAPTER 2

### NATIONAL SYSTEMS OF LICENSING AND REGISTRATION

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#### INTRODUCTION

Already in its 2001 report, the Group of Governmental Experts tasked with examining the “feasibility of restricting the manufacture and trade of [small arms and light weapons] to the manufacturers and dealers authorized by States” noted that “Many States have not put in place laws, regulations or administrative procedures that regulate arms brokering and related activities.”<sup>1</sup> In the Group’s opinion, this was particularly worrisome, as it meant that “activities that sometimes contribute substantially to illicit trafficking and to excessive and destabilizing accumulations and transfers of small arms and light weapons are not subject to regulation in many countries.”<sup>2</sup> Indeed—the Group continued—despite their centrality in the arms market, brokers often operate in grey areas between the licit and the illicit spheres, where they can exploit existing regulatory gaps or inconsistencies and facilitate the completion of illegal or illegitimate arms transfers.<sup>3</sup>

The Group’s report was one among the many initiatives that, since 2001, have brought the issue of the regulation of brokering activities to the fore, particularly in the context of international debates on the illicit trade of small arms and light weapons (SALW).<sup>4</sup> This increase in attention has led to important changes at both the international and national levels. For example, a variety of regional forums, including among others the European Union (EU), the Organization of American States (OAS) and the Organization for Security and Co-operation in Europe (OSCE), have adopted standards that the respective member states should or are encouraged to implement in order to control brokers’ activities. At the national level, a few countries have modified their arms exports regimes to include specific controls on previously unregulated brokering activities. The

total number of countries where such controls are in place, however, remains very low. Recent estimates set this number at around 40 countries worldwide, that is, around one-fifth of current UN Member States.<sup>5</sup> This means that, unlike other actors in the arms trade—most notably exporters and importers—brokers enjoy a very high degree of freedom from state monitoring and regulation. In the case of arms delivered to illicit or illegitimate recipients, this has allowed them to operate in a general situation of impunity.

It is important to provide an overview of how brokering controls work in the countries where they have been established, particularly in light of the first meeting of the UN Group of Governmental Experts on illicit brokering in November 2006.<sup>6</sup> The aim of this chapter is to analyse existing national laws and regulations on arms brokering, with a particular focus on the two control elements of licensing and registration.<sup>7</sup> Through an overview of the different ways in which these elements are designed in national jurisdictions, the chapter intends to present a spectrum of regulatory alternatives, thus offering practical input into upcoming international discussions. Based on feedback from governments, the chapter also presents some data on the application of licensing and registration requirements at the national level. However, because only ten of the thirty governments contacted by the author provided such feedback, this information can only be considered indicative.

The chapter is divided into two main sections. The first deals with licensing systems, that is, with those sets of rules that establish what types of activities require government authorization, and the procedures with which such authorizations are granted (or denied). This section is connected to the question of the definition of brokering activities, as it explores what constitutes a (controllable) intermediation activity under different national regimes. The second section deals with registration requirements for brokers. In a few countries, these are established in addition to the licensing of brokering transactions, and constitute a prerequisite for the broker to be able to apply for a specific deal license.

## LICENSING SYSTEMS

Licensing systems constitute the backbone of all national regimes for the control of brokering activities. In all the countries where brokering activities

are controlled, there is a requirement for brokers to obtain explicit—usually written—government authorization in order to be able to operate. Lacking such an authorization, the related deals are deemed illegal and therefore susceptible to prosecution and punishment by national authorities.

Licensing systems for brokering activities are usually integrated in the more general sets of rules governing the transfer of arms and military equipment. This means that relevant provisions are contained in national laws and regulations on the export, import and transit of arms and military equipment. The bodies administering the latter also administer brokering controls, and the criteria used for deciding on arms exports are also used to decide on brokering applications. As far as SALW are concerned, however, it is common for national systems to apply different sets of rules to military-style SALW, on the one hand, and so-called “civilian circulation weapons” on the other.

While generally present across national jurisdictions, licensing systems vary greatly in terms of what is considered a controllable brokering activity. While the principle that brokering must be licensed remains the same, each system deals differently with the specification of who can or must seek government authorization for which types of actions, relating to which types of deals and for which types of goods. For the sake of simplicity and comparability, we can say that licensing systems vary across the following main dimensions:

- the type of activity subject to control, that is, what is legally defined as a controllable “brokering activity” (for example, contract mediation, buying or selling arms on one’s own account or on account of others, the organization of services such as transportation or financing related to arms transfers, or the actual provision of such services);
- the type of deals the brokerage of which requires a license (for example, brokering related to imports/exports, or to the transfer of weapons between two foreign countries);
- the type of actors and the location of their activities to which the controls are applied (for example, national citizens, companies or residents acting abroad);
- the types of goods for whose brokering a license is necessary; and
- the types of exemptions from the licensing requirement.

The elements pertaining to the above dimensions determine who must apply for a brokering license and for what types of deals. Within this general framework, national rules also establish elements relating to the procedure through which licenses are screened and ultimately granted or refused. These specify, among others:

- the types of agents eligible to apply for brokering licenses (for example, natural or legal persons);
- the national agencies responsible for assessing license applications and for granting or refusing the related authorizations;
- the information that must be provided by the prospective broker when applying for a license;
- the types of licenses that can be granted (general versus individual); and
- the criteria used to assess brokering license applications.

All these dimensions, relating to both the general legal framework and to application procedures, are analysed in the following sections.

## GENERAL LEGAL FRAMEWORK

### Types of activities subject to control

As it could be expected, national definitions on the types of brokering activities subject to control—thus, definitions of what brokering *is*—vary greatly, both in content and specificity. Some definitions are broad and perhaps vague, potentially able to capture a wide spectrum of actions, while others are detailed and descriptive.

In the Netherlands, for instance, brokering controls relating to the transfer of strategic goods are based on the *Financial Transactions of Strategic Goods Order* of 1996. The Order does not contain an explicit definition of the terms “broker” or “brokering activity”. However, it does establish a licensing requirement for “acts performed by Dutch residents related to financial transactions for the purpose of trade in military goods, outside the European Union”.<sup>8</sup> Put simply, this means that any Dutch resident financially involved in an operation that leads to the transfer of strategic goods located outside the EU must possess government authorization. In practice, the Order has been interpreted to include operations that fall

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under a general definition of brokering activities, particularly the buying or selling of weapons located outside the European Union.<sup>9</sup>

Similarly, in Hungary, brokering activities have been under government control since 1991, even if an explicit definition of the term was introduced only in 2004. Before such an explicit definition was provided, *Government Decree 48/1991 on the Export, Import and Re-export of Military Equipment and Services* established a licensing requirement for:

The import and export of military products respectively into and from the territory of the Republic of Hungary, the performance there of relevant agency, representation and re-export-related activity, and the performance by Hungarian natural and legal persons and entities lacking legal incorporation of relevant agency, representation and re-export-related activity outside the customs area of the Republic of Hungary.<sup>10</sup>

By way of practice, this provision has been interpreted to cover brokering activities related to arms exports as well as to arms transfers between third countries. With the amendments to the Decree introduced in 2004, brokering activity was explicitly defined as that activity conducted by an eligible firm “in order to achieve the purchase/sale of military equipment or technical assistance between firms from two or more countries”. Importantly, this includes “arranging the transaction, acting as an intermediary between the contracting parties, identifying the possibility of the transaction to either the buyer or the seller, as well as buying or selling on its own account”.<sup>11</sup>

In other national jurisdictions the terms “broker” or “brokering activity” are defined in great detail and specificity. In South Africa, for example, “brokering services” are defined as:

- (a) acting as an agent in negotiating or arranging a contract, purchase, sale or transfer of conventional arms for a commission, advantage or cause, whether financially or otherwise;
- (b) acting as an agent in negotiating or arranging a contract for the provision of services for a commission, advantage or cause, whether financially or otherwise;
- (c) facilitating the transfer of documentation, payment, transportation or freight forwarding, or any combination of the aforementioned, in respect of any transaction relating to buying, selling or transfer of conventional arms; and

- (d) acting as intermediary between any manufacturer or supplier of conventional arms, or provider of services, and any buyer or recipient thereof.<sup>12</sup>

In the majority of cases, national systems focus on those activities that, in international forums, have been designated as “core” brokering.<sup>13</sup> Typically, these involve contract mediation, putting in contact buyers and sellers, as well as arranging payment and/or transportation schemes necessary for the actualization of the planned weapons transfer (as opposed to the actual provision of transportation or financing services). Importantly, these systems consider the actual possession of the weapons by the broker irrelevant. Whether an agent physically possesses the weapons he/she helps to sell or buy, his/her activity will be considered as brokering, and therefore will be legal only if carried out with government authorization.<sup>14</sup> Given the frequency with which brokers mediate transactions in which they do not possess the transferred weapons, this is a particularly important detail.

A few countries extend their controls to activities such as transportation and financing. In Bulgaria, for example, controlled “intermediary activity” includes “activities related to the preparation and/or performance of the foreign trade deal including forwarding services, transport services, consulting services, financing, when the person performing these activities is not the actual exporter, importer or re-exporter and when in some way these activities are related to the territory of the Republic of Bulgaria or with the use of telecommunication facilities for connection and/or postal services of the Republic of Bulgaria ”.<sup>15</sup> In Estonia, “brokering” is understood as “the provision or making available information, practical assistance or funds with a view to arranging or negotiating the arrangement of transactions relating to military goods that involve the transfer of goods from a foreign country to any other foreign country”.<sup>16</sup>

### Types of brokering transactions subject to controls

Another element defining the scope of a given national system of control on brokering activities is represented by the types of transactions for which an authorization to act as a broker is necessary. A broker operating in a given country X may facilitate different types of deals. Some may involve weapons that are located in country X itself, and that, therefore, would be exported from it. Others may involve the movement of weapons from outside X to a destination within it, that is, an arms import. But brokering by this agent

may also relate to the movement of weapons from a location outside X to another location outside X. We are dealing here with an instance of so-called “third-party”, or “third-country”, brokering.

Third-country brokering is an extremely common occurrence in the arms trade. Brokers very often work in one country to facilitate arms deals where the weapons are transferred without physically touching its territory, a type of activity that is made easier by the contemporary characteristics of trade flows and communications systems. From the regulatory point of view, third-country brokering represents a challenge, because a “classic” arms export/import control system—which centres around the control of weapons that move across national borders—does not cover such deals. In practice this means that brokers working in a given country are able to evade its arms export/import controls by simply organizing the transfer wholly outside this country’s borders. As Chapter 1 highlighted, this is one of the ways in which brokers facilitating arms transfers to questionable or outright illegitimate recipients have been able to evade strong national export controls. It is not surprising, then, that third-country brokering has been the focus of most international initiatives and multilateral standards on the issue. Existing national systems also target this particular legal loophole: all of them, indeed, have established a licensing requirement for brokering between third countries, when the brokering occurs on their territory.<sup>17</sup> It is important to note, however, that what constitutes a “third country” may vary across national jurisdictions.

In the simplest form, a “third country” indicates any foreign state. In Norway, for example, the *Regulations of 10 January 1989 Relating to the Implementation of Control of the Export of Strategic Goods, Services and Technology* establish that:

It is not permitted for persons who are domiciled or resident in Norway and Norwegian companies, foundations or associations to engage in trade in, negotiate or by other means assist in the sale of the military products included in [the national military list] *from one foreign country to another* [emphasis added] without the consent of the Ministry of Foreign Affairs.<sup>18</sup>

A similar understanding is present in the United Kingdom, where “third country” is intended as “any country that is not the United Kingdom or the Isle of Man”.<sup>19</sup> Brokering between such countries, which is conducted

wholly or in part in the United Kingdom, requires a license, whether it implies direct trade (acquisition or selling) of the weapons by the broker or the mediation of these operations between other parties.<sup>20</sup>

Within the European Union, a few national systems interpret “third country” as a country outside the EU. This is the understanding that is likely to prevail in the Union, given that it is the one established within the *Council Common Position 2003/468/CFSP* on the control of arms brokering of 2003.<sup>21</sup> The system in Romania, for example, defines brokering activities as those of persons and entities negotiating or arranging transactions that may involve the transfer of items on the Romanian list of military goods from a third country to any other third country, or who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country.<sup>22</sup>

An interesting double system is in place in Germany, where brokering must be authorized for different types of deals, depending on the weapons to be traded. German brokering controls have been in place since 1978, when an amendment to the *War Weapons Control Act* of 1961 established a licensing requirement for the acquisition, selling, and the related mediation of weapons located *outside German federal territory* and not destined to import into, or transit through, the country. The Act was applicable only to the brokering of weapons of war, as defined in German law, which included all types of light weapons but excluded some types of military small arms— notably revolvers, self-loading pistols, rifles and carbines. The export, import and transit of such military small arms—and all “other military equipment”—were regulated by the *Foreign Trade and Payments Act* and the *Foreign Trade and Payments Ordinance*, which, however, did not contain any provisions on brokering. Following the adoption of the EU Common Position, an amendment was introduced to establish controls on brokering activities that relate to the transfer of “other military equipment”. In line with the Common Position, brokering is defined as “negotiating or arranging transactions that may involve the transfer of items of the EU Military List from a third country [that is, non-EU] to any other third country”.<sup>23</sup>

Most national systems control brokering related to transfers that touch the national territory (most typically exports), in addition to third-country transfers. This is the case of Sweden, for example, which controls both brokering related to exports from its own territory as well as the brokering

of weapons transfers between two locations abroad.<sup>24</sup> Similarly, applicable legislation in Malta covers the brokerage (with or without actual possession by the broker) of items in the List of Military Equipment “from any country, including Malta, to any other country”.<sup>25</sup> In Bosnia and Herzegovina, as well, brokering (mediation) includes the facilitation by individuals or companies located in the country (whether permanently or temporarily) of “trade in weapons and military equipment, which are located in or out of Bosnia and Herzegovina, for the benefit of the third [foreign] country”.<sup>26</sup>

The distinction between exports/third-country transfers is overcome in systems that employ broad definitions of the scope of brokering controls. The Belgian law, for example, defines as a broker anyone who, whether in return for a fee or not, creates the conditions for the conclusion of a contract relating to the negotiation, exportation or delivery abroad, or possesses, to this end, arms, munitions or military material and related technology *whatever the origin or destination of the goods and independently of the fact that they enter Belgian territory*.<sup>27</sup> A similar wording is contained in the Ukrainian legislation, whose controls on intermediary activity apply “irrespective of the origin of [brokered] goods”.<sup>28</sup>

Among existing systems, an even broader understanding of the scope for brokering controls is used in the United States. Besides applying to nationals and residents, irrespective of where they or the weapons they broker are located, US controls also cover transfers brokered by foreign agents if the traded weapons are of US origin. Indeed, the US definition of brokering includes, among others, “activities by ... foreign persons subject to US jurisdiction involving defense articles or defense services of US or foreign origin which are located inside or outside of the United States”.<sup>29</sup>

### Extraterritorial controls

So far, we have analysed how countries regulate brokering activities conducted on their territory. But what of those activities that are carried out by a given state’s nationals, registered companies or established (permanent) residents abroad? If a broker, national of country A, carries out a deal from country B, do the rules that apply to the broker in A also apply in this case? And, if so, to what extent? For any deal the broker mediates, or only for some types? All these questions pertain to the extraterritorial dimension of national brokering controls, that is, to the extent to which they

apply to nationals, registered companies and residents of a given country operating from outside its borders.

The issue of extraterritoriality has drawn considerable attention in international debates on the issue of brokering activities. This is understandable, for at least two reasons. On the one hand, because extraterritorial provisions imply the application of a state's rules over individuals or companies operating in a foreign jurisdiction, they raise the question of effective enforcement. On the other hand, however, given the international nature of arms brokering—which commonly spans many countries—at least some degree of extraterritoriality becomes essential for a meaningful functioning of national controls. In a situation like the current one, in which brokering controls are in place only in a minority of countries, this issue acquires even more importance. As reported and well-documented cases have shown, brokers registered in a given country, which does not apply relevant controls extraterritorially, can easily evade such controls by conducting business from a foreign location. (See illustrative cases in Chapters 1 and 3.)

A variety of existing national systems have introduced an extraterritorial dimension to their controls on brokering activities. In most cases, extraterritoriality is full, that is, all the rules that apply to nationals, registered companies and established residents when they operate within the national territory extend to their activities abroad. This covers rules for licensing and, where present, for registration, with penalties for related violations. In Finland, for example, "Finnish citizens, Finnish corporations or foreign citizens considered permanent residents of Finland ... are required to have a brokerage licence to engage in the brokerage of defence materiel between third countries outside Finnish territory."<sup>30</sup> It is important to note that in this case, as in all others in which extraterritoriality applies to third country transfers, the only link between the controlling state and the broker may be the latter's nationality or residency. In other words, if the broker is a Finnish national, corporation or resident, it does not matter whether the broker's activity or the actual transfer of the weapons takes place outside Finnish territory for controls to be applicable.

The United States employs a particularly broad understanding of extraterritoriality in brokering controls. Under US law, brokering licensing requirements apply to activities of all nationals, even when they operate from abroad, for any type of deal (relating to transfers touching US

territory—imports and exports—as well as third-country transfers). The requirement also applies to “non-nationals operating on U.S. soil or abroad in cases where their transactions involve American weapons or reside and/or operate in the U.S.—including using U.S. mail or making telephone calls to and from the US”.<sup>31</sup>

A few states have opted for selective forms of extraterritoriality; in this case, the activities of nationals and residents conducted abroad are covered by national controls only in specific cases. In the United Kingdom, for example, the licensing requirement for brokering activities does not include those conducted wholly outside the United Kingdom (and the Isle of Man), except when the brokering relates to “restricted goods” (for example, long-range missiles and goods used in torture).<sup>32</sup> In addition, any brokering activity that entails the violation of a national or international arms embargo (mandated by the UN Security Council, the EU or the OSCE) can be prosecuted in UK courts, even when conducted overseas.<sup>33</sup>

The amendments to the legislation in Germany, which entered into force in July 2006, have also introduced a previously lacking extraterritorial dimension, which applies to selected cases. According to these new provisions, German residents brokering outside the EU are subject to German prosecution if they carry out deals in contravention of arms embargoes. In addition, the brokering of SALW conducted by German residents outside the EU also requires a license.<sup>34</sup>

### Types of goods

As previously mentioned, national brokering controls are usually included in the broader legal framework regulating arms exports, imports and transits. As a consequence, the items (weapons and military equipment) covered by brokering controls are the same that are subject to a given country’s export/import regime. These items are inserted in lists that are defined at the national level—so-called “control lists”. It is, however, common for these control lists to be designed to include, or coincide with, lists determined by multilateral organizations. Among existing national systems, many refer to the control lists approved by the European Union and the Wassenaar Arrangement.

In Bosnia and Herzegovina, for example, brokering controls cover the items contained in the EU Common Military List.<sup>35</sup> In Bulgaria, they cover the

Wassenaar Arrangement Lists and the EU *List of Dual-Use Items and Technology*.<sup>36</sup> In Hungary, they apply to a consolidated national list that includes equipment and technology contained in the Munitions Lists of the Wassenaar Arrangement, the Common Military List of the EU, and two additional categories: “instruments of coercion and crime surveillance” and “secret-service devices”.<sup>37</sup>

As far as SALW are concerned, the EU Common Military List—generally referred to by EU countries—and the Wassenaar Arrangement Control Lists cover the same categories of items.<sup>38</sup> These include: “Smooth-bore weapons with a calibre of less than 20 mm, other arms and automatic weapons with a calibre of 12.7 mm (calibre 0.50 inches) or less and accessories” and related specially designed components (Munitions List 1);<sup>39</sup> “Smooth-bore weapons with a calibre of 20 mm or more, other weapons or armament with a calibre greater than 12.7 mm (calibre 0.50 inches), projectors and accessories, ... and specially designed components” (Munitions List 2);<sup>40</sup> ammunition relating to the weapons listed in Munitions Lists 1 and 2 (Munitions List 3); and “Bombs, torpedoes, rockets, missiles, other explosive devices and charges and related equipment and accessories, ... specially designed for military use, and specially designed components ...” (Munitions List 4).

The lists agreed by these multilateral organizations, as reflected in the majority of national military lists, cover military-style SALW, but do not cover some types of small arms permitted for civilian circulation and possession. Brokering of the latter is either regulated through other pieces of legislation (usually the national firearms acts, which also establish the conditions for acquisition and carrying of weapons by civilians) or is not regulated at all. An interesting example in this respect is represented by the system in Lithuania. In this country, weapons subject to control by the state are divided into four categories: A, B, C and D.<sup>41</sup> Of these, the first includes military-style SALW—among others—while the remaining three categories relate to civilian-circulation weapons. Controls for the brokering of civilian-circulation weapons were established in 2002, with the *Law on the Control of Arms and Ammunition*. The law provides for a licensing requirement for the brokering of weapons (in the categories B, C and D) that are imported, exported or in transit through Lithuanian territory. Permits are granted only on an individual basis by the Police Department. They are not necessary for individual deals of these weapons involving two third countries; however,

brokers must submit annual reports to the Police Department on such activities.<sup>42</sup>

In 2004, further controls were established in Lithuania for the regulation of brokering relating to category A weapons, through amendments to the *Law on the Control of Strategic Goods*. These entered into force on 1 August 2004, and control the trade and brokering of weapons listed in the EU Common Military List, some of which are part of category A (military weapons) while others are not. Lithuanian natural and legal persons need both an activity license and an individual deal licence in order to broker weapons that are included in category A. Licenses, which are granted by the Ministry of Economy, are necessary for all transfers directed towards a third country—originating from Lithuania or any country outside Lithuania—and for transfers between EU countries. For the weapons still falling under the provisions of the *Law on the Control of Strategic Goods*, but which are not included in category A weapons, a partially different system applies. Brokers in these weapons only need an individual transaction license—no need for an activity license—which is also granted by the Ministry of Economy. This requirement applies, as above, to all transfers directed to a third country, but not to transfers between two EU countries.<sup>43</sup>

In the Netherlands, as well, two different sets of laws and regulations cover military SALW and civilian-circulation small arms. The above-mentioned *Financial Transactions of Strategic Goods Order* of 1996 controls SALW that fall under the category of strategic goods. The agency mainly responsible for granting licenses under this act is the CDIU (*Centrale Dienst voor In- en Uitvoer*—Central Department for Import and Export Licenses), which is part of the Tax and Customs Department of the Ministry of Finance; while the main enforcement agency is the Fiscal and Economic Investigation Services (FIOD-ECD). The trade, including brokering, of civilian small arms, on the other hand, is controlled through the provisions of the *Arms and Ammunition Act* of 1997; in this case, the main licensing and enforcement agency is the police.

### Licensing exemptions

Exemptions from the licensing requirement for brokering activities are extremely common. All the analysed systems provide for situations in which a brokering license will not be necessary. At a minimum, such an exemption covers the activities of government agencies, particularly national armed

and police forces. In a few instances, however, licensing exemptions apply to broader instances which relate to trade with allies or very close commercial partners.

In the United States, for example, licenses are not necessary for brokering activities that are “arranged wholly within and destined exclusively for the North Atlantic Treaty Organization, any member country of that Organization, Japan, Australia, or New Zealand” except for cases in which particular items are the object of the brokered deal, including fully automatic firearms, their parts and components.<sup>44</sup>

In Switzerland, brokering activities may be conducted on the basis of both a general authorization and individual deal licenses. In two cases, however, only general authorizations are required.<sup>45</sup> Individual licenses are not necessary for the brokering of shipments destined to a specified list of countries.<sup>46</sup> In addition, Swiss manufacturers do not need individual licenses in order to broker war material if they already possess an initial authorization to broker or trade in items similar to those they produce in their own premises. As Swiss officials explained, this provision is intended to cover situations in which the order of a foreign customer exceeds the production capacities of a Swiss manufacturer. The licensing exemption allows such a manufacturer to supply the requested goods directly from their production branches established abroad to the foreign customer, without having to apply for an individual deal license.<sup>47</sup>

#### LICENSING PROCEDURE

Once the general framework for the licensing of brokering activities has been established, a variety of other measures provide for the procedure that must be followed for government authorization to be granted (or refused). These measures specify a variety of elements, such as who can apply for a brokering license, what types of documents must be submitted along with the application, what agencies are charged with issuing authorizations and what criteria these must take into account in their decision-making process. These elements are analysed in the following sections, which deal with the application process, the decision-making process and the types of licences that can be granted.

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### The application process

In general, existing systems for the control of brokering activities do not set specific requirements for eligibility to apply for a license. In a few instances, however, certain conditions must be met for an individual or company to be able to apply for a brokering license. In addition, in some countries—for example, Slovakia—only corporate persons (as opposed to individuals) can apply for brokering licenses.

In the Czech Republic, for example, only “corporate persons with their place of business” in the country in possession of a permit may carry out trade in military equipment. Permits, on the other hand—which are a precondition for applying for brokering licenses—can only be granted under the following conditions:

- a) not more than 49% of the equity capital of the corporate person was invested by foreign persons,
- b) the members of the statutory body of the corporate person and the chief clerks ... ,
  1. have reached 21 years of age,
  2. are citizens of the Czech Republic,
  3. have their permanent residence in the Czech Republic,
  4. are qualified to perform legal acts,
  5. satisfy the conditions laid down by special legislation ... ; meet the prerequisites set out for holding certain positions within the bodies and organizations of the State pursuant to a special legal regulation ... ,
  6. meet the prerequisites for engaging in sensitive activity under a special law ...
- c) the trade in military equipment shall be carried out by a corporate person in his own name and to his own account,
- d) the financial backing of the trade in military equipment by the corporate person is adequate in respect of the expected size of the business.<sup>48</sup>

The system in Poland also establishes requirements on the part of individuals or companies wishing to apply for a brokering license. Before filing an application, natural and legal persons have to implement an “internal system of control” to determine whether:

1. the end user intends to use military goods to violate or repress human rights and fundamental freedoms;

2. the delivery of military goods poses any threat to peace or may otherwise cause destabilisation in the region;
3. the country of final destination supports, facilitates or encourages terrorism or international crime;
4. military goods may be used for any other purpose than to satisfy justified requirements of defence and security in the country of destination.<sup>49</sup>

The internal system of control is also intended to “define tasks of individual authorities in the organization, job descriptions as regards basic tasks related to control and management of trade, framework of co-operation between the natural or legal person and state administration in this area, as well as rules and procedures of employee recruitment, data archiving, internal controls, and completion of orders”.<sup>50</sup>

While the majority of national systems apply to nationals and permanent residents, in a few cases the provisions controlling brokering activities also apply to foreigners and temporary residents. In Switzerland, for example, anyone that wishes to broker from Swiss territory weapons destined to a foreign state, and that does not possess any production premises in Switzerland, needs authorization from the relevant Swiss governmental agency, regardless of the broker’s nationality or country of residence.<sup>51</sup> However, Swiss officials suggested that the practical implementation of such controls on foreign persons may be challenging because they are difficult to monitor.<sup>52</sup> Indeed, in the period between 1998 and 2004, no foreign company or individual operating in Switzerland applied for a brokering license even if, as acknowledged by these officials, such activities “probably took place”.<sup>53</sup> In addition, because the Swiss system does not extend to activities conducted by nationals and residents abroad, it leaves open an easily exploitable loophole.

Similarly, Estonian controls apply to the provision of services, including brokering, “from Estonia to a foreign country or to a foreign recipient of services *regardless of the residence of the service provider who is a natural person or seat of the service provider who is a legal person* [emphasis added] or through the business activity of an Estonian service provider in a foreign country.”<sup>54</sup>

In terms of the license application process, state laws or regulations usually specify the types of documents that must be submitted along with the

application. At a minimum, such documents are intended to prove the nature and establishment of the applying person, as well as to specify the type and quantity of the military and security items or weapons of the intended brokerage deal. A few national systems also require documentation attesting the end-use or end-user of the intended deal, through the submission of an end-use(r) certificate, import certificate or equivalent. For example, agents applying for an individual brokering license in the Czech Republic must submit, in addition to details on the applicant's business and of the weapons to be transferred, "the name of the state from which the military equipment is to be imported or to which it is to be exported, or with which the military equipment abroad is to be handled, even if it is not transported via the Czech Republic".<sup>55</sup> Information must also be submitted concerning the purpose of the transfer, as well as the name and place of the end-user. The application must be supported by the following documents:

- a draft contract or a signed contract with a precise specification of the military equipment and its amount;
- a document on its final use; [and]
- at the Ministry's request [any] other documents enabling a proper assessment of the case ...<sup>56</sup>

In Latvia, the transit of weapons is subject to a license by the Control Committee of Strategic Goods, even when conducted wholly outside Latvian territory (which effectively covers third-country brokering activities).<sup>57</sup> In order to apply for a transit license, individuals or companies must submit, together with the application, a description of the transited goods, a copy of the contract, as well as an import certificate or equivalent document issued by the country of destination or the confirmation of the final use of the relevant goods.<sup>58</sup>

### **The decision-making process**

Within each country, one state agency is usually the main organ responsible for examining brokering license applications and granting (or refusing) the related authorizations. Existing agencies in this respect are located in a variety of national ministries, typically the ministries of foreign affairs, economy or trade. It is, however, common for these agencies to consult with other government ministries or departments before a decision is taken on a license application. In these cases, in other words, decisions are taken

through inter-agency processes. For example, in Slovakia, brokering permits are issued by the Ministry of Economy following the opinion of the Ministries of Foreign Affairs, Defence and Interior, as well as the National Security Office.<sup>59</sup> In Hungary, the inter-agency process is built in the very constitution of the organ tasked with examining license applications. Brokering licenses are issued by the Hungarian Trade Licensing Office, which consults with the Committee on the Licensing of Foreign Trade in Military Equipment. The Committee's members are designated by the minister heading the Prime Minister's office, and by the Ministries of Interior, Defence, Economy and Transport, Foreign Affairs and Finance.<sup>60</sup>

A particularly important element in the decision-making process is represented by the criteria or guidelines that relevant national agencies employ to ultimately decide whether to grant or refuse a brokering license. These criteria may spell out prohibitions—instances in which authorizations will be refused—or specify the elements that must be considered during the decision-making process. Most common prohibitions are connected with the implementation of arms embargoes—most typically decreed by the UN Security Council, but also by other multilateral or regional organizations. In these cases, the criteria or guidelines establish by law that brokering licenses will be refused if they relate to the transfer of weapons to embargoed destinations. Other prohibitions may relate to the transfer of weapons to countries in a situation of internal conflict or regional instability. Besides outright prohibitions, decision-making criteria may include factors such as the consideration of the situation in the recipient country, in terms of human rights violations, reliability or economic stability. Of course, criteria may also relate to the protection of the foreign policy, economic or other interests of the country deciding on the license application. In South Africa, for example, the Committee responsible for granting brokering licenses must:

- (a) assess each application on a case-by-case basis;
- (b) safeguard the national security interests of the Republic and those of its allies;
- (c) avoid contributing to internal repression, including the systematic violation or suppression of human rights and fundamental freedoms;
- (d) avoid transfers of conventional arms to governments that systematically violate or suppress human rights and fundamental freedoms;
- (e) avoid transfers of conventional arms that are likely to contribute to the escalation of regional military conflicts, endanger peace by

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- introducing destabilising military capabilities into a region or otherwise contribute to regional instability;
- (f) adhere to international law, norms and practices and the international obligations and commitments of the Republic, including United Nations Security Council arms embargoes;
  - (g) take account of calls for reduced military expenditure in the interests of development and human security;
  - (h) avoid contributing to terrorism and crime;
  - (i) consider the conventional arms control system of the recipient country and its record of compliance with end-user certificate undertakings, and avoid the export of conventional arms to a government that has violated an end-user certificate undertaking;
  - (j) take into account the inherent right of individual and collective self-defence of all sovereign countries in terms of the United Nations Charter; and
  - (k) avoid the export of conventional arms that may be used for purposes other than the legitimate defence and security needs of the government of the country of import.<sup>61</sup>

In Nicaragua, prohibited brokering activities relate to exports of conventional firearms to countries:

- with which Nicaragua has an ongoing conflict or dispute;
- which are subject to a UN arms embargo;
- which systematically violate human rights; or
- which support terrorism or crime or provide asylum to drug traffickers.<sup>62</sup>

Brokering licenses will also be refused when there is evidence or suspicion that the recipient country has committed genocide or crimes against humanity; if there is a risk that the weapons will be diverted to irregular armed groups; or if the related arms transfer would violate Nicaragua's bilateral or multilateral agreements on the control non-proliferation of weapons.<sup>63</sup>

European Union countries share a certain degree of uniformity in this respect, as they all refer to the rules set out in the EU Code of Conduct on Arms Exports. Approved in 1998, the Code sets out eight criteria for the assessment of arms exports license applications that relate to the following:

- respect for international commitments taken on by EU members, including international arms embargoes and non-proliferation agreements;
- the human rights situation in the recipient country;
- the internal situation of the recipient country, particularly in relation to the existence of an armed conflict;
- the preservation of peace, security and stability;
- the national security of the EU members, their territories, as well as their allies and friendly states;
- the “behaviour” of the recipient country, particularly as relates to its attitude to terrorism, and respect for international law;
- the risk of unauthorized re-export from the recipient country; and
- the compatibility of the arms exports with the technical and economic capacity of the recipient country.<sup>64</sup>

The Code criteria are sometimes used by states in conjunction with other rules emanating from other multilateral organizations in which they participate. For example, in Bosnia and Herzegovina, licenses are assessed on the basis of the sanctions of the UN Security Council, of the EU Code of Conduct as well as the OSCE Common Export Criteria, in addition to the obligations to the state deriving from other international agreements.<sup>65</sup>

### Types of licenses

Generally speaking, brokering licenses are of two types: individual and open (or general). Individual licenses are granted for one specific transaction, which usually entails one specified destination or end-user and a specific quantity and type of equipment. Open licenses are authorizations for multiple transfers, which may involve multiple destinations or end-users, or multiple classes of goods.

Not all national systems specify the types of brokering licenses that they allow for, but among those that do, the majority of systems require that brokering licenses be granted on a case-by-case basis, that is, for each individual transaction. In a few systems, such as in Poland and Ukraine, both individual and open licenses can be granted. In one country, only general licenses are issued to brokers: in Slovakia, brokers need a permit (or general authorization) issued by the Ministry of Economy in order to operate, but do not require a specific license for individual transactions. On the other hand, they must keep records of each individual deal (for at least

five years) and report periodically to the same Ministry on their activities.<sup>66</sup> In addition, they must inform the Ministry of Economy for each individual transaction conducted abroad.<sup>67</sup>

A few countries have also established a “multi-stage” licensing system. Brokers in these countries must possess more than one license in order to legally operate; most commonly, these are a general permit, which allows the agent to act as a broker, and an individual license for each specific deal.<sup>68</sup> Such a system is present, for example, in Bulgaria<sup>69</sup> and the Czech Republic.<sup>70</sup> The system in Hungary is three-tiered: in order to operate, Hungarian agents wishing to “act as a representative, agent, broker or intermediary in respect of military equipment or technical assistance, whether within or outside the territory of the Republic of Hungary”<sup>71</sup> need an activity licence, a negotiating licence and a contract licence. Activity licenses can be general (covering any product, country or transaction) or specific (covering a specific product, country or transaction). Obtaining such a license is a necessary precondition for the firm to do any preparatory activity related to the intended deal, and can be granted for a maximum of 24 months (with a possible renewal of 24 additional months). The negotiating license can be granted only if an activity license is present; it authorizes the applicant to prepare a contract within 12 months and can be renewed once for a further 12 months. The performance of a specific deal also requires a contract license, which cannot be granted if either the activity or the negotiating licenses are absent. A contract license is also valid for a 12-month period, renewable for 12 more months. All licenses are granted by the Hungarian Trade Licensing Office and none of the three stages replaces the others.

#### SOME DATA ON IMPLEMENTATION

At the beginning of this research a questionnaire was circulated among countries with brokering controls. Some of the submitted questions related to the practical implementation of licensing rules; they were intended to assess various elements, such as the average workload entailed by the screening of brokering license applications, and the ability of national rules to screen effectively particular types of brokering transactions (for example, extraterritorial activities; transfers of SALW alone as opposed to transfers of conventional military equipment more generally). Unfortunately cooperation from governments was low, as less than one-third of contacted countries provided the requested information. Submitted data, however,

still gives us important indications of national practice as well as of possible enforcement challenges.

In government replies, the average number of license applications processed in one year ranged from zero to 187; the number of licenses granted over the last five years (or the applicable period, for recently established controls) ranged from zero to 274. Importantly, the two highest figures (187 and 274) were both submitted by the United Kingdom, a large weapons producer, where brokering controls were introduced quite recently (2004), and which accompanied the establishment of brokering controls with an extensive information campaign.<sup>72</sup> The UK government also indicated that a high number of prospective brokers were registered for the Open General Trade Control License, the use of which is encouraged by the UK government itself in order to lighten the burden on the screening agencies. The lowest figure reported by responding governments (zero) may be explained by two considerations, which are not necessarily mutually exclusive. On the one hand, countries that reported having screened no application have established brokering controls only recently, in one case starting from July 2006. On the other hand, a government representative suggested that there may be actual confusion on the part of individuals or companies as to when and for what type of activity a brokering license is necessary. In this sense, either the vagueness of the legal definition or the lack of proper communication between governmental authorities and potentially interested agents may have negatively affected the practical implementation of brokering controls.<sup>73</sup>

Governments were also asked whether granted licenses related to two specific types of transactions: brokering conducted by nationals/residents abroad (extraterritorial application of controls) and brokering related to the transfer of SALW only. Of course, where no license has been granted the two questions were not applicable, but answers still offer important indications. Among the five countries that granted brokering licenses in the last five years, three reported that some of these related to the brokering conducted by national agents abroad, indicating the possibility of enforcement across borders, which is often put in doubt in international discussions. In these cases, it would be important to enquire for more detail as to the means that allowed such an extraterritorial screening. On the other hand, most of the respondents reported that no license was granted for the transfer of SALW alone. Again, part of the explanation may rest on the recent establishment of brokering controls but, more generally, this may

indicate that brokers rarely engage in the mediation of transfers of SALW alone. In the context of current international initiatives on the issue—which all developed in the framework of the fight against the illicit proliferation of small arms—this is a very important indication that the separation between brokering of SALW, as opposed to the brokering of other military equipment, is artificial and does not necessarily reflect actual trade practices. In fact, it was suggested that cases of illicit brokering investigated by subsequent UN Security Council sanctions committees—established to monitor UN embargo implementation—reveal that 90% of illicit brokering is related to the transfer of all kinds of conventional items, and only 10% to the transfer of SALW alone.<sup>74</sup>

## REGISTRATION SYSTEMS

In addition to requiring that brokering activities be licensed, some national systems impose a registration requirement on brokers as a precondition to be able to operate. In these systems, brokers must be registered before they can apply for a license to perform a specific transaction.

The essential trait of registration as a precondition to operate is that it establishes a second level of screening, additional to the one taking place during the licensing process. Registers are also sources of “institutional memory”, records that lend themselves to potential uses in the enforcement of controls nationally and in the exchange of information internationally.

In the systems where a “multi-stage” licensing requirement is in place, brokers’ registration may coincide with the first of these stages, that is, with the granting of a general authorization (or permit) to conduct brokering activity, usually if and when specific deals are licensed. This is the case with Switzerland, for example, where “any person who, on Swiss territory, intends to ... trade in war material, for his own account, or for another’s, or to broker ... for foreign recipients, regardless of the location of the said material” needs an initial authorization before he/she can apply for a specific-deal license.<sup>75</sup> When applying for an initial authorization, brokers wishing to work in Switzerland must submit, among others, a list of the war material object of the required authorization, a declaration of domicile and a copy of their criminal record.<sup>76</sup> Importantly, the initial authorization to broker is revoked if it has not been used for three years.<sup>77</sup>

In other systems with a “multi-stage” licensing process, registration is additional to the other trading licenses that are necessary for the broker to operate. For example, in Bulgaria, only legal or physical persons registered under the Company Law can perform foreign trade activity; after this registration, they still need an activity license and a permit for each transaction.<sup>78</sup> Similarly, in Slovenia, “Trading permits, consents for production and permits for single deals can be obtained only by legal persons registered in the Republic of Slovenia who have a suitable activity entered in the register of companies, or by physical persons who have a suitable activity entered in the register of sole traders.”<sup>79</sup> Once registered, brokers in Slovenia can act on the basis of an initial authorization and a specific deal license for transfers touching Slovenian territory (exports, imports and transits). On the other hand, in addition to being registered, brokers will need only a general authorization if operating in Slovenia and facilitating third-country transfers.<sup>80</sup>

The registration of brokers as a precondition for them to apply for individual deal licenses is a very common practice among existing national systems. It may also be selectively applied; it can be necessary only for the brokering of certain categories of goods, or certain types of transfers. For example, in Lithuania, registration is necessary for the brokering of arms and ammunition that fall into the nationally defined four categories, one of which partially overlaps with the EU Common List of Military Equipment.<sup>81</sup> For the brokering of weapons and equipment that are part of the EU list but not of the national classification, a registration is not necessary, even if individual licenses are still required.<sup>82</sup> Similarly, in the Netherlands, registration is necessary for the brokering of weapons covered by the *Arms and Ammunition Act*, but not for brokers acting under the provisions of the *Financial Transactions of Strategic Goods Order* even if, in this case as well, individual deal licenses will still be necessary.

For the majority of systems that have established a registration requirement, this is applied to all brokering activities. Registration, of course, may be cancelled or revoked, particularly in the case of violations to the national trade laws and regulations. In the United States, for example, debarment is one of the possible penalties that brokers who have violated US trade laws may incur.

In the countries where brokers do not have to register with national authorities before they apply for an individual deal license, the

maintenance of records on granted licenses by the state becomes a particularly important element. In a few systems, the record of the information a broker has provided when applying for an individual deal license is treated as a form of de facto automatic registration. This is the case with Norway and Germany, for example. As stated in the Norwegian report on implementation of the UN Programme of Action, "Norway has no legal registration requirement for brokers. However, when a broker applies for a permission to execute a brokering activity, he will automatically be registered."<sup>83</sup> In Germany, as well, brokering registration is effected with the first license application.<sup>84</sup> As a source of institutional memory, state records on granted/refused licenses are an important means to exercise monitoring and implementation. In Estonia, the Ministry of Foreign Affairs is mandated to maintain the state register of arms brokers as well as a database of granted export licenses, among others.<sup>85</sup> Similarly, in Bosnia and Herzegovina, the Ministry for Foreign Trade and Economic Relations, tasked with granting brokering licenses, is charged with establishing a database on issued licenses, on which it reports every six months to the Parliamentary Assembly.<sup>86</sup>

Overviewed countries commonly keep records of registered brokers or granted licenses; according to replies to the questionnaire submitted at the beginning of this research, the storing of data on refused licenses is also quite common. Records are also kept for quite long periods of time, which range (in the case of responding governments) from a minimum of ten years to indefinitely. Replies to the questionnaire also give two important indications concerning the sharing of information on granted/refused licenses among national agencies as well as with other countries' authorities or international organizations. Most responding governments report that records on granted/refused licenses are shared with national agencies other than those responsible for screening them. In the majority of cases, however, this is done on request or "if necessary". At the international level, it is significant that all except one of the responding countries indicated they do not share this information with foreign governmental authorities or international institutions. The sharing of information is done for the most part on request, if it is made at all possible by existing national rules on privacy. In terms of enforcement, the fact that data on granted and, especially, refused licenses is not shared as a matter of practice with other states or international enforcement agencies may represent a serious pitfall. When faced with a refusal of their license application by a given country, brokers may apply for the same authorization in another state, which—in

the absence of information sharing—would simply not be alerted to the possible illicit nature of the proposed deal. The same, of course, applies to the sharing of information on registered brokers who, if debarred in one state due to violations of arms trade laws, may simply move business elsewhere with minimum risk of being detected.

## CONCLUSION

Since attention has started to emerge on the problem of illicit arms brokers, a central concern of the international community—expressed in non-governmental and inter-governmental reports alike—has related to the general lack of appropriate regulatory frameworks at the national level. One of the key recommendations of the report submitted by the Group of Governmental Experts—which reported in 2001 on the feasibility of restricting the manufacture and trade of SALW to the manufacturers and dealers authorized by states—was indeed that states should, at a minimum, establish national systems of control for brokering and related activities occurring within their territorial jurisdiction, in order to deal effectively with illicit or undesirable arms transfers.

In the last decade much has occurred, at the national level, to respond to this generally expressed concern, and a growing number of countries have modified their national arms export regimes to include specific controls on brokering. At the same time, the total number of countries with such controls in place remains, to date, staggeringly low. It is estimated that around 40 countries worldwide control brokers and their activities, over two-thirds of which are located in the European (Eastern and Western) region.

This chapter presented an overview and analysis of such national regimes, with a particular focus on the two elements of licensing and registration. By examining the different ways in which these are designed at the national level, this chapter tried to present a spectrum of regulatory options, in the hope of providing a valuable resource to the UN Group of Governmental Experts tasked “to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons”.<sup>87</sup>

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The comparison reveals that national brokering controls vary in many respects, two of which may prove central in forthcoming international discussions: the legal definition of “broker” and “brokering activity”, and the degree and nature of extraterritoriality, that is, the application of national controls on activities of nationals and residents abroad.

This chapter also presented some data on national implementation of licensing and registration requirements that, while only indicative, point to some important enforcement challenges. These relate, among others, to:

- the need for legal systems to be very clear as to what is considered a controllable brokering activity and, therefore, needs government authorization;
- the possibility that the distinction between brokering of SALW alone, as opposed to the brokering of conventional military equipment more generally, is difficult to make in practice;
- the related possibility that the present international focus, centred on efforts to combat the illicit proliferation of small arms specifically, may have to be adjusted to the reality of brokering transactions; and
- the importance of national agencies being able to share information internationally on brokering licenses and registered brokers, whether on a bilateral or multilateral basis.

## Notes

<sup>1</sup> *Report of the Group of Governmental Experts Established Pursuant to General Assembly Resolution 54/54 V of 15 December 1999, Entitled “Small Arms”, UN document A/CONF.192/2, 11 May 2001, para. 25.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, para. 62.

<sup>4</sup> For details on the international initiatives on the issue as well as on its historical development, see Chapters 1 and 4 of this report.

<sup>5</sup> Holger Anders and Silvia Cattaneo, *Regulating Arms Brokering: Taking Stock and Moving Forward The United Nations Process*, Groupe de recherche et d’information sur la paix et la sécurité, GRIP Report, 2005; Biting the Bullet Project (International Alert, Saferworld and the University of Bradford), *International Action on Small Arms 2005*:

*Examining Implementation of the UN Programme of Action*, *Biting the Bullet* (produced for the International Action Network on Small Arms), 2005, p. 6. The formulation of a precise figure presents some challenges. At the national level, the terms “broker” and “brokering activity” are understood in quite different ways. This variation has not only had a negative effect on the formulation of agreed international definitions of either term, but it also makes cross-country comparisons difficult. In many cases this difficulty is compounded by a lack of publicly available legal texts, or by the lack of cooperation by national authorities in providing information.

- 6 With resolution A/RES/60/81 the UN General Assembly established a Group of Governmental Experts tasked “to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons”. The Group will meet in three one-week sessions, starting from November 2006.
- 7 This chapter is based on an analysis of the regulatory systems in place in the following countries: Austria, Belgium, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Latvia, Liechtenstein, Lithuania, Malta, the Netherlands, Nicaragua, Norway, Poland, Romania, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Ukraine, the United Kingdom and the United States. Information for each of these systems was obtained through an analysis and interpretation of relevant legal documents (arms trade laws and regulations), which in a few cases was supplemented with feedback from government authorities. Unofficial translations of legal instruments have been provided throughout this chapter. However, readers should refer to the law in its original language for any clarification or for further information.
- 8 Report submitted in 2005 by the Netherlands to the UN Department for Disarmament Affairs on national implementation of the Programme of Action, p. 6, available at <[http://disarmament.un.org/cab/nationalreports/2005/National%20Report%20\(the%20Netherlands.pdf](http://disarmament.un.org/cab/nationalreports/2005/National%20Report%20(the%20Netherlands.pdf)>.
- 9 In theory, this provision could also be used to control brokers who receive a fee or commission relating to a transfer of strategic goods, even when they do not directly buy or sell such weapons. In practice, such an occurrence has not materialized so far.

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- <sup>10</sup> Hungary, *Government Decree 48/1991 on the Export, Import and Re-export of Military Equipment and Services* [A haditechnikai eszközök és szolgáltatások kiviteléről, behozataláról, illetve reexportjáról szóló], [Government Decree 48/1991 (III.27.)], art. 1(2).
- <sup>11</sup> Hungary, *On the Licensing of the Export, Import, Transfer and Transit of Military Equipment and Technical Assistance*, [Government Decree 16/2004 (II.6.)], art. 1(3).
- <sup>12</sup> South Africa, *National Conventional Arms Control Act*, [No. 41 of 2002], art. 1(i).
- <sup>13</sup> The distinction between “core” and “associated” brokering activities is commonplace in international discussions on the issue, and would aim at capturing the distinction between “mediation”, on the one hand, and the provision of so called “ancillary” services—most typically transportation and financing—on the other. In practice, however, the distinction is not always evident, as the variety of activities conducted by brokers cannot easily be classified according to discreet and clear-cut categories.
- <sup>14</sup> Holger Anders and Silvia Cattaneo, *Regulating Arms Brokering: Taking Stock and Moving Forward the United Nations Process*, Groupe de recherche et d’information sur la paix et la sécurité, GRIP Report, 2005, p. 14.
- <sup>15</sup> Additional provision 1(a)(2) of the *Law on the Control of Foreign Trade Activity in Arms and in Dual-Use Goods and Technologies* (1995, with amendments up to 2002); Bulgaria, *Law on the Control of Foreign Trade Activity in Arms and in Dual-use Goods and Technologies*, [State Gazette 75/2.08.2002r]; see also articles 13(a) and 13(b) regulating the provision of transportation and transit. This text was provided by the Bulgarian Ministry of Foreign Affairs.
- <sup>16</sup> Estonia, *Strategic Goods Act* [Strateegilise Kauba Seadus], [RT I 2004, 2, 7], 17 December 2003, § 3(2)(1).
- <sup>17</sup> A separate question concerns the control of nationals and residents when they work outside the national territory of their country of establishment. This issue is dealt with below, in the section on extraterritorial controls.
- <sup>18</sup> Norway, *Regulations Relating to the Implementation of Control of the Export of Strategic Goods, Services and Technology*, [FOR-1989-01-10-51], 10 January 1989, §1(i). See also Norway, *Act of 18 December 1987 Relating to Control of the Export of Strategic Goods, Services, Technology, etc.*, [LOV-1987-12-18-93], 18 December 1987, § 1: “The King may also lay down a prohibition whereby persons who are

- domiciled or resident in Norway and Norwegian companies, foundations and associations may not without special permission engage in trade in, negotiate, or by other means assist in the sale of weapons or military equipment from one foreign country to another”.
- <sup>19</sup> United Kingdom, *The Trade in Goods (Control) Order 2003*, [Statutory Instrument 2003 no. 2765], art. 2.
- <sup>20</sup> *Ibid.*, art. 4(1–2). The United Kingdom uses different terms for these two cases: it defines “trafficking” as an instance in which a broker trades between two overseas countries on the broker’s own behalf, while “brokering” is intended as an instance in which the broker arranges or mediates contracts between others for trade in military and paramilitary goods between foreign countries. See “Supplementary Guidance Note on Trade (“Trafficking And Brokering”) in Controlled Goods including Trade to Embargoed Destinations”, <[www.dti.gov.uk/files/file8418.pdf](http://www.dti.gov.uk/files/file8418.pdf)>.
- <sup>21</sup> The Common Position is binding on EU members, the majority of which have adopted brokering controls or are in the process of amending relevant export control legislation. See Council of the European Union, *Council Common Position 2003/468/CFSP of 23 June 2003 on the Control of Arms Brokering*, 2003/468/CFSP, 23 June 2003. See also Holger Anders, *Implementing the EU Common Position on the Control of Arms Brokering: Progress after Two Years*, Groupe de recherche et d’information sur la paix et la sécurité briefing, note d’analyse, 2005.
- <sup>22</sup> Romania, *Government Ordinance no. 158/1999 on the control regime of exports, imports and other foreign trade operations with military goods, approved and amended by Law nr. 595/2004 [Lege pentru aprobarea Ordonanței de urgență a Guvernului nr. 158/1999 privind regimul exporturilor și importurilor de produse strategice]*, [Law no. 595/2004], 15 December 2004, art. 5(e).
- <sup>23</sup> Communication with German Ministry of Foreign Affairs, May 2006; see also report submitted in 2005 by Germany to the UN Department for Disarmament Affairs on national implementation of the Programme of Action, available at <<http://disarmament.un.org/cab/nationalreports/2005/Germany.pdf>>.
- <sup>24</sup> Communication with Swedish Ministry of Foreign Affairs, May 2006. See also Sweden, *Military Equipment Act [Lag (1992:1300) om krigsmateriel]*, [SFS 1992:1300], 12 October 1992.
- <sup>25</sup> Malta, *Military Equipment (Export Control) Regulations*, [S.L.365.13], 1 January 2002, art. 2.

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- <sup>26</sup> Bosnia and Herzegovina, *Law on the Import and Export of Weapons and Military Equipment* [Zakona o uvozu i izvozu oružja i vojne opreme], [Sl.Glasnik BiH 5/03 and 33/03], 3 July 2003, art. 2(2).
- <sup>27</sup> Belgium, *Law of 25 March 2003, Modifying Law of 5 August 1991 Concerning Import, Export, and Transit of Weapons* [Loi modifiant la loi du 5 août 1991 relative à l'importation, à l'exportation et au transit d'armes, de munitions et de matériel devant servir spécialement à un usage militaire et de la technologie y afférente], [2003/09355], 25 March 2003, art. 15.
- <sup>28</sup> Ukraine, *On the State Control over International Transfers of Military and Dual-Use Commodities*, [Law No. 549-IV], 20 February 2003, art. 1.
- <sup>29</sup> United States of America, *International Traffic in Arms Regulations* (ITAR), rev. 1 April 2006, § 129.2(b).
- <sup>30</sup> Finland, *Act on the Export and Transit of Defence Materiel*, [242/1990; amendments up to 900/2002 included], sec. 2a(2).
- <sup>31</sup> Loretta Bondi and Elise Keppler, *Casting the Net? The Implications of the U.S. Law on Arms Brokering*, Washington, DC., The Fund for Peace, January 2001, p. 26. See also Small Arms Survey, *Small Arms Survey 2004: Rights at Risk*, Graduate Institute of International Studies, 2004, p. 158.
- <sup>32</sup> It is also important to note that, when the transfer of restricted goods is involved, not only brokers, but also agents providing accessory services such as transportation, financing, insurance, advertising and promotion—who are normally exempt from licensing for the transfer of non-restricted goods—must be authorized. See UK Department of Trade and Industry, *Supplementary Guidance Note on Trade (“Trafficking And Brokering”) in Controlled Goods Including Trade to Embargoed Destinations*, 2004, <[www.dti.gov.uk/files/file8418.pdf](http://www.dti.gov.uk/files/file8418.pdf)>.
- <sup>33</sup> United Kingdom, *The Trade in Controlled Goods (Embargoed Destinations) Order 2004*, [Statutory Instrument 2004 No. 318], art. 3.
- <sup>34</sup> Communication with the German Ministry of Foreign Affairs, May 2006.
- <sup>35</sup> Bosnia and Herzegovina, *Law on the Import and Export of Weapons and Military Equipment* [Zakona o uvozu i izvozu oružja i vojne opreme], [Sl.Glasnik BiH 5/03 and 33/03], 3 July 2003, art. 3(1).
- <sup>36</sup> E-mail communication with Bulgarian Ministry of Foreign Affairs, January 2004.
- <sup>37</sup> These are contained in Hungary, *On the Licensing of the Export, Import, Transfer and Transit of Military Equipment and Technical*

- Assistance, [Government Decree 16/2004 (II. 6.)], chapters 23 and 24; see also József Gyöngyös, "Conventional Arms Trade Control", <[http://mkeh.gov.hu/haditechnika/nemzeti/haditechnika\\_kulkereskedelem](http://mkeh.gov.hu/haditechnika/nemzeti/haditechnika_kulkereskedelem)>.
- 38 The most recent version of the *Common Military List of the European Union (equipment covered by the European Union Code of Conduct on Arms Exports)* can be found at <[www.eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2006:066:SOM:EN:HTML](http://www.eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2006:066:SOM:EN:HTML)>. The Wassenaar Arrangement Control Lists are available at <[www.wassenaar.org/controllists/WA-LIST%20\(05\)%201%20Corr..pdf](http://www.wassenaar.org/controllists/WA-LIST%20(05)%201%20Corr..pdf)>.
- 39 Included here are, among others, rifles, carbines, revolvers, pistols, machine pistols and machine guns; smooth-bore weapons specially designed for military use and others of the fully automatic, semi-automatic or pump-action type; weapons using caseless ammunition. A few exceptions apply, for example, for old weapons and related reproductions.
- 40 For example, guns, howitzers, cannon, mortars, anti-tank weapons, projectile launchers, military flame throwers, recoilless rifles.
- 41 Lithuania, *Law on the Control of Arms and Ammunition*, [No. IX-705], 15 January 2002, chp. 2.
- 42 Lithuanian reply to authors' questionnaire, 30 May 2006.
- 43 Ibid.
- 44 United States of America, *International Traffic in Arms Regulations (ITAR)*, rev. 1 April 2006, §§ 129.6(b)(2) and 129.7(a)(1)(i).
- 45 Switzerland, *Ordinance on War Materiel [Ordonnance sur le matériel de guerre]*, [RS 514.511], 25 February 1998, art. 6.
- 46 The list is annexed to the ordinance. It currently includes the following countries: Argentina, Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxemburg, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, the United Kingdom and the United States.
- 47 E-mail communication with the Swiss State Secretariat for Economic Affairs, January 2004.
- 48 The Czech Republic, *Act of 15 February 1994 to Regulate Trade in Military Equipment with Foreign Countries*, [No. 38/1994 Coll.], art. 7. The "special legislation" and the "special legal regulation" referred to in sub-paragraph 5 are listed as "Sub-paragraphs a) and b) of the provisions of Art. 2 paragraph 1 of Act no. 451/1991 Coll., stipulating additional prerequisites for the execution of certain functions in State bodies and organizations of the Czech and Slovak Federal Republic,

- the Czech Republic and the Slovak Republic.” The “special law” mentioned in sub-paragraph 6 refers to “Act no. 412/2005 Coll., on the Protection of classified information and on security capacity” (ibid., notes 2 and 2a).
- <sup>49</sup> Poland, *Law of 29 November 2000 on External Trade in Goods, Technologies and Services of Strategic Importance both for State Security and for the Keeping of International Peace and Security* (as amended in July 2004), [Dz. U. No. 119, item 1250], art. 10(1).
- <sup>50</sup> Ibid., art. 11(1).
- <sup>51</sup> Switzerland, *Federal Law on War Materiel [Loi fédérale sur le matériel de guerre]*, [RS 514.51], 13 December 1996, art. 15.
- <sup>52</sup> E-mail communication with the Swiss State Secretariat for Economic Affairs, January 2004.
- <sup>53</sup> Ibid.
- <sup>54</sup> Estonia, *Strategic Goods Act [Strateegilise Kauba Seadus]*, [RT I 2004, 2, 7], 17 December 2003, § 4(2)(4).
- <sup>55</sup> The Czech Republic, *Act of 15 February 1994 to Regulate Trade in Military Equipment with Foreign Countries*, [No. 38/1994 Coll.], art. 15(2)(h).
- <sup>56</sup> Ibid., art.15(3)(a–d).
- <sup>57</sup> Latvian Ministry of Foreign Affairs, *Export, Import and Transit Control of Strategic Goods in the Republic of Latvia*, policy paper, 25 November 2002, <[www.am.gov.lv/en/policy/4672/](http://www.am.gov.lv/en/policy/4672/)>.
- <sup>58</sup> Latvia, *Regulations Regarding Control of Goods of Strategic Significance*, [Cabinet Regulation no. 421], 16 December 1997, art. 26(3).
- <sup>59</sup> Slovak Republic, *On Trading in Military Material and on the Amendment to Act No. 455/1991 Coll. on Licensed Trade as Amended, as Amended*, [Act No. 179/1998 Coll.], art. 5(2).
- <sup>60</sup> Hungary, *Government Decree 48/1991 on the Export, Import and Re-export of Military Equipment and Services [A haditechnikai eszközök és szolgáltatások kivételéről, behozataláról, illetve reexportjáról szóló]*, [Government Decree 48/1991 (III.27)], art. 4(1–2).
- <sup>61</sup> South Africa, *National Conventional Arms Control Act*, [No. 41 of 2002], art. 15.
- <sup>62</sup> Nicaragua, *Law on the Control and Regulation of Firearms, Munitions, Explosives, and Other Related Materials [Ley especial para el control y regulación de armas de fuego, municiones, explosivos y otros materiales relacionados]*, [Ley No. 510-05], 25 February 2005, art. 114.
- <sup>63</sup> Ibid., art. 119.
- <sup>64</sup> The Code is available at <[www.smallarmsnet.org/docs/saeu03.pdf](http://www.smallarmsnet.org/docs/saeu03.pdf)>.

- <sup>65</sup> Report submitted in 2005 by Bosnia and Herzegovina to the UN Department for Disarmament Affairs on national implementation of the Programme of Action, p. 8, available at <<http://disarmament2.un.org/cab/nationalreports/2005/Bosnia%20and%20Herzegovina.pdf>>.
- <sup>66</sup> *Export Controls of Arms, Military Material and Dual-use Goods and Technologies in Slovakia*, paper presented during the 5<sup>th</sup> International Conference on Export Controls, Budapest, 15–17 September 2003.
- <sup>67</sup> Slovak reply to authors' questionnaire, August 2006.
- <sup>68</sup> In these systems the permit granting the general authorization to act as a broker may coincide with the registration of the agent (see section on registration systems).
- <sup>69</sup> Note that the Bulgarian system uses the term "license" to designate initial authorizations and "permits" for individual (transaction-specific) authorizations. See Bulgaria, *Law on the Control of Foreign Trade Activity in Arms and in Dual-use Goods and Technologies*, [State Gazette 75/2.08.2002r], art. 5(2).
- <sup>70</sup> The Czech Republic, *Act of 15 February 1994 to Regulate Trade in Military Equipment with Foreign Countries*, [No. 38/1994 Coll.], art. 6 and 14.
- <sup>71</sup> Hungary, *On the Licensing of the Export, Import, Transfer and Transit of Military Equipment and Technical Assistance*, [Government Decree 16/2004 (II.6.)], art. 2(2)(c).
- <sup>72</sup> See, for example, the comprehensive information available on the site of the UK Department of Trade and Industry, <[www.dti.gov.uk](http://www.dti.gov.uk)>. Seminars and information sessions were also held to the benefit of arms exporters and prospective brokers.
- <sup>73</sup> Interview with government delegate to the UN Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in SALW in All Its Aspects, July 2006.
- <sup>74</sup> Intervention by Alex Vines during the meeting "The Scope and Implications of Developing a Mechanism to Prevent Illicit Brokering", New York, 5 July 2006.
- <sup>75</sup> Switzerland, *Federal Law on War Materiel [Loi fédérale sur le matériel de guerre]*, [RS 514.51], 13 December 1996, art. 9 and communication with Swiss federal authorities, January 2004.
- <sup>76</sup> Switzerland, *Ordinance on War Materiel [Ordonnance sur le matériel de guerre]*, [RS 514.511], 25 February 1998, art. 3.
- <sup>77</sup> *Ibid.*, art. 4.

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- <sup>78</sup> Bulgaria, *Law on the Control of Foreign Trade Activity in Arms and in Dual-use Goods and Technologies*, [State Gazette 75/2.08.2002r], art. 5, especially 5(1–2).
- <sup>79</sup> Slovenia, *Decree on Permits and Consents for the Trade in and Production of Military Weapons and Equipment*, [Ur.l. RS, št. 31/2005], 6 February 2003, art. 1.7. “Trade in military weapons and equipment” includes “the sale of military weapons and equipment, including brokerage ..., and import, export and transit of military weapons and equipment” (ibid., art. 1.3). English translation provided by Slovenian official.
- <sup>80</sup> E-mail communication with Slovenian officials, January 2004.
- <sup>81</sup> This being category A.
- <sup>82</sup> Lithuanian response to authors’ questionnaire, 30 May 2006.
- <sup>83</sup> Report submitted in 2005 by Norway to the UN Department for Disarmament Affairs on national implementation of the Programme of Action, available at <<http://disarmament2.un.org/cab/nationalreports/2005/NORWAY.pdf>>.
- <sup>84</sup> German reply to authors’ questionnaire, May 2006.
- <sup>85</sup> Estonia, *Strategic Goods Act* [*Strateegilise Kauba Seadus*], [RT I 2004, 2, 7], 17 December 2003, § 10.1–2. Note that in this law “export” includes the provision of services, including brokering (see § 4).
- <sup>86</sup> Bosnia and Herzegovina, *Law on the Import and Export of Weapons and Military Equipment* [*Zakona o uvozu i izvozu oružja i vojne opreme*], [Sl.Glasnik BiH 5/03 and 33/03], 3 July 2003, art. 11(1).
- <sup>87</sup> General Assembly, UN document A/RES/60/81, 11 January 2006.